# UNITED STATES CODE

## 1976 EDITION

CONTAINING THE GENERAL AND PERMANENT LAWS
OF THE UNITED STATES, IN FORCE
ON JANUARY 3, 1977

Prepared and published under authority of Title 2, U.S. Code, Section 285b
by the Office of the Law Revision Counsel of the House of Representatives

## VOLUME EIGHT

### TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE
### TO
### TITLE 31—MONEY AND FINANCE

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1977

For Sale by the
Superintendent of Documents
U.S. Government Printing Office, Washington, D.C. 20402
Stock Number 052-001-00134-6

# TITLES OF UNITED STATES CODE

*1. General Provisions.
2. The Congress.
*3. The President.
*4. Flag and Seal, Seat of Government, and the States.
*5. Government Organization and Employees.
*6. Surety Bonds.
7. Agriculture.
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*This title has been enacted as law.
†This title has been eliminated by the enactment of Title 10.

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## PREFACE—1976 EDITION

This ninth edition of the United States Code was prepared and published pursuant to section 285b of Title 2 of the Code. It contains a consolidation and codification of all the general and permanent laws of the United States which are in force on January 3, 1977. By statutory authority this edition may be cited "U.S.C. 1976 ed." Previous editions were published in 1926, 1934, 1940, 1946, 1952, 1958, 1964, and 1970.

Inasmuch as many of the general and permanent laws which are required to be incorporated in this Code are inconsistent, redundant, and obsolete, the Office of the Law Revision Counsel is engaged in a comprehensive project of revising and enacting the Code into law, title by title. Since 1947, bills have been enacted to revise, codify and enact into law Titles 1, 3, 4, 5, 6, 9, 10, 13, 14, 17, 18, 23, 28, 32, 35, 37, 38, 39, and 44. In addition, bills relating to other titles are also being prepared for introduction. When this work is completed all the titles of the Code will be legal evidence of the general and permanent law and recourse to the numerous volumes of the Statutes at Large for this purpose will be unnecessary.

The title and chapter structure of the 1970 edition, together with Supplement V thereto, has been substantially preserved, the only changes made having been necessitated by the enactment of legislation since 1970.

This edition continues the practice of setting out notes captioned "Section referred to in other sections". These notes have been inserted following each section that is referred to in the text of another section, indicating the section that contains the internal reference. In addition, there is included in this edition, for the first time, a comprehensive Table of Internal References which appears in the Tables volume. This Table consolidates all internal references contained in the individual "Section referred to in other sections" notes.

This edition has been prepared and published under the supervision of Edward F. Willett, Jr., Law Revision Counsel of the House of Representatives, with the assistance of the West Publishing Company, of St. Paul, Minnesota, which assisted in preparing all prior editions and supplements of the Code. Grateful acknowledgment is made of the cooperation by all who have helped in this work, particularly by the staffs of the publishing company and of the Office of the Law Revision Counsel, and by the Government Printing Office.

Thomas P O'Neill Jr.
M.C.
*Speaker of the House of Representatives*

WASHINGTON, D.C., *January 4, 1977.*

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Speaker of the House of Representatives.

Washington, D.C., January 3, 1977.

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# TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

***This title was enacted by act June 25, 1948, ch. 646, § 1, 62 Stat. 869.***

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### ENACTMENT INTO LAW; CITATION

Section 1 of act June 25, 1948, ch. 646, 62 Stat. 869, provided in part: "That title 28 of the United States Code, entitled 'Judicial Code and Judiciary' is hereby revised, codified, and enacted into law, and may be cited as 'Title 28, United States Code, section———.'"

### LEGISLATIVE CONSTRUCTION

Section 33 of act June 25, 1948, ch. 646, 62 Stat. 991, provided that: "No inference of a legislative construction is to be drawn by reason of the chapter in Title 28, Judiciary and Judicial Procedure, as set out in section 1 of this Act, in which any section is placed, nor by reason of the catchlines used in such title."

### SEPARABILITY OF PROVISIONS

Section 34 of act June 25, 1948, ch. 646, 62 Stat. 991, provided that: "If any part of Title 28, Judiciary and Judicial Procedure, as set out in section 1 of this Act, shall be held invalid, the remainder shall not be affected thereby."

### EFFECTIVE DATE

Section 38 of act June 25, 1948, ch. 646, 62 Stat. 992, provided that: "The provisions of this Act shall take effect on September 1, 1948."

### REPEALS; RIGHTS AND LIABILITIES SAVED

Section 39 of act June 25, 1948, ch. 646, 62 Stat. 992, repealed the sections or parts thereof of the Revised Statutes of the United States, Statutes at Large, or the Revised Statutes of the District of Columbia covering provisions codified in this title, but saved any rights or liabilities then existing under said sections or parts thereof.

R.S. § 1012 as affected by act Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167 [section 880 of former Title 28, Judicial Code and Judiciary], provided that appeals from district courts shall be subject to the same rules, regulations, and restrictions as are or may be prescribed in law in cases of writs of error. This provision was repealed by act June 25, 1948, ch. 646, § 39, 62 Stat. 992. Section 2 of act Jan. 31, 1928, ch. 14, 45 Stat. 54, as amended Apr. 26, 1928, ch. 440, 45 Stat. 466; June 25, 1948, ch. 646, § 23, 62 Stat. 990 [section 861b of former Title 28, Judicial Code and Judiciary], provided that: "All Acts of Congress referring to writs of error shall be construed as amended to the extent necessary to substitute appeal for writ of error."

### WRITS OF ERROR

Act Jan. 31, 1928, ch. 14, § 1, 45 Stat. 54 [section 861a of former Title 28, Judicial Code and Judiciary], provided that: "The writ of error in cases, civil and criminal, is abolished. All relief which heretofore [Jan. 31, 1928] could be obtained by writ of error shall hereafter be obtainable by appeal." This provision was omitted from the 1948 Revised Judicial Code as obsolete, and repealed by act June 25, 1948, ch. 646, § 39, 62 Stat. 992.

### TITLE 28 AS CONTINUATION OF EXISTING LAW; CHANGE OF NAME OF CIRCUIT COURTS OF APPEALS

Section 2(b) of act June 25, 1948, ch. 646, 62 Stat. 985, provided that: "The provisions of Title 28, Judiciary and Judicial Procedure, of the United States Code, set out in section 1 of this Act, with respect to the organization of each of the several courts therein provided for and of the Administrative Office of the United States Courts, shall be construed as continuations of existing law, and the tenure of the judges, officers, and employees thereof and of the United States attorneys and marshals and their deputies and assistants, in office on the effective date of this Act [Sept. 1, 1948], shall not be affected by its enactment, but each of them shall continue to serve in the same capacity under the appropriate provisions of title 28, as set out in section 1 of this Act, pursuant to his prior appointment: *Provided, however,* That each circuit court of appeals shall, as in said title 28 set out, hereafter be known as a United States court of appeals. No loss of rights, interruption of jurisdiction, or prejudice to matters pending in any of such courts on the effective date of this Act shall result from its enactment."

### CROSS REFERENCES

District of Columbia, organization of courts, see Title 11 of District of Columbia Code.

Territorial courts, see Title 48, Territories and Insular Possessions.

United States Tax Court, see section 7441 et seq. of Title 26, Internal Revenue Code.

## PART I—ORGANIZATION OF COURTS

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## CHAPTER 1—SUPREME COURT

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1. Number of justices; quorum.
2. Terms of court.
3. Vacancy in office of Chief Justice; disability.
4. Precedence of associate justices.
5. Salaries of justices.
6. Records of former court of appeals.

### CROSS REFERENCES

Allotment of Supreme Court Justices to circuits, see section 42 of this title.

Circuit justices competent to sit as judges of the courts of appeals, see section 43 of this title.

Jurisdiction of Supreme Court, see section 1251 et seq. of this title.

### Rules of the Supreme Court

See Appendix to this title.

## § 1. Number of justices; quorum

The Supreme Court of the United States shall consist of a Chief Justice of the United States and eight associate justices, any six of whom shall constitute a quorum.

(June 25, 1948, ch. 646, 62 Stat. 869.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 321 (Mar. 3, 1911, ch. 231, § 215, 36 Stat. 1152).

Appointment of "judges of the Supreme Court" by the President by and with the advice and consent of the Senate is provided by U.S. Constitution art. 2, § 2, cl. 2.

### Short Title of 1976 Amendments

Pub. L. 94-583, § 1, Oct. 21, 1976, 90 Stat. 2891, provided: "That this Act [enacting sections 1330 and 1602 to 1611 of this title, amending sections 1332, 1391, and 1441 of this title, and enacting provisions set out as notes under section 1602 of this title] may be cited as the 'Foreign Sovereign Immunities Act of 1976'."

Pub. L. 94-554, § 1, Oct. 19, 1976, 90 Stat. 2603, provided: "That this Act [amending section 376 of this title and enacting provisions set out as notes under section 376 of this title] may be cited as the 'Judicial Survivors' Annuities Reform Act'."

### Short Title of 1970 Amendment

Pub. L. 91-271, title I, § 101, June 2, 1970, 84 Stat. 274, provided that: "This title [enacting sections 256 and 257 of this title, amending sections 253 to 255, 1541, 1582, 2601, 2602, and 2631 to 2639 of this title, repealing sections 1583 and 2640 to 2642 of this title, and enacting provisions set out as notes under this section] may be cited as 'The Customs Courts Act of 1970'."

### Short Title of 1966 Amendment

Pub. L. 89-504, title II, § 201, July 18, 1966, 80 Stat. 293, provided that: "This title [enacting provisions set out as notes under sections 603, 604, and 753 of this title] may be cited as the 'Federal Judicial Salary Act of 1966'."

### Short Title of 1964 Amendment

Pub. L. 88-426, title IV, § 401, Aug. 14, 1964, 78 Stat. 433, provided that: "This title [amending sections 5, 44, 135, 173, 213, 252, 603, and 792 of this title, section 867 of Title 10, Armed Forces, section 68 of Title 11, Bankruptcy, and section 7443 of Title 26, Internal Revenue Code, and enacting provisions set out as notes under sections 603, 604 and 753 of this title] may be cited as the 'Federal Judicial Salary Act of 1964'."

### Cross References

Appointment of Supreme Court Justices, see U.S. Const., Art. 2, § 2, cl. 2.

Creation of Supreme Court, see U.S. Const., Art. 3, § 1.

Justices to hold office during good behavior, see U.S. Const., Art. 3, § 1.

Oath of Justice, see section 453 of this title.

Official station of Supreme Court Justices, see section 456 of this title.

### Rules of the Supreme Court

Quorum and adjournments, see rule 4, Appendix to this title.

## § 2. Terms of court

The Supreme Court shall hold at the seat of government a term of court commencing on the first Monday in October of each year and may hold such adjourned or special terms as may be necessary.

(June 25, 1948, ch. 646, 62 Stat. 869.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 338 (Mar. 3, 1911, ch. 231, § 230, 36 Stat. 1156; Sept. 6, 1916, ch. 448, § 1, 39 Stat. 726).

Minor changes in phraseology were made.

### Cross References

Courts always open, see section 452 of this title.

Official station of Supreme Court Justices, see section 456 of this title.

Seat of the Government, see chapter 3 of Title 4, Flag and Seal, Seat of Government, and the States.

### Rules of the Supreme Court

Term, see rule 3, Appendix to this title.

## § 3. Vacancy in office of Chief Justice; disability

Whenever the Chief Justice is unable to perform the duties of his office or the office is vacant, his powers and duties shall devolve upon the associate justice next in precedence who is able to act, until such disability is removed or another Chief Justice is appointed and duly qualified.

(June 25, 1948, ch. 646, 62 Stat. 869.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 323 (Mar. 3, 1911, ch. 231, § 217, 36 Stat. 1152).

The sentence, "This provision shall apply to every Associate Justice who succeeds to the office of Chief Justice", was omitted as covered by last portion of revised section.

Minor changes were made in phraseology.

For seniority of commissions, see section 4 of this title.

## § 4. Precedence of associate justices

Associate justices shall have precedence according to the seniority of their commissions. Justices whose commissions bear the same date shall have precedence according to seniority in age.

(June 25, 1948, ch. 646, 62 Stat. 869.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 322 (Mar. 3, 1911, ch. 231, § 216, 36 Stat. 1152).

Minor changes in phraseology were made.

## § 5. Salaries of justices

The Chief Justice and each associate justice shall each receive a salary at annual rates determined under section 225 of the Federal Salary Act of 1967 (2 U.S.C. 351-361), as adjusted by section 461 of this title.

(June 25, 1948, ch. 646, 62 Stat. 870; Mar. 2, 1955, ch. 9, § 1(a), 69 Stat. 9; Aug. 14, 1964, Pub. L. 88-426, title IV, § 403(a), 78 Stat. 434; Aug. 9, 1975, Pub. L. 94-82, title II, § 205(b)(1), 89 Stat. 422.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 324 (Mar. 3, 1911, ch. 231, § 218, 36 Stat. 1152; Dec. 13, 1926, ch. 6, § 1, 44 Stat. 919; July 31, 1946, ch. 704, § 1, 60 Stat. 716).

The provision "to be paid monthly" was omitted since the time of payment of salaries is a matter of administrative convenience. (See 20 Comp. Gen. 834.)

Minor changes in phraseology were made.

### Amendments

1975—Pub. L. 94-82 substituted provisions setting the annual salary of the Chief Justice and each associate justice at rates determined under section 225 of the Federal Salary Act of 1967, as adjusted by section 461 of this title, for provisions granting the Chief Justice and each associate justice a salary of $40,000 and $39,500 a year, respectively.

1964—Pub. L. 88-426 increased the salary of the Chief Justice from $35,500 to $40,000 and that of the Associate Justices from $35,000 to $39,500.

1955—Act Mar. 2, 1955, increased the salary of the Chief Justice from $25,500 to $35,500 and the salaries of the Associate Justices from $25,000 to $35,000 a year.

### Effective Date of 1964 Amendment

Amendment by Pub. L. 88-426 effective on the first day of the first pay period which begins on or after July 1, 1964, except to the extent provided in section 501(c) of Pub. L. 88-426, see section 501 of Pub. L. 88-426.

### Effective Date of 1955 Amendment

Amendment by act Mar. 2, 1955, effective Mar. 1, 1955, see section 5 of act Mar. 2, 1955, set out as an Effective Date of 1955 Amendment note under section 31 of Title 2, The Congress.

### Increase of Salaries

Salaries of the Chief Justice and Associate Justices increased respectively to $75,000 and $72,000 per annum, upon recommendation of the President of the United States, see note set out under section 358 of Title 2, The Congress.

Salaries of the Chief Justice and Associate Justices increased to $68,800 and $66,000, respectively, effective on the first day of the first pay period beginning on or after Oct. 1, 1976, by Ex. Order No. 11941, Oct. 1, 1976, 41 F.R. 43889, set out as a note under section 5332 of Title 5, Government Organization and Employees. Ex. Ord. No. 11941, further provided that pursuant to the Legislative Branch Appropriation Act, 1977, funds are not available to pay a salary at a rate which exceeds the rate in effect on Sept. 30, 1976, which was $65,600 for the Chief Justice and $63,000 for the Associate Justices.

Salaries of the Chief Justice and Associate Justices increased to $65,600 and $63,000, respectively, effective on the first day of the first pay period beginning on or after Oct. 1, 1975, by Ex. Order No. 11883, Oct. 6, 1975, 40 F.R. 47091, set out as a note under section 5332 of Title 5, Government Organization and Employees.

Salaries of the Chief Justice and Associate Justices increased respectively from $40,000 and $39,500 to $62,500 and $60,000 per annum, commencing February 14, 1969, upon recommendation of the President of the United States, see note set out under section 358 of Title 2, The Congress.

Prior to June 25, 1948, salaries of justices were increased as follows:

The salary of the Chief Justice was increased from $20,500 to $25,500 a year, and the salaries of the associate justices were increased from $20,000 to $25,000 a year, by act July 31, 1946, ch. 704, § 1, 60 Stat. 716.

The salary of the Chief Justice was increased from $15,000 to $20,500 a year, and the salaries of the associate justices were increased from $14,500 to $20,000 a year, by act Dec. 13, 1926, ch. 6, § 1, 44 Stat. 919.

The salary of the Chief Justice was set at $15,000 a year and the salaries of the associate justices were set at $14,500 a year by the Judicial Code of 1911, act Mar. 3, 1911, ch. 231, § 1, 36 Stat. 1152.

### Cross References

Compensation not to be diminished during continuance in office, see U.S. Const. Art. 3, § 1.

Payment of salaries by marshal of Supreme Court, see section 672 of this title.

Retirement of Justices, see section 371 et seq. of this title.

Traveling and subsistence expenses of Justices, payment of, see section 456 of this title.

## § 6. Records of former court of appeals

The records and proceedings of the court of appeals, appointed previous to the adoption of the Constitution, shall be kept until deposited with the National Archives of the United States in the office of the clerk of the Supreme Court, who shall furnish copies thereof to any person requiring and paying for them, in the manner provided by law for giving copies of the records and proceedings of the Supreme Court. Such copies shall have the same faith and credit as proceedings of the Supreme Court.

(June 25, 1948, ch. 646, 62 Stat. 870; Oct. 25, 1951, ch. 562, § 4(7), 65 Stat. 640.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 329 (Mar. 3, 1911, ch. 231, § 222, 36 Stat. 1153).

In a letter dated August 8, 1944, the clerk of the Supreme Court advised that many of the early records mentioned in this section were destroyed by fire. Others are on file in the Clerk's office.

Minor changes in phraseology were made.

### Amendments

1951—Act Oct. 25, 1951, inserted "until deposited with the National Archives of the United States" in first sentence.

### Cross References

Management and disposition of records, see sections 2101 et seq., 2301 et seq., 2501 et seq., 2701 et seq., 2901 et seq., 3101 et seq., and 3301 et seq. of Title 44, Public Printing and Documents.

# CHAPTER 3—COURTS OF APPEALS

Sec.
41. Number and composition of circuits.
42. Allotment of Supreme Court justices to circuits.
43. Creation and composition of courts.
44. Appointment, tenure, residence and salary of circuit judges.
45. Chief judges; precedence of judges.
46. Assignment of judges; divisions; hearings; quorum.
47. Disqualification of trial judge to hear appeal.
48. Terms of court.

### Cross References

Jurisdiction of courts of appeals, see section 1291 et seq. of this title.

## § 41. Number and composition of circuits

The eleven judicial circuits of the United States are constituted as follows:

| *Circuits* | *Composition* |
|---|---|
| District of Columbia. | District of Columbia. |
| First | Maine, Massachusetts, New Hampshire, Puerto Rico, Rhode Island. |
| Second | Connecticut, New York, Vermont. |
| Third | Delaware, New Jersey, Pennsylvania, Virgin Islands. |
| Fourth | Maryland, North Carolina, South Carolina, Virginia, West Virginia. |
| Fifth | Alabama, Canal Zone, Florida, Georgia, Louisiana, Mississippi, Texas. |
| Sixth | Kentucky, Michigan, Ohio, Tennessee. |
| Seventh | Illinois, Indiana, Wisconsin. |
| Eighth | Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, South Dakota. |
| Ninth | Alaska, Arizona, California, Idaho, Montana, Nevada, Oregon, Washington, Guam, Hawaii. |
| Tenth | Colorado, Kansas, New Mexico, Oklahoma, Utah, Wyoming. |

(June 25, 1948, ch. 646, 62 Stat. 870; Oct. 31, 1951, ch. 655, § 34, 65 Stat. 723.)

### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C. 1940 ed., § 211, and section 864 of title 48, U.S.C., 1940 ed., Territories and Insular Possessions (Apr. 12, 1900, ch. 191, § 35, 31 Stat. 85; Mar. 3, 1911, ch. 231, § 116, 36 Stat. 1131; Jan. 28, 1915, ch. 22, §§ 1, 2, 38 Stat. 803; Mar. 2, 1917, ch. 145, § 42, 39 Stat. 966; Feb. 13, 1925, ch. 229, §§ 1, 13, 43 Stat. 936, 942; Jan. 31, 1928, ch. 14, § 1, 45 Stat. 54; Feb. 28, 1929, ch. 363, § 1, 45 Stat. 1346; May 17, 1932, ch. 190, 47 Stat. 158).

Form of section was simplified.

The District of Columbia was added as a separate circuit. This is in accord with the decision of the Supreme Court of the United States which held the Court of Appeals for the District of Columbia to be a circuit court of appeals within the Transfer Act of Sept. 14, 1922, ch. 305, 42 Stat. 837, incorporated in the Judicial Code as § 238(a), but repealed by act Feb. 13, 1925, ch. 229, § 13, 43 Stat. 942. (See *Swift and Co.* v. *U.S.*, 1928, 48 S.Ct. 311, 276 U.S. 311, 72 L.Ed. 587.)

In recognizing the District of Columbia as a separate circuit, the Supreme Court recently used this language: "* * * the eleven circuits forming the single federal judicature * * *". *Comm'r.* v. *Bedford's Estate*, 65 S.Ct. 1157, at page 1160, 325 U.S. 283, 89 L.Ed. 611.

See section 17 of title 28, U.S.C., 1940 ed., providing, "For the purposes of sections 17-23 of this title, the District of Columbia shall be deemed to be a judicial circuit * * *", and act Dec. 23, 1944, ch. 724, 58 Stat. 925, which amended section 215 of title 28, U.S.C., 1940 ed., incorporated in section 42 of this title. Such amendment provided that for the purposes of said section 215 "the District of Columbia shall be deemed to be a judicial circuit."

Many other acts of Congress have recognized the District of Columbia as a separate circuit. (See the following acts; Aug. 24, 1937, ch. 754, 50 Stat. 751; Feb. 11, 1938, ch. 25, 52 Stat. 28; Aug. 5, 1939, ch. 433, 53 Stat. 1204; Aug. 7, 1939, ch. 501, 53 Stat. 1223; Dec. 29, 1942, ch. 835, 56 Stat. 1094; May 11, 1944, ch. 192, 58 Stat. 218; Dec. 23, 1944, ch. 724, 58 Stat. 925.)

See also the following acts recognizing the Court of Appeals for the District of Columbia as a circuit court of appeals: Aug. 15, 1921, ch. 64, 42 Stat. 162; July 5, 1935, ch. 372, 49 Stat. 454; Aug. 24, 1937, ch. 754, 50 Stat. 751; Apr. 6, 1942, ch. 210, 56 Stat. 198; May 9, 1942, ch. 295, 56 Stat. 271. See also Rule 81(d) Federal Rules of Civil Procedure.

In the following cases the Supreme Court of the United States has recognized the status of the Court of Appeals of the District of Columbia as a permanent establishment within the federal judicial system: *O'Donoghue* v. *United States*, 1933, 53 S.Ct. 740, 289 U.S. 516, 77 L.Ed. 1356; *Federal Trade Commission* v. *Klesner*, 1927, 47 S.Ct. 557, 274 U.S. 145, 71 L.Ed. 972; *Claiborne-Annapolis Ferry* v. *United States*, 1932, 52 S.Ct. 440, 285 U.S. 382, 76 L.Ed. 808; *United States* v. *California Canneries*, 1929, 49 S.Ct. 423, 279 U.S. 553, 73 L.Ed. 838.

Alaska, Canal Zone, and Virgin Islands were added to the 9th, 5th, and 3rd Circuits, respectively, to conform to section 1294 of this title.

Some of the provisions of section 864 of title 48, U.S.C., 1940 ed., have been retained in said title. For those which were incorporated in other sections of this revised title, see Distribution Table.

### AMENDMENTS

1951—Act Oct. 31, 1951, inserted a reference to Guam in that part relating to composition of the Ninth judicial circuit.

### COMMISSION ON REVISION OF THE FEDERAL APPELLATE SYSTEM

Pub. L. 92-489, Oct. 13, 1972, 86 Stat. 807, as amended by Pub. L. 93-420, Sept. 19, 1974, 88 Stat. 1153, provided for the establishment, membership, travel expenses, personnel, experts and consultants, administrative and research services, cooperation of other governmental agencies, and appropriations of not to exceed $606,000 of a Commission on Revision of the Federal Court Appellate System which Commission was to study the geographical division of the judicial circuits and the structure and internal procedures of the appellate court system and to report to the President, Congress, and the Chief Justice its recommendations for changes in the geographical boundaries of the circuits to expedite disposition of judicial business and for changes in the appellate court structure to expedite disposition of the appellate courts caseload in a manner consistent with fundamental concepts of fairness and due process. The Commission was to cease existence ninety days after submission of its final report, which report was submitted June 20, 1975.

### CONTINUATION OF ORGANIZATION OF COURT

Section 2(b) of act June 25, 1948, ch. 646, 62 Stat. 869, provided in part that the provisions of this title as set out in section 1 of act June 25, 1948, with respect to the organization of each of the several courts therein provided, shall be construed as continuations of existing law, and the tenure of the judges, officers, and employees thereof and of the United States attorneys and marshals and their deputies and assistants, in office on Sept. 1, 1948, shall not be affected by its enactment, but each of them shall continue to serve in the same capacity under the appropriate provisions of this title, pursuant to his prior appointment.

### PUERTO RICO

The name of the island of "Porto Rico" was changed to "Puerto Rico" by act May 17, 1932, ch. 190, 47 Stat. 158.

### TENTH JUDICIAL CIRCUIT

Act Feb. 28, 1929, ch. 363, § 1, 45 Stat. 1346, divided the eighth judicial circuit and created the tenth judicial circuit. Prior to such division the eighth judicial circuit included, in addition, the States now constituting the tenth judicial circuit.

### CROSS REFERENCES

Circuits in which decisions are reviewable, see section 1294 of this title.

### § 42. Allotment of Supreme Court justices to circuits

The Chief Justice of the United States and the associate justices of the Supreme Court shall from time to time be allotted as circuit justices among the circuits by order of the Supreme Court. The Chief Justice may make such allotments in vacation.

A justice may be assigned to more than one circuit, and two or more justices may be assigned to the same circuit.

(June 25, 1948, ch. 646, 62 Stat. 870.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 215 (Mar. 3, 1911, ch. 231, § 119, 36 Stat. 1131; Dec. 23, 1944, ch. 724, 58 Stat. 925).

The authority of the Chief Justice in vacation to assign a circuit justice to more than one circuit was extended by omitting the phrase "whenever by reason of death or resignation, no Justice is allotted to a circuit."

The provision in section 215 of Title 28, U.S.C., 1940 ed., that, for the purposes of said section, the "District of Columbia shall be deemed to be a judicial circuit," was omitted, since the District of Columbia is made a judicial circuit by section 41 of this title.

The last paragraph was added to make clear the intent of Congress that the powers of the Court to assign the justices among the several circuits should be completely flexible.

Changes were made in phraseology.

### § 43. Creation and composition of courts

(a) There shall be in each circuit a court of appeals, which shall be a court of record, known as the United States Court of Appeals for the circuit.

(b) Each court of appeals shall consist of the circuit judges of the circuit in regular active service. The circuit justice and justices or judges designated or assigned shall be competent to sit as judges of the court.

(June 25, 1948, ch. 646, 62 Stat. 870; Nov. 13, 1963, Pub. L. 88-176, § 1(a), 77 Stat. 331.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 212 (Mar. 3, 1911, ch. 231, § 117, 36 Stat. 1131).

The provision in section 212 of title 28, U.S.C., 1940 ed., for a three-judge court of appeals was permissive and did not limit the power of the court to sit in banc. Thus, subsection (b) reflects present status of law, namely, that court is composed of not only circuit judges of the circuit in active service, of whom there may be more than three, but the circuit justice or justices and judges who may be assigned or designated to the court. (See *Textile Mills Securities Corporation* v. *Commissioner of Internal Revenue*, 1942, 62 S.Ct. 272, 314 U.S. 326, 86 L.Ed. 249 and Reviser's Notes under section 46 of this title.)

Words "with appellate jurisdiction, as hereinafter limited and established" were omitted as covered by section 1291 et seq. of this title, conferring appellate jurisdiction on the courts of appeals.

The term "court of appeals" was substituted in this section and throughout this title for the term "circuit court of appeals."

Provision for a quorum of the court is now covered by section 46(d) of this title.

#### Amendments

1963—Subsec. (b). Pub. L. 88-176 inserted "regular" preceding "active service".

#### Change of Name of Court

Section 2(b) of act June 25, 1948, provided in part that each circuit court of appeals should, after Sept. 1, 1948, be known as a United States Court of Appeals, but that the enactment of act June 25, 1948 should in no way entail any loss of rights, interruption of jurisdiction, or prejudice to matters pending in any such courts on Sept. 1, 1948.

#### Cross References

Assignment of circuit judges and judges of Court of Claims to other circuits or courts, see section 291 et seq. of this title.

Authority to create courts inferior to Supreme Court, see U.S. Const., Art. 3, § 1.

### § 44. Appointment, tenure, residence and salary of circuit judges

(a) The President shall appoint, by and with the advice and consent of the Senate, circuit judges for the several circuits as follows:

| *Circuits* | *Number of Judges* |
|---|---|
| District of Columbia | 9 |
| First | 3 |
| Second | 9 |
| Third | 9 |
| Fourth | 7 |
| Fifth | 15 |
| Sixth | 9 |
| Seventh | 8 |
| Eighth | 8 |
| Ninth | 13 |
| Tenth | 7 |

(b) Circuit judges shall hold office during good behavior.

(c) Except in the District of Columbia, each circuit judge shall be a resident of the circuit for which appointed at the time of his appointment and thereafter while in active service.

(d) Each circuit judge shall receive a salary at an annual rate determined under section 225 of the Federal Salary Act of 1967 (2 U.S.C. 351-361), as adjusted by section 461 of this title.

(June 25, 1948, ch. 646, 62 Stat. 871; Aug. 3, 1949, ch. 387, § 1, 63 Stat. 493; Feb. 10, 1954, ch. 6, § 1, 68 Stat. 8; Mar. 2, 1955, ch. 9, § 1(b), 69 Stat. 10; May 19, 1961, Pub. L. 87-36, § 1(b), 75 Stat. 80; Aug. 14, 1964, Pub. L. 88-426, title IV, § 403(b), 78 Stat. 434; Mar. 18, 1966, Pub. L. 89-372, § 1(b), 80 Stat. 75; June 18, 1968, Pub. L. 90-347, § 3, 82 Stat. 184; Aug. 9, 1975, Pub. L. 94-82, title II, § 205(b)(2), 89 Stat. 422.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 213, and sections 11-201, 11-202, District of Columbia Code, 1940 ed. (Feb. 9, 1893, ch. 74, § 1, 27 Stat. 434; Mar. 3, 1901, ch. 854, §§ 221, 222, 31 Stat. 1224; Mar. 3, 1911, ch. 231, § 118, 36 Stat. 1131; Jan. 13, 1912, ch. 9, 37 Stat. 52; Feb. 25, 1919, ch. 29, § 2, 40 Stat. 1156; Sept. 14, 1922, ch. 306, § 6, 42 Stat. 840; Mar. 3, 1925, ch. 437, 43 Stat. 1116; Dec. 13, 1926, ch. 6, § 1, 44 Stat. 919; Feb. 28, 1929, ch. 363, § 2, 45 Stat. 1347; Mar. 1, 1929, ch. 413, §§ 1, 2, 45 Stat. 1414; June 10, 1930, ch. 437, 46 Stat. 538; June 10, 1930, ch. 438, 46 Stat. 538; June 19, 1930, ch. 538, 46 Stat. 785; June 16, 1933, ch. 102, 48 Stat. 310; Aug. 2, 1935, ch. 425, § 1, 49 Stat. 508; June 24, 1936, ch. 735, § 1, 49 Stat. 1903; Apr. 14, 1937, ch. 80, 50 Stat. 64; May 31, 1938, ch. 290, §§ 1, 3, 52 Stat. 584, 585; May 24, 1940, ch. 209, § 1, 54 Stat. 219; Dec. 14, 1942, ch. 731, 56 Stat. 1050; Dec. 7, 1944, ch. 521, § 1, 58 Stat. 796; July 31, 1946, ch. 704, § 1, 60 Stat. 716).

This section includes the members of the United States Court of Appeals for the District of Columbia and designates them as "judges" rather than as "justices", thus harmonizing it with the provisions of section 41 of this title, which specifically designates the District of Columbia as a judicial circuit of the United States. In doing so it consolidates sections 11-201, 11-202 of the District of Columbia Code, 1940 ed., which provided for one "chief justice" and five associate "justices."

Act February 9, 1893, established a court of appeals for the District of Columbia to consist of one chief justice and two associate justices whose jurisdiction was almost entirely to review the judgments of the Supreme Court of the District of Columbia, the name of which was changed in 1936 to the District Court of the United States for the District of Columbia. Circuit courts were established by the first Judiciary Act of September 24, 1789, § 4, and R.S. § 608, enacted June 22, 1874. R.S. § 605 provided that the words "circuit justice" and "justice of a circuit" should designate the justice of the Supreme Court of the United States allotted to any circuit; that "judge" when applied to any circuit included such justice.

The Judiciary Appropriation Act, 1945, Act June 26, 1944, ch. 277, § 202, 58 Stat. 358, provided that as used in that Act, "the term 'circuit court of appeals' includes the United States Court of Appeals for the District of Columbia; the term 'senior circuit judge' includes the Chief Justice of the United States Court of Appeals for the District of Columbia; and the term 'circuit judge' includes associate justice of the United States Court of Appeals for the District of Columbia; and the term 'judge' includes justice."

Provisions in section 11-202 of the District of Columbia Code, 1940 ed., and section 213 of title 28, U.S.C., 1940 ed., for payment of salaries in monthly installments were omitted, since time of payment is a matter of administrative convenience (20 Comp. Gen. 834).

The exception in subsection (c) extends to circuit judges in the District of Columbia the effect of the recent decision in *U.S. ex rel. Laughlin* v. *Eicher*, D.C. 1944, 56 F.Supp. 972, holding that residence requirement of section 1 of title 28, U.S.C., 1940 ed., did not apply to district judges in the District of Columbia. (See Reviser's Note under section 134 of this title.)

The provision in section 213 of the title 28, U.S.C., 1940 ed., that "it shall be the duty of each circuit judge in each circuit to sit as one of the judges of the circuit court of appeals in that circuit from time to time according to law," was omitted as unnecessary since the duty to serve is implied by the creation and composition of the court in section 43 of this title.

Last sentence, providing that nothing in section 213 of title 28, U.S.C., 1940 ed., should prevent a circuit judge from holding district court as provided by law, was omitted as unnecessary. (See section 291 of this title authorizing assignments to district courts.)

Subsection (b) was added in conformity with the U.S. Constitution, art. 3.

Changes were made in phraseology.

### AMENDMENTS

1975—Subsec. (d). Pub. L. 94-82 substituted provision that each circuit judge shall receive a salary at an annual rate determined under section 225 of the Federal Salary Act of 1967, as adjusted by section 461 of this title, for provision that each circuit judge shall receive a salary of $33,000 a year.

1968—Subsec. (a). Pub. L. 90-347 increased the number of circuit judges in the enumerated circuits as follows: Third Circuit, eight to nine; Fifth Circuit, nine to fifteen; Sixth Circuit, eight to nine; Ninth Circuit, nine to thirteen, and Tenth Circuit, six to seven.

1966—Subsec. (a). Pub. L. 89-372 increased the number of circuit judges in the enumerated circuits as follows: Fourth Circuit, five to seven; Sixth Circuit, six to eight; Seventh Circuit, seven to eight; Eighth Circuit, seven to eight.

1964—Subsec. (d). Pub. L. 88-426 increased the salary of the circuit judges from $25,500 to $33,000.

1961—Subsec. (a). Pub. L. 87-36 increased the number of circuit judges in the enumerated circuits, as follows: Second Circuit, six to nine; Third Circuit, seven to eight; Fourth Circuit, three to five; Fifth Circuit, seven to nine; Seventh Circuit, six to seven; and Tenth Circuit, five to six.

1955—Subsec. (d). Act Mar. 2, 1955, increased the salary of circuit judges from "$17,500" a year to "$25,500".

1954—Subsec. (a). Act Feb. 10, 1954, increased the number of circuit judges in the Fifth Circuit from six to seven, and in the Ninth Circuit from seven to nine.

1949—Subsec. (a). Act Aug. 3, 1949, increased the number of circuit judges for the District of Columbia from six to nine, for the third circuit from six to seven, for the seventh circuit from five to six, and for the tenth circuit from four to five.

### EFFECTIVE DATE OF 1964 AMENDMENT

Amendment by Pub. L. 88-426 effective on the first day of the first pay period which begins on or after July 1, 1964, except to the extent provided in section 501(c) of Pub. L. 88-426, see section 501 of Pub. L. 88-426.

### EFFECTIVE DATE OF 1955 AMENDMENT

Amendment to this section by act Mar. 2, 1955, effective Mar. 1, 1955, see section 5 of act Mar. 2, 1955, set out as an Effective Date of 1955 Amendment note under section 31 of Title 2, The Congress.

### INCREASE OF SALARIES

Salaries of circuit judges increased to $57,500 per annum, upon recommendation of the President of the United States, see note set out under section 358 of Title 2, The Congress.

Salaries of circuit judges increased to $46,800 effective on the first day of the first pay period beginning on or after Oct. 1, 1976, by Ex. Ord. No. 11941, Oct. 1, 1976, 41 F.R. 43889, set out as a note under section 5332 of Title 5, Government Organization and Employees. Ex. Ord. No. 11941, further provided that pursuant to the Legislative Branch Appropriation Act, 1977, funds are not available to pay a salary at a rate which exceeds the rate in effect on Sept. 30, 1976, which was $44,600.

Salaries of circuit judges increased to $44,600 effective on the first day of the first pay period beginning on or after Oct. 1, 1975, by Ex. Ord. No. 11883, Oct. 6, 1975, 40 F.R. 47091, set out as a note under section 5332 of Title 5, Government Organization and Employees.

Salary of circuit judge increased from $33,000 to $42,500 per annum, commencing February 14, 1969, upon recommendation of the President of the United States, see note set out under section 358 of Title 2, The Congress.

Prior to June 25, 1948, salaries of circuit judges were increased as follows:

The salaries of the circuit judges were increased from $12,500 to $17,500 a year by act July 31, 1946, ch. 704, § 1, 60 Stat. 716.

The salaries of the circuit judges were increased from $8,500 to $12,500 a year by act Dec. 13, 1926, ch. 6, § 1, 44 Stat. 919.

The salaries of the circuit judges were increased from $7,000 to $8,500 a year by act Feb. 25, 1919, ch. 29, § 1, 40 Stat. 1156.

Salaries of circuit court judges had been set at $7,000 a year by the Judicial Code of 1911, act Mar. 3, 1911, ch. 231, § 1, 36 Stat. 1131.

### ADDITIONAL JUDGES

Since 1925, the appointment of additional judges was authorized by the following acts:

Second circuit. Act May 31, 1938, ch. 290, § 1, 52 Stat. 584.

Third circuit. Act Aug. 3, 1949, ch. 387, § 1, 63 Stat. 493; act Dec. 7, 1944, ch. 521, § 1, 58 Stat. 796; act June 10, 1930, ch. 438, 46 Stat. 538.

Act June 24, 1936, ch. 735, § 1, 49 Stat. 1903, repealed by act May 31, 1938, ch. 290, § 3, 52 Stat. 585.

Fifth circuit. Act Dec. 14, 1942, ch. 731, 56 Stat. 1050; act May 31, 1938, ch. 290, § 1, 52 Stat. 584; act June 10, 1930, ch. 437, 46 Stat. 538.

Sixth circuit. Act May 24, 1940, ch. 209, § 1, 54 Stat. 219; act May 31, 1938, ch. 290, § 1, 52 Stat. 584.

Seventh circuit. Act Aug. 3, 1949, ch. 387, § 1, 63 Stat. 493; act May 31, 1938, ch. 290, § 1, 52 Stat. 584.

Eighth circuit. Act May 24, 1940, ch. 209, § 1, 54 Stat. 219; act Mar. 3, 1925, ch. 436, 43 Stat. 1116.

Ninth circuit. Act Apr. 14, 1937, ch. 80, 50 Stat. 64; act Aug. 2, 1935, ch. 425, § 1, 49 Stat. 508; act June 16, 1933, ch. 102, 48 Stat. 310 (removing limitation on filling of vacancy); act Mar. 1, 1929, ch. 413, 45 Stat. 1414.

Tenth circuit. Act Aug. 3, 1949, ch. 387, § 1, 63 Stat. 493.

District of Columbia Court of Appeals. Act Aug. 3, 1949, ch. 387, § 1, 63 Stat. 493; act May 31, 1938, ch. 290, § 2, 52 Stat. 584; act June 19, 1930, ch. 538, 46 Stat. 785.

Act Feb. 28, 1929, ch. 363, § 2, 45 Stat. 1346, 1347 provided that "There shall be in the sixth, seventh, and tenth circuits, respectively, four circuit judges; and in the second and eighth circuits, respectively, five circuit judges; and, in each of the other circuits three circuit judges, to be appointed by the President, by and with the advice and consent of the Senate."

Another part of section 1 of act Feb. 10, 1954, which amended subsec. (a) of this section, provided for the appointment by the President, by and with the advice and consent of the Senate, of the additional judges for the Fifth and Ninth Circuits, provided for in such amendment.

Section 1(a) of Pub. L. 87-36 provided that: "The President shall appoint, by and with the advice and consent of the Senate, three additional circuit judges for the second circuit, one additional circuit judge for the third circuit, two additional circuit judges for the fourth circuit, two additional circuit judges for the fifth circuit, one additional circuit judge for the seventh circuit, and one additional circuit judge for the tenth circuit."

Section 1(a) of Pub. L. 89-372 provided that: "The President shall appoint, by and with the advice and consent of the Senate, two additional circuit judges for the fourth circuit, two additional circuit judges for the sixth circuit, one additional circuit judge for the seventh circuit, and one additional circuit judge for the eighth circuit."

Section 1(c) of Pub. L. 89-372, as amended by Pub. L. 90-347, § 2, June 18, 1968, 82 Stat. 183, provided that: "The President shall appoint, by and with the advice and consent of the Senate, four additional circuit judges for the fifth circuit." The second sentence of section 1(c) of Pub. L. 89-372 which provided that the first four vacancies occurring in the office of circuit judge in the fifth circuit shall not be filled was deleted by section 2 of Pub. L. 90-347, which also made those judgeships permanent and further provided that the present incumbents of such judgeships shall henceforth hold their offices under this section.

Section 1 of Pub. L. 90-347 provided: "That the President shall appoint, by and with the advice and consent of the Senate, one additional circuit judge for the third circuit, two additional circuit judges for the fifth circuit, one additional circuit judge for the sixth circuit, four additional circuit judges for the ninth circuit, and one additional circuit judge for the tenth circuit."

### EX. ORD. NO. 11972. UNITED STATES CIRCUIT JUDGE NOMINATING COMMISSION

Ex. Ord. No. 11972, Feb. 14, 1977, 42 F.R. 9659, provided:

By virtue of the authority vested in me by the Constitution and statutes of the United States of America, and as President of the United States of America, it is hereby ordered as follows:

SECTION 1. *Establishment of the Commission.* There is hereby established the United States Circuit Judge Nominating Commission (hereinafter referred to as the "Commission"). The Commission shall be composed of thirteen panels, each of which shall, upon the request of the President, recommend for nomination as circuit judges persons whose character, experience, ability, and commitment to equal justice under law, fully qualify them to serve in the Federal judiciary. Except as indicated below, each panel shall serve a geographic area set forth in 28 U.S.C. 41. The panels shall be as follows:

(1) Panel for the District of Columbia Circuit;

(2) Panel for the First Circuit;

(3) Panel for the Second Circuit;

(4) Panel for the Third Circuit;

(5) Panel for the Fourth Circuit;

(6) Panel for the Eastern Fifth Circuit, for the States of Alabama, Florida, Georgia and Mississippi;

(7) Panel for the Western Fifth Circuit, for the States of Louisiana and Texas, and the Canal Zone;

(8) Panel for the Sixth Circuit;

(9) Panel for the Seventh Circuit;

(10) Panel for the Eighth Circuit;

(11) Panel for the Southern Ninth Circuit, for the States of Arizona, California, and Nevada;

(12) Panel for the Northern Ninth Circuit, for the States of Alaska, Hawaii, Idaho, Montana, Oregon, and Washington, and the Territory of Guam; and

(13) Panel for the Tenth Circuit.

A panel shall be designated as, *e.g.*, the "United States Circuit Judge Nominating Panel for The First Circuit."

SEC. 2. *Membership.* (a) The membership of the Commission shall consist of the combined memberships of the panels. The President may appoint a member of the Commission as its Chairman, with such duties as the President may assign.

(b) A panel shall be composed of a Chairman and other members appointed by the President. No panel shall have more than eleven members including the Chairman.

(c) Each panel shall include members of both sexes, members of minority groups, and approximately equal numbers of lawyers and nonlawyers. Except as provided in subsection (d), the membership of each panel shall include at least one resident of each of the States within the geographic area of the panel, but additional members may be appointed from any territory or State within that area.

(d) All members of the panel for the District of Columbia Circuit shall be persons residing within the District of Columbia or within twenty miles of its boundaries.

SEC. 3. *Functions of Panels.* A panel shall begin functioning when the President notifies its Chairman that he desires the panel's assistance in aid of his constitutional responsibility and discretion to select a nominee to fill a vacancy on a United States Court of Appeals. Upon such notification, the panel shall:

(a) Give public notice of the vacancy within the relevant geographic area, inviting suggestions as to potential nominees;

(b) Conduct inquiries to identify potential nominees;

(c) Conduct inquiries to identify those persons among the potential nominees who are well-qualified to serve as a United States Circuit Judge; and

(d) Report in confidence to the President, within sixty days after the notification of the vacancy, the results of its activities, including its recommendations as to the five persons whom the panel considers best qualified to fill the vacancy.

SEC. 4. *Standards for Selection of Proposed Nominees.* (a) Before transmitting to the President the names of the five persons it deems best qualified to fill an existing vacancy, a panel shall have determined:

(1) That those persons are members in good standing of at least one state bar, or the District of Columbia bar, and members in good standing of any other bars of which they may be members;

(2) That they possess, and have reputations for, integrity and good character;

(3) That they are of sound health;

(4) That they possess, and have demonstrated, outstanding legal ability and commitment to equal justice under law;

(5) That their demeanor, character, and personality indicate that they would exhibit judicial temperament if appointed to the position of United States Circuit Judge.

(b) In selecting persons whose names will be transmitted to the President, a panel shall consider whether the training, experience, or expertise of certain of the well-qualified individuals would help to meet a perceived need of the court of appeals on which the vacancy exists.

(c) To implement the above standards, a panel may adopt such additional criteria or guidelines as it considers appropriate for the identification of potential nominees and the selection of those best qualified to serve as United States Circuit Judges.

SEC. 5. *Ineligibility of Commission Members.* No person shall be considered by a panel as a potential nominee while serving as a Commission member or for a period of one year after termination of such service.

SEC. 6. *Travel Expenses and Financing.* (a) Members of the Commission shall receive no compensation from the Government of the United States for their service as members of the Commission, but may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by law (5 U.S.C. 5702 and 5703) for persons intermittently employed in the government service.

(b) All necessary expenses incurred in connection with the work of the Commission shall be paid from the appropriation for "Unanticipated Needs" in the Executive Office Appropriations Act, 1977, or from such other funds as may be available.

(c) Expenditures authorized by this Section may be made only after the President has notified a panel's Chairman that he desires the panel's assistance in accordance with Sec. 3, above, and before the termination of appointments to the panel in accordance with Sec. 7 below.

SEC. 7. *Term of Membership.* Unless extended by the President, each appointment to a panel shall terminate thirty days after submission of the panel's report to the President. Within a reasonable time after termination of an appointment, or the creation of a vacancy for any other reason, the President shall appoint a person to fill such vacancy.

SEC. 8. *Termination of Commission.* The Commission shall terminate on December 31, 1978, unless sooner extended by the President.

JIMMY CARTER.

### CROSS REFERENCES

Assignment of circuit judges to other circuits or courts, see section 291 et seq. of this title.

Compensation not to be diminished during continuance in office, see U.S. Const., Art. 3, § 1.

Judges to hold office during good behavior, see U.S. Const., Art. 3, § 1.

Oath of judge, see section 453 of this title.

Official station of circuit judges, see section 456 of this title.

Payment of salaries by United States marshal, see section 571 of this title.

Retirement of judges, see section 371 et seq. of this title.

## § 45. Chief judges; precedence of judges

(a) The circuit judge in regular active service who is senior in commission and under seventy years of age shall be the chief judge of the circuit. If all the circuit judges in regular active service are seventy years of age or older the youngest shall act as chief judge until a judge has been appointed and qualified who is under seventy years of age, but a judge may not act as chief judge until he has served as a circuit judge for one year.

(b) The chief judge shall have precedence and preside at any session of the court which he attends. Other circuit judges shall have precedence and preside according to the seniority of their commissions. Judges whose commissions bear the same date shall have precedence according to seniority in age. The circuit justice, however, shall have precedence over all the circuit judges and shall preside at any session which he attends.

(c) If the chief judge desires to be relieved of his duties as chief judge while retaining his active status as circuit judge, he may so certify to the Chief Justice of the United States, and thereafter the circuit judge in active service next in precedence and willing to serve shall be designated by the Chief Justice as the chief judge of the circuit.

(d) If a chief judge is temporarily unable to perform his duties as such, they shall be performed by the circuit judge in active service, present in the circuit and able and qualified to act, who is next in precedence.

(June 25, 1948, ch. 646, 62 Stat. 871; Oct. 31, 1951, ch. 655, § 35, 65 Stat. 723; Aug. 6, 1958, Pub. L. 85-593, § 1, 72 Stat. 497.)

### HISTORICAL AND REVISION NOTES

Based on sections 216 and 216a of title 28, U.S.C., 1940 ed. (Mar. 3, 1911, ch. 231, § 120, 36 Stat. 1132; May 23, 1934, ch. 339, 48 Stat. 796).

Subsection (a), providing for "chief judge," is new. Such term is adopted to replace the term "senior circuit judge" in recognition of the great increase in administrative duties of such judge.

Subsection (b) conforms with section 4 of this title relating to precedence of associate justices of the Supreme Court, and consolidates the provisions of the second and third sentences of section 216 of title 28, U.S.C., 1940 ed. The designation when filed in the court of appeals will not only record the transfer of function from the relieved chief judge to his successor, but will also determine the question of willingness of the successor to serve.

Other provisions of section 216 of title 28, U.S.C., 1940 ed., are covered by section 47 of this title.

Subsection (c) is new.

Subsection (d) is based on section 216a of title 28, U.S.C., 1940 ed.

The official status of the Chief Justice of the Court of Appeals for the District of Columbia holding office on the effective date of the act is preserved by section 2 of the bill to enact revised Title 28.

Changes were made in phraseology.

### AMENDMENTS

1958—Subsec. (a). Pub. L. 85-593 provided that chief judges of circuit courts cease to serve as such upon reaching the age of seventy, that the youngest circuit judge act as chief judge where all circuit judges in regular active service are seventy years or older until a judge under seventy has been appointed and qualified, and that circuit judge must have served one year before acting as chief judge.

1951—Subsec. (a). Act Oct. 31, 1951, inserted "in active service who is".

### EFFECTIVE DATE OF 1958 AMENDMENT

Section 3 of Pub. L. 85-593 provided that: "The amendments to sections 45 and 136 of title 28 of the United States Code, made by this Act shall take effect at the expiration of one year from the date of enactment [Aug. 6, 1958], of this Act, except that the amendment made by section 136 shall not be effective with respect to any district having two judges in regular active service so long as the district judge holding the position of chief judge of any such district on such date of enactment continues to hold such position."

#### Chief Judge of Court of Appeals for District of Columbia

Section 2(a) of act June 25, 1948, provided in part that the Chief Justice of the Court of Appeals for the District of Columbia in office on Sept. 1, 1948, shall thereafter be known as the Chief Judge.

### § 46. Assignment of judges; divisions; hearings; quorum

(a) Circuit judges shall sit on the court and its divisions in such order and at such times as the court directs.

(b) In each circuit the court may authorize the hearing and determination of cases and controversies by separate divisions, each consisting of three judges. Such divisions shall sit at the times and places and hear the cases and controversies assigned as the court directs.

(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service. A circuit judge of the circuit who has retired from regular active service shall also be competent to sit as a judge of the court in banc in the rehearing of a case or controversy if he sat in the court or division at the original hearing thereof.

(d) A majority of the number of judges authorized to constitute a court or division thereof, as provided in paragraph (c), shall constitute a quorum.

(June 25, 1948, ch. 646, 62 Stat. 871; Nov. 13, 1963, Pub. L. 88-176, § 1(b), 77 Stat. 331.)

#### Historical and Revision Notes

Based in part on title 28, U.S.C., 1940 ed., § 212 (Mar. 3, 1911, ch. 231, § 117, 36 Stat. 1131).

Subsections (a)-(c) authorize the establishment of divisions of the court and provide for the assignment of circuit judges for hearings and rehearings in banc.

The Supreme Court of the United States has ruled that, notwithstanding the three-judge provision of section 212 of title 28, U.S.C., 1940 ed., a court of appeals might lawfully consist of a greater number of judges, and that the five active circuit judges of the third circuit might sit in banc for the determination of an appeal. (See *Textile Mills Securities Corporation* v. *Commissioner of Internal Revenue*, 1941, 62 S.Ct. 272, 314 U.S. 326, 86 L.Ed. 249.)

The Supreme Court in upholding the unanimous view of the five judges as to their right to sit in banc, notwithstanding the contrary opinion in *Langs Estate* v. *Commissioner of Internal Revenue*, 1938, 97 F.2d 867, said in the Textile Mills case: "There are numerous functions of the court, as a 'court of record, with appellate jurisdiction', other than hearing and deciding appeals. Under the Judicial Code these embrace: prescribing the form of writs and other process and the form and style of its seal (28 U.S.C., § 219); the making of rules and regulations (28 U.S.C., § 219); the appointment of a clerk (28 U.S.C., § 221) and the approval of the appointment and removal of deputy clerks (28 U.S.C., § 222); and the fixing of the 'times' when court shall be held (28 U.S.C., § 223). Furthermore, those various sections of the Judicial Code provide that each of these functions shall be performed by the court."

This section preserves the interpretation established by the Textile Mills case but provides in subsection (c) that cases shall be heard by a court of not more than three judges unless the court has provided for hearing in banc. This provision continues the tradition of a three-judge appellate court and makes the decision of a division, the decision of the court, unless rehearing in banc is ordered. It makes judges available for other assignments, and permits a rotation of judges in such manner as to give to each a maximum of time for the preparation of opinions.

Whether divisions should sit simultaneously at the same or different places in the circuit is a matter for each court to determine.

#### Amendments

1963—Subsec. (c). Pub. L. 88-176 inserted "regular" preceding "active service" wherever appearing, and provided that a retired circuit judge shall be competent to sit as a judge of the court in banc, in a rehearing if he sat in at the original hearing.

### § 47. Disqualification of trial judge to hear appeal

No judge shall hear or determine an appeal from the decision of a case or issue tried by him.

(June 25, 1948, ch. 646, 62 Stat. 872.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 216, and District of Columbia Code, 1940 ed., § 11-205 (Feb. 9, 1893, ch. 74, § 6, 27 Stat. 435; July 30, 1894, ch. 172, § 2, 28 Stat. 161; Mar. 3, 1901, ch. 854, § 225, 31 Stat. 1225; Mar. 3, 1911, ch. 231, § 120, 36 Stat. 1132).

The provision in section 11-205 of the District of Columbia Code, 1940 ed., that a justice of the district court while on the bench of the Court of Appeals in the District of Columbia shall not sit in review of judgment, order, or decree rendered by him below, was consolidated with a similar provision of section 216 of title 28, U.S.C., 1940 ed. The consolidation simplifies the language without change of substance.

References in said section 11-205 to the power to prescribe rules, requisites of record on appeal, forms of bills of exception, and procedure on appeal, were omitted as covered by Rules 73, 75, 76, of the Federal Rules of Civil Procedure and by Rule 51 of the Federal Rules of Criminal Procedure.

Said section 11-205 contained a provision that on a divided opinion by the Court of Appeals for the District of Columbia the decision of the lower court should stand affirmed. This was omitted as unnecessary as merely expressing a well-established rule of law.

Other provisions of said section 11-205 are incorporated in section 48 of this title.

The provision of section 216 of title 28, U.S.C., 1940 ed., with respect to the competency of justices and judges to sit, was omitted as covered by section 43 of this title.

Specific reference in said section 216 to the Chief Justice of the United States was likewise omitted inasmuch as he sits as a circuit justice.

The provision of said section 216 with respect to assignment of district judges was omitted as covered by section 291 et seq. of this title.

Provision of said section 216 relating to presiding judge was omitted as covered by section 44 of this title.

### § 48. Terms of court

Terms or sessions of courts of appeals shall be held annually at the places listed below, and at such other places within the respective circuits as may be designated by rule of court. Each court of appeals may hold special terms at any place within its circuit.

| *Circuits* | *Places* |
|---|---|
| District of Columbia. | Washington. |
| First | Boston. |
| Second | New York. |
| Third | Philadelphia. |
| Fourth | Richmond, Asheville. |
| Fifth | New Orleans, Atlanta, Fort Worth, Jacksonville, Montgomery. |
| Sixth | Cincinnati. |
| Seventh | Chicago. |
| Eighth | St. Louis, Kansas City, Omaha, St. Paul. |
| Ninth | San Francisco, Los Angeles, Portland, Seattle. |
| Tenth | Denver, Wichita, Oklahoma City. |

Any court of appeals may, with the consent of the Judicial Conference of the United States, pretermit any regular term or session of the court at any place for insufficient business or other good cause.

(June 25, 1948, ch. 646, 62 Stat. 872; Oct. 31, 1951, ch. 655, § 36, 65 Stat. 723.)

### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 223 and § 11-205 District of Columbia Code, 1940 ed. (Feb. 9, 1893, ch. 74, § 6, 27 Stat. 435; July 30, 1894, ch. 172, § 2, 28 Stat. 161; Mar. 3, 1901, ch. 854, § 225, 31 Stat. 1225; Mar. 3, 1911, ch. 231, § 126, 36 Stat. 1132; July 17, 1916, ch. 246, 39 Stat. 385; Jan. 8, 1925, ch. 57, 43 Stat. 729; July 3, 1926, ch. 735, 44 Stat. 809; Feb. 28, 1929, ch. 363, § 3, 45 Stat. 1347; May 17, 1932, ch. 190, 47 Stat. 158).

This section consolidates section 223 of title 28, U.S.C., 1940 ed., with part of section 11-205 of the District of Columbia Code.

Reference to San Juan as a place for holding court in the First Circuit was omitted. The revised section will permit the holding of terms at San Juan when the public interest requires.

The phrase "and at such other places within the respective circuits as may be designated by rule of court" was added to enable each court of appeals to hold such additional regular terms as changing circumstances might require.

The provisions of such section 223, for furnishing suitable rooms and accommodation at Oakland City, were omitted as obsolete since the erection of a new Federal building there.

The provisions as to fixed times for holding court in the Fifth Circuit was omitted as inconsistent with the practice in the other circuits. Words "San Francisco, Los Angeles, Portland, Seattle" were substituted for "San Francisco and two other places designated by the court" to conform with the practice in the Ninth Circuit.

Changes were made in phraseology.

### SENATE REVISION AMENDMENT

By Senate amendment, Jacksonville (Fla.) was added as a place for holding a regular session of the Court of Appeals for the Fifth Circuit. See 80th Congress Senate Report No. 1559.

### AMENDMENTS

1951—Act Oct. 31, 1951, added last paragraph.

### TERMS OF COURT

Act Feb. 28, 1929, ch. 363, § 3, 45 Stat. 1347, amended Judicial Code 1911, § 126, to provide as follows: "A term shall be held annually by the circuit courts of appeals in the several judicial circuits at the following places, and at such times as may be fixed by said courts, respectively: In the first circuit, in Boston, and when in its judgement the public interests require in San Juan, Porto Rico [now Puerto Rico]; in the second circuit, in New York; in the third circuit, in Philadelphia; in the fourth circuit, in Richmond and in Asheville, North Carolina; in the fifth circuit, in New Orleans, Atlanta, Fort Worth, and Montgomery; in the sixth circuit, in Cincinnati; in the seventh circuit, in Chicago; in the eighth circuit, in Saint Louis, Kansas City, Omaha, and Saint Paul; in the ninth circuit, in San Francisco, and each year in two other places in said circuit to be designated by the judges of said court; in the tenth circuit, in Denver, Wichita, and Oklahoma City, provided that suitable rooms and accommodations for holding court at Oklahoma City are furnished free of expense to the United States; and in each of the above circuits terms may be held at such other times and in such other places as said courts, respectively, may from time to time designate, except that terms shall be held in Atlanta on the first Monday in October, in Fort Worth on the first Monday in November, and in Montgomery on the third Monday in October. All appeals and other appellate proceedings which may be taken or prosecuted from the district courts of the United States in the State of Georgia, in the State of Texas, and in the State of Alabama, to the circuit court of appeals for the fifth judicial circuit shall be heard and disposed of, respectively, by said court at the terms held in Atlanta, in Fort Worth, and in Montgomery, except that appeals in cases of injunctions and in all other cases which, under the statutes and rules, or in the opinion of the court, are entitled to be brought to a speedy hearing, may be heard and disposed of wherever said court may be sitting. All appeals and other appellate proceedings which may be taken or prosecuted from the district court of the United States at Beaumont, Texas, to the circuit court of appeals for the fifth circuit, shall be heard and disposed of by the said circuit court of appeals at the terms of court held at New Orleans, except that appeals in cases of injunctions and in all other cases which, under the statutes and rules, or in the opinion of the court, are entitled to be brought to a speedy hearing, may be heard and disposed of wherever said court may be sitting."

Act July 3, 1926, ch. 735, 44 Stat. 809, provided for an annual term of the United States Circuit Court of Appeals for the eighth circuit at Oklahoma City at such times as might be fixed by the court, provided that suitable rooms and accommodations were furnished free of expense to the United States.

### SURVEY OF JUDICIAL BUSINESS IN ALASKA

Section 23(a) of Pub. L. 86-70, June 25, 1959, 73 Stat. 147, provided that: "The Judicial Conference of the United States, with the assistance of the Administrative Office of the United States Courts, shall conduct a study, including a field survey, of the Federal judicial business arising in the State of Alaska with a view toward directing the United States Court of Appeals for the Ninth Circuit to hold such terms of court in Anchorage or such other Alaskan cities as may be necessary for the prompt and efficient administration of justice."

### PUERTO RICO

Act May 17, 1932, ch. 190, 47 Stat. 158, changed the name of the island of "Porto Rico" to "Puerto Rico."

Act Jan. 8, 1925, ch. 57, 43 Stat. 729, provided that the Court of Appeals for the first circuit shall, when in its judgment the public interests require, hold a sitting of such court at San Juan, Porto Rico.

### CROSS REFERENCES

Courts always open, see section 452 of this title.

## CHAPTER 5—DISTRICT COURTS

Sec.
81. Alabama.
81A. Alaska.
82. Arizona.
83. Arkansas.

Sec.
84. California.
85. Colorado.
86. Connecticut.
87. Delaware.
88. District of Columbia.
89. Florida.
90. Georgia.
91. Hawaii.
92. Idaho.
93. Illinois.
94. Indiana.
95. Iowa.
96. Kansas.
97. Kentucky.
98. Louisiana.
99. Maine.
100. Maryland.
101. Massachusetts.
102. Michigan.
103. Minnesota.
104. Mississippi.
105. Missouri.
106. Montana.
107. Nebraska.
108. Nevada.
109. New Hampshire.
110. New Jersey.
111. New Mexico.
112. New York.
113. North Carolina.
114. North Dakota.
115. Ohio.
116. Oklahoma.
117. Oregon.
118. Pennsylvania.
119. Puerto Rico.
120. Rhode Island.
121. South Carolina.
122. South Dakota.
123. Tennessee.
124. Texas.
125. Utah.
126. Vermont.
127. Virginia.
128. Washington.
129. West Virginia.
130. Wisconsin.
131. Wyoming.
132. Creation and composition of district courts.
133. Appointment and number of district judges.
134. Tenure and residence of district judges.
135. Salaries of district judges.
136. Chief judges; precedence of district judges.
137. Division of business among district judges.
138. Terms abolished.
139. Times for holding regular sessions.
140. Adjournment.
141. Special sessions; places; notice.
142. Accommodations at places for holding court.
143. Vacant judgeship as affecting proceedings.
144. Bias or prejudice of judge.

### HISTORICAL AND REVISION NOTES

Sections 81-131 of this chapter show the territorial composition of districts and divisions by counties as of January 1, 1945. All references to dates were omitted as unnecessary.

All references to fixed terms of holding court were also omitted in order to vest in each district court a wider discretion and greater flexibility in the disposition of its business. Such times will now be determined by rule of court rather than by statute. See sections 138 and 141 of this title.

### AMENDMENTS

1963—Pub. L. 88-139, § 3(a), Oct. 16, 1963, 77 Stat. 248, substituted "Terms abolished" for "Times for holding regular terms" in item 138, "Times for holding regular sessions" for "Term continued until terminated" in item 139, and "sessions" for "terms" in item 141.

1958—Pub. L. 85-508, § 12(a), July 7, 1958, 72 Stat. 348 added item 81A.

### CROSS REFERENCES

Guam and Virgin Islands district courts, see sections 1424, 1424b and 1611 et seq. of Title 48, Territories and Insular Possessions.

Jurisdiction and venue of district courts, see sections 1331 et seq. and 1391 et seq. of this title.

Temporary judicial districts in newly acquired territories, see section 1453a of Title 48, Territories and Insular Possessions.

Three-judge courts, composition, see section 2284 of this title.

### FEDERAL RULES OF CIVIL PROCEDURE

See Appendix to this title.

### CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in sections 451, 1869 of this title; title 18 sections 3006A, 6001; title 22 section 1623.

## § 81. Alabama

Alabama is divided into three judicial districts to be known as the Northern, Middle, and Southern Districts of Alabama.

### *Northern District*

(a) The Northern District comprises seven divisions.

(1) The Northwestern Division comprises the counties of Colbert, Franklin, and Lauderdale.

Court for the Northwestern Division shall be held at Florence.

(2) The Northeastern Division comprises the counties of Cullman, Jackson, Lawrence, Limestone, Madison, and Morgan.

Court for the Northeastern Division shall be held at Huntsville and Decatur.

(3) The Southern Division comprises the counties of Blount, Jefferson, and Shelby.

Court for the Southern Division shall be held at Birmingham.

(4) The Eastern Division comprises the counties of Calhoun, Clay, Cleburne, and Talladega.

Court for the Eastern Division shall be held at Anniston.

(5) The Western Division comprises the counties of Bibb, Greene, Pickens, Sumter, and Tuscaloosa.

Court for the Western Division shall be held at Tuscaloosa.

(6) The Middle Division comprises the counties of Cherokee, De Kalb, Etowah, Marshall, and Saint Clair.

Court for the Middle Division shall be held at Gadsden.

(7) The Jasper Division comprises the counties of Fayette, Lamar, Marion, Walker, and Winston.

Court for the Jasper Division shall be held at Jasper.

### *Middle District*

(b) The Middle District comprises three divisions.

(1) The Northern Division comprises the counties of Autauga, Barbour, Bullock, Butler, Chilton, Coosa, Covington, Cren-

shaw, Elmore, Lowndes, Montgomery, and Pike.

Court for the Northern Division shall be held at Montgomery.

(2) The Southern Division comprises the counties of Coffee, Dale, Geneva, Henry, and Houston.

Court for the Southern Division shall be held at Dothan.

(3) The Eastern Division comprises the counties of Chambers, Lee, Macon, Randolph, Russell, and Tallapoosa.

Court for the Eastern Division shall be held at Opelika.

*Southern District*

(c) The Southern District comprises two divisions.

(1) The Northern Division comprises the counties of Dallas, Hale, Marengo, Perry, and Wilcox.

Court for the Northern Division shall be held at Selma.

(2) The Southern Division comprises the counties of Baldwin, Choctaw, Clarke, Conecuh, Escambia, Mobile, Monroe, and Washington.

Court for the Southern Division shall be held at Mobile.

(June 25, 1948, ch. 646, 62 Stat. 873; May 19, 1961, Pub. L. 87-36, § 3(a), 75 Stat. 83.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed. § 142 (Mar. 3, 1911, ch. 231, § 70, 36 Stat. 1105; Feb. 28, 1913, ch. 89, 37 Stat. 698; June 27, 1922, ch. 247, 42 Stat. 667).

Provisions relating to the places for the maintenance of the clerks' offices were omitted as covered by section 751 of this title, providing that deputy clerks may be designated to reside and maintain offices at such places for holding court as the judge may determine.

Provisions that the offices of the court shall be kept open at all times were omitted as covered by section 452 of this title.

A provision requiring the district judge for the northern district to reside at Birmingham was omitted as incongruous with section 134 of this title, requiring every district judge to reside within the district for which he is appointed. Likewise the provision of section 142 of title 28, U.S.C., 1940 ed., requiring the court to remain in session at Birmingham at least 6 months in each calendar year was omitted as unnecessary and not in harmony with provisions respecting other districts.

The provisions for furnishing rooms and accommodations at Florence, Gadsden, Jasper and Opelika were omitted as obsolete upon advice of the Director of the Administrative Office of the United States Courts that Federal accommodations are now available in each of these places.

Changes in arrangement and phraseology were made.

AMENDMENTS

1961—Subsec. (a)(2). Pub. L. 87-36 provided for the holding of a term of court at Decatur.

### § 81A. Alaska

Alaska constitutes one judicial district.

Court shall be held at Anchorage, Fairbanks, Juneau, Ketchikan, and Nome.

(Added Pub. L. 85-508, § 12(b), July 7, 1958, 72 Stat. 348, and amended Pub. L. 86-70, § 23(b), June 25, 1959, 73 Stat. 147.)

AMENDMENTS

1959—Pub. L. 86-70 inserted "Ketchikan,".

EFFECTIVE DATE OF 1959 AMENDMENT

Section 12 of Pub. L. 85-508 provided in part that this section, and the amendments to sections 133, 333, 373, 376, 460, 610, 753, 1252, 1291, 1292, 1294, 1346, 1963, 2072, 2201 and 2410 of this title, section 341b of Title 5, Government Organization and Employees, and sections 3241, 3401, 3771 and 3772 of Title 18, Crimes and Criminal Procedure, should be effective upon the admission of Alaska into the Union. Admission as a State was accomplished Jan. 3, 1959 upon issuance of Proc. No. 3269, Jan. 3, 1959, 24 F.R. 81, 73 Stat. c16, as required by sections 1 and 8(c) of Pub. L. 85-508. See notes set out preceding section 21 of Title 48, Territories and Insular Possessions.

CONTINUATION OF SUITS

Section 13 of Pub. L. 85-508 provided that: "No writ, action, indictment, cause, or proceeding pending in the District Court for the Territory of Alaska on the date when said Territory shall become a State, and no case pending in an appellate court upon appeal from the District Court for the Territory of Alaska at the time said Territory shall become a State, shall abate by the admission of the State of Alaska into the Union, but the same shall be transferred and proceeded with as hereinafter provided.

"All civil causes of action and all criminal offenses which shall have arisen or been committed prior to the admission of said State, but as to which no suit, action, or prosecution shall be pending at the date of such admission, shall be subject to prosecution in the appropriate State courts or in the United States District Court for the District of Alaska in like manner, to the same extent, and with like right of appellate review, as if said State had been created and said courts had been established prior to the accrual of said causes of action or the commission of such offenses; and such of said criminal offenses as shall have been committed against the laws of the Territory shall be tried and punished by the appropriate courts of said State, and such as shall have been committed against the laws of the United States shall be tried and punished in the United States District Court for the District of Alaska."

APPEALS

Section 14 of Pub. L. 85-508 provided that: "All appeals taken from the District Court for the Territory of Alaska to the Supreme Court of the United States or the United States Court of Appeals for the Ninth Circuit, previous to the admission of Alaska as a State, shall be prosecuted to final determination as though this Act had not been passed. All cases in which final judgement has been rendered in such district court, and in which appeals might be had except for the admission of such State, may still be sued out, taken, and prosecuted to the Supreme Court of the United States or the United States Court of Appeals for the Ninth Circuit under the provisions of then existing law, and there held and determined in like manner; and in either case, the Supreme Court of the United States, or the United States Court of Appeals, in the event of reversal, shall remand the said cause to either the State supreme court or other final appellate court of said State, or the United States district court for said district, as the case may require: *Provided,* That the time allowed by existing law for appeals from the district court for said Territory shall not be enlarged thereby."

TRANSFER OF CASES

Section 15 of Pub. L. 85-508 provided that: "All causes pending or determined in the District Court for the Territory of Alaska at the time of the admission of Alaska as a State which are of such nature as to be within the jurisdiction of a district court of the United States shall be transferred to the United States District Court for the District of Alaska for final disposition and enforcement in the same manner as is now provided by law with reference to the judgments and decrees in existing United States district courts. All other causes pending or determined in the District Court for the Territory of Alaska at the time of the admission of Alaska as a State shall be transferred to the appropriate State court of Alaska. All final judgments and decrees rendered upon such transferred cases in the United States District Court for the District of Alaska may be reviewed by the Supreme Court of the United States or by the United States Court of Appeals for the Ninth Circuit in the same manner as is now provided by law with reference to the judgments and decrees in existing United States district courts."

### SUCCESSION OF COURTS

Section 16 of Pub. L. 85-508 provided that: "Jurisdiction of all cases pending or determined in the District Court for the Territory of Alaska not transferred to the United States District Court for the District of Alaska shall devolve upon and be exercised by the courts of original jurisdiction created by said State, which shall be deemed to be the successor of the District Court for the Territory of Alaska with respect to cases not so transferred and, as such, shall take and retain custody of all records, dockets, journals, and files of such court pertaining to such cases. The files and papers in all cases so transferred to the United States district court, together with a transcript of all book entries to complete the record in such particular cases so transferred, shall be in like manner transferred to said district court."

### PENDING CASES

Section 17 of Pub. L. 85-508 provided that: "All cases pending in the District Court for the Territory of Alaska at the time said Territory becomes a State not transferred to the United States District Court for the District of Alaska shall be proceeded with and determined by the courts created by said State with the right to prosecute appeals to the appellate courts created by said State, and also with the same right to prosecute appeals or writs of certiorari from the final determination in said causes made by the court of last resort created by such State to the Supreme Court of the United States, as now provided by law for appeals and writs of certiorari from the court of last resort of a State to the Supreme Court of the United States."

### TERMINATION OF JURISDICTION OF DISTRICT COURT FOR THE TERRITORY OF ALASKA

Section 18 of Pub. L. 85-508 provided that: "The provisions of the preceding sections with respect to the termination of the jurisdiction of the District Court for the Territory of Alaska, the continuation of suits, the succession of courts, and the satisfaction of rights of litigants in suits before such courts, shall not be effective until three years after the effective date of this Act [see section 8(b) of Pub. L. 85-508, set out as a note preceding section 21 of Title 48, Territories and Insular Possessions], unless the President, by Executive order, shall sooner proclaim that the United States District Court for the District of Alaska, established in accordance with the provisions of this Act, is prepared to assume the functions imposed upon it. During such period of three years or until such Executive order is issued, the United States District Court for the Territory of Alaska shall continue to function as heretofore. The tenure of the judges, the United States attorneys, marshals, and other officers of the United States District Court for the Territory of Alaska shall terminate at such time as that court shall cease to function as provided in this section."

### SCHEDULE OF FEES, MILEAGE, OR OTHER COMPENSATION

Section 23(c) of Pub. L. 86-70, June 25, 1959, 73 Stat. 147, provided that: "Such authority as has been exercised by the Attorney General heretofore, with regard to the Federal court system in Alaska, pursuant to section 30 of the Act of June 6, 1900 (48 U.S.C. 25) shall continue to be exercised by him after the court created by section 12(b) of the Act of July 7, 1958 (72 Stat. 339, 348) [this section], providing for the admission of the State of Alaska into the Union, is established."

### EX. ORD. NO. 10867. ASSUMPTION OF FUNCTIONS BY UNITED STATES DISTRICT COURT FOR DISTRICT OF ALASKA

Ex. Ord. No. 10867, Feb. 20, 1960, 25 F.R. 1584, provided:

Whereas the act of July 7, 1958, 72 Stat. 339 [set out as a note preceding section 21 of Title 48, Territories and Insular Possessions], relating to the admission of the State of Alaska into the Union, provides that the United States District Court for the Territory of Alaska shall continue to function as theretofore for a period of three years after the effective date of that act, unless the President, by Executive order, shall sooner proclaim that the United States District Court for the District of Alaska, established in accordance with the provisions of that act, is prepared to assume the functions imposed upon it; and

Whereas that act further provides that its provisions relating to the termination of the jurisdiction of the District Court for the Territory of Alaska, the continuation of suits, the succession of courts, and the satisfaction of the rights of litigants in suits before such courts shall not be effective until the expiration of the above-mentioned three-year period or until such Executive order is issued; and that the tenure of the judges, the United States Attorneys, Marshals, and other officers of the United States District Court for the Territory of Alaska shall terminate at such time as that court shall cease to function; and

Whereas, I have appointed, by and with the advice and consent of the Senate, and commissioned the Honorable Walter N. Hodge to be United States District Judge for the District of Alaska, and he has taken his oath of office; and

Whereas Judge Hodge has appointed an acting United States Attorney, an acting United States Marshal, and other court officers; and

Whereas the United States District Court for the District of Alaska is now prepared to assume the functions imposed upon it:

Now, therefore, by virtue of the authority vested in me by section 18 of the said act of July 7, 1958 [set out as a note above], I hereby proclaim that the United States District Court for the District of Alaska is prepared to assume the functions imposed upon it. Accordingly, the jurisdiction of the District Court for the Territory of Alaska and the tenure of the judges, the United States Attorneys, Marshals, and other officers of that court are now terminated.

DWIGHT D. EISENHOWER.

## § 82. Arizona

Arizona constitutes one judicial district.

Court shall be held at Globe, Phoenix, Prescott, and Tucson.

(June 25, 1948, ch. 646, 62 Stat. 874.)

### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 143 (June 20, 1910, ch. 310, § 31, 36 Stat. 576; Oct. 3, 1913, ch. 17, §§ 1, 2, 38 Stat. 203).

A provision for transfer of causes, civil or criminal, from one place for holding court to another was omitted. Such provision, as to civil cases, is covered by section 1404 of this title, and, as to criminal cases, is rendered unnecessary because of inherent power of the court and Rules 18-20 of the Federal Rules of Criminal Procedure, relating to venue.

A provision for making an interlocutory order at any place designated for holding court was omitted as unnecessary in view of Federal Rules of Civil Procedure, rule 77(b).

A provision requiring the clerk to keep his office at the State capital was omitted as covered by section 751 of this title.

Changes in arrangement and phraseology were made.

### § 83. Arkansas.

Arkansas is divided into two judicial districts to be known as the Eastern and Western Districts of Arkansas.

#### *Eastern District*

(a) The Eastern District comprises five divisions.

(1) The Eastern Division comprises the counties of Cross, Lee, Monroe, Phillips, Saint Francis, and Woodruff.

Court for the Eastern Division shall be held at Helena.

(2) The Western Division comprises the counties of Conway, Faulkner, Lonoke, Perry, Pope, Prairie, Pulaski, Saline, Van Buren, White and Yell.

Court for the Western Division shall be held at Little Rock.

(3) The Pine Bluff Division comprises the counties of Arkansas, Chicot, Cleveland, Dallas, Desha, Drew, Grant, Jefferson, and Lincoln.

Court for the Pine Bluff Division shall be held at Pine Bluff.

(4) The Northern Division comprises the counties of Cleburne, Fulton, Independence, Izard, Jackson, Sharp, and Stone.

Court for the Northern Division shall be held at Batesville.

(5) The Jonesboro Division comprises the counties of Clay, Craighead, Crittenden, Greene, Lawrence, Mississippi, Poinsett, and Randolph.

Court for the Jonesboro Division shall be held at Jonesboro.

#### *Western District*

(b) The Western District comprises six divisions.

(1) The Texarkana Division comprises the counties of Hempstead, Howard, Lafayette, Little River, Miller, Nevada, and Sevier.

Court for the Texarkana Division shall be held at Texarkana.

(2) The El Dorado Division comprises the counties of Ashley, Bradley, Calhoun, Columbia, Ouachita, and Union.

Court for the El Dorado Division shall be held at El Dorado.

(3) The Fort Smith Division comprises the counties of Crawford, Franklin, Johnson, Logan, Polk, Scott, and Sebastian.

Court for the Fort Smith Division shall be held at Fort Smith.

(4) The Harrison Division comprises the counties of Baxter, Boone, Carroll, Marion, Newton, and Searcy.

Court for the Harrison Division shall be held at Harrison.

(5) The Fayetteville Division comprises the counties of Benton, Madison, and Washington.

Court for the Fayetteville Division shall be held at Fayetteville.

(6) The Hot Springs Division comprises the counties of Clark, Garland, Hot Springs, Montgomery, and Pike.

Court for the Hot Springs Division shall be held at Hot Springs.

(June 25, 1948, ch. 646, 62 Stat. 874; May 19, 1961, Pub. L. 87-36, § 5, 75 Stat. 84.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 144 (Mar. 3, 1911, ch. 231, § 71, 36 Stat. 1106; Apr. 12, 1924, ch. 87, § 1, 43 Stat. 90; Feb. 17, 1925, ch. 252, 43 Stat. 948; Apr. 16, 1926, ch. 147, § 1, 44 Stat. 296; Apr. 21, 1926, ch. 168, 44 Stat. 304; Feb. 7, 1928, ch. 29, § 1, 45 Stat. 58; Apr. 17, 1940, ch. 100, 54 Stat. 109; June 11, 1940, ch. 321, § 1, 54 Stat. 302).

A provision making inoperative the terms of the last paragraph of this section, whenever court accommodations shall be provided in Federal buildings was omitted as unnecessary. When such buildings become available the Director of the Administrative Office of the United States Courts will, under section 604 of this title, provide court accommodations therein.

Provisions relating to places for maintenance of clerks' offices and requiring said offices to be kept open at all times were omitted as covered by sections 452 and 751 of this title.

The provision authorizing the referee in bankruptcy for the western division of the eastern district to serve by appointment in the Hot Springs division of the western district is to be transferred to title 11, U.S.C., 1940 ed., Bankruptcy.

The provision with reference to court accommodations at Fayetteville and Hot Springs was omitted as covered by section 142 of this title.

Changes in arrangement and phraseology were made.

#### AMENDMENTS

1961—Pub. L. 87-36 eliminated from enumeration in subsec. (a)(1) the parish of Desha and in subsec. (a)(2) the parishes of Arkansas, Chicot, Cleveland, Dallas, Drew, Grant, Jefferson, and Lincoln, created the third division of subsec. (a), consisting of such parishes, and redesignated former subsec. (a)(3) and (4) to be subsec. (a)(4) and (5).

### § 84. California

California is divided into four judicial districts to be known as the Northern, Eastern, Central, and Southern Districts of California.

#### *Northern District*

(a) The Northern District comprises the counties of Alameda, Contra Costa, Del Norte, Humboldt, Lake Marin, Mendocino, Monterey, Napa, San Benito, Santa Clara, Santa Cruz, San Francisco, San Mateo, and Sonoma.

Court for the Northern District shall be held at Eureka, Oakland, San Francisco, and San Jose.

#### *Eastern District*

(b) The Eastern District comprises the counties of Alpine, Amador, Butte, Calaveras, Colusa, El Dorado, Fresno, Glenn, Inyo, Kern, Kings, Lassen, Madera, Mariposa, Merced, Modoc, Mono, Nevada, Placer, Plumas, Sacramento, San Joaquin, Shasta, Sierra, Siskiyou, Solano, Stanislaus, Sutter, Tehama, Trinity, Tulare, Tuolumne, Yolo, and Yuba.

Court for the Eastern District shall be held at Fresno, Redding, and Sacramento.

### *Central District*

(c) The Central District comprises the counties of Los Angeles, Orange, Riverside, San Bernardino, San Louis Obispo, Santa Barbara, and Ventura.

Court for the Central District shall be held at Los Angeles.

### *Southern District*

(d) The Southern District comprises the counties of Imperial and San Diego.

Court for the Southern District shall be held at San Diego.

(June 25, 1948, ch. 646, 62 Stat. 875; Mar. 18, 1966, Pub. L. 89-372, § 3(a), 80 Stat. 75.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 145 and section 76 of title 16, Conservation (Mar. 3, 1911, ch. 231, § 72, 36 Stat. 1107; May 16, 1916, ch. 122, 39 Stat. 122; June 2, 1920, ch. 218, § 2, 41 Stat. 731; Mar. 1, 1929, ch. 421, 45 Stat. 1424).

A provision relating to the place for maintenance of a clerk's office, and requiring such office to be kept open at all times, was omitted as covered by sections 452 and 751 of this title.

Changes in arrangement and phraseology were made.

#### Amendments

1966—Pub. L. 89-372 expanded the number of judicial districts in California from two to four by creating an Eastern and a Central District in addition to the existing Northern and Southern Districts, removed the provisions separating the Northern and Southern Districts into divisions, transferred to the newly created Eastern Division the counties of Alpine, Almador, Butte, Calaveras, Colusa, El Dorado, Glenn, Lassen, Modoc, Mono, Nevada, Placer, Plumas, Sacramento, San Joaquin, Shasta, Sierra, Siskiyou, Solano, Stanislaus, Sutter, Tehama, Trinity, Tuolumne, Yolo, and Yuba from the Northern District and Fresno, Inyo Kern, Kings, Madera, Mariposa, Merced, and Tulare from the Southern District, transferred to the newly created Central District the counties of Los Angeles, Orange, Riverside, San Bernadino, San Louis Obispo, Santa Barbara, and Ventura from the Southern District, substituted Eureka, Oakland, San Francisco, and San Jose for Eureka, Sacramento, and San Francisco as places for holding court for the Northern District, removed Fresno and Los Angeles from the list of places for holding court for the Southern District leaving San Diego as the only place for holding of court in the Southern District, and provided for the holding of court in Los Angeles for the Central District and in Fresno, Redding, and Sacramento for the Eastern District.

#### Effective Date of 1966 Amendment

Section 3(i) of Pub. L. 89-372 provided that: "The provisions of this section [amending this section and enacting provisions set out as a note under this section and section 133 of this title] shall become effective six months after the date of enactment of this Act [Mar. 18, 1966]."

#### Creation of Eastern and Central Districts: Transfer of District Judges; Transfer and Appointment of United States Attorneys and United States Marshals

Section 3(b) to (g) of Pub. L. 89-372 provided that:

"(b) The two district judges for the northern district of California holding office on the day before the effective date of this section [see Effective Date of 1966 Amendment note above] and whose official station is Sacramento shall, on and after such date, be district judges for the eastern district of California. All other district judges for the northern district of California holding office on the day before the effective date of this section [see Effective Date of 1966 Amendment note above] shall, on and after such date, be district judges for the northern district of California.

"(c) The district judge for the southern district of California, residing in the northern division thereof and holding office on the day before the effective date of this section [see Effective Date of 1966 Amendment note above], shall, on and after such date, be a district judge for the eastern district of California. The two district judges for the southern district of California holding office on the day before the effective date of this section [see Effective Date of 1966 Amendment note above], and whose official station is San Diego shall, on and after such date, be the district judges for the southern district of California. All other district judges for the southern district of California holding office on the day before the effective date of this section [see Effective Date of 1966 Amendment note above] shall, on and after such date, be district judges for the central district of California.

"(d) Nothing in this Act [amending sections 44, 84, and 133 of this title and enacting provisions set out as notes under sections 44, 84, and 133 of this title] shall in any manner affect the tenure of office of the United States attorney and the United States marshal for the northern district of California who are in office on the effective date of this section [see Effective Date of 1966 Amendment note above], and who shall be during the remainder of their present terms of office the United States attorney and marshal for such district as constituted by this Act.

"(e) Nothing in this Act [amending sections 44, 84, and 133 of this title and enacting provisions set out as notes under sections 44, 84, and 133 of this title] shall in any manner affect the tenure of office of the United States attorney and the United States marshal for the southern district of California who are in office on the effective date of this section, and who shall be during the remainder of their present terms of office the United States attorney and marshal for the central district of California.

"(f) The President shall appoint, by and with the advice and consent of the Senate, a United States attorney and a United States marshal for the southern district of California.

"(g) The President shall appoint, by and with the advice and consent of the Senate, a United States attorney and a United States marshal for the eastern district of California."

### § 85. Colorado

Colorado constitutes one judicial district.

Court shall be held at Denver, Durango, Grand Junction, Montrose, Pueblo, and Sterling.

(June 25, 1948, ch. 646, 62 Stat. 875.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 146 (Mar. 3, 1911, ch. 231, § 73, 36 Stat. 1108; June 12, 1916, ch. 143, 39 Stat. 225; May 29, 1924, ch. 209, 43 Stat. 243).

A provision for furnishing rooms and accommodations at Sterling was omitted as obsolete upon advice from the Director of the Administrative Office of the United States Courts that Federal accommodations are now available.

A provision authorizing adjournment at Denver when there is not business for terms at other places, is incorporated in section 138 of this title.

Provisions as to clerk's and marshal's deputies and maintenance of offices were deleted as covered by sections 541, 542, and 751 of this title.

Changes in arrangement and phraseology were made.

### § 86. Connecticut

**Connecticut constitutes one judicial district.**

**Court shall be held at Bridgeport, Hartford, New Haven, New London, and Waterbury.**

**(June 25, 1948, ch. 646, 62 Stat. 875; May 19, 1961, Pub. L. 87-36, § 3(b), 75 Stat. 83; Sept. 7, 1966, Pub. L. 89-558, 80 Stat. 705.)**

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 147 (Mar. 3, 1911, ch. 231, § 74, 36 Stat. 1108; Feb. 27, 1921, ch. 74, 41 Stat. 1146; June 15, 1933, ch. 80, 48 Stat. 148; Dec. 28, 1945, ch. 599, 59 Stat. 663).

Changes in arrangement and phraseology were made.

#### AMENDMENTS

1966—Pub. L. 89-558 provided for the holding of a term of court at New London.

1961—Pub. L. 87-36 provided for the holding of a term of court at Bridgeport and Waterbury.

### § 87. Delaware

**Delaware constitutes one judicial district.**

**Court shall be held at Wilmington.**

**(June 25, 1948, ch. 646, 62 Stat. 875.)**

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 148 (Mar. 3, 1911, ch. 231, § 75, 36 Stat. 1108).

Minor changes in phraseology were made.

### § 88. District of Columbia

**The District of Columbia constitutes one judicial district.**

**Court shall be held at Washington.**

**(June 25, 1948, ch. 646, 62 Stat. 875.)**

#### HISTORICAL AND REVISION NOTES

This section expressly makes the District of Columbia a judicial district of the United States.

Section 41 of this title also makes the District of Columbia a judicial circuit of the United States.

Section 11-305 of the District of Columbia Code, 1940 ed., provides that the District Court of the United States for the District of Columbia shall possess the same powers and exercise the same jurisdiction as the district courts of the United States, and shall be deemed a court of the United States.

It is consonant with the ruling of the Supreme Court in *O'Donoghue* v. *United States*, 1933, 53 S.Ct. 740, 289 U.S. 516, 77 L.Ed. 1356, that the (then called) Supreme Court and Court of Appeals of the District of Columbia are constitutional courts of the United States, ordained and established under article III of the Constitution, Congress enacted that the Court of Appeals "shall hereafter be known as the United States Court of Appeals for the District of Columbia" (Act of June 7, 1934, 48 Stat. 926); and also changed the name of the Supreme Court of the District of Columbia to "district court of the United States for the District of Columbia" (Act of June 25, 1936, 49 Stat. 1921). In *Federal Trade Commission* v. *Klesner*, 1927, 47 S.Ct. 557, 274 U.S. 145, 71 L.Ed. 972, the Supreme Court ruled: "* * * The parallelism between the Supreme Court of the District [of Columbia] and the Court of Appeals of the District [of Columbia], on the one hand, and the district courts of the United States and the circuit courts of appeals, on the other, in the consideration and disposition of cases involving what among the States would be regarded as within Federal jurisdiction, is complete." See also to the same effect *Clairborne-Annapolis Ferry Company* v. *United States*, 1932, 52 S.Ct. 440, 285 U.S. 382, 76 L.Ed. 808.

### § 89. Florida

**Florida is divided into three judicial districts to be known as the Northern, Middle, and Southern Districts of Florida.**

#### *Northern District*

**(a) The Northern District comprises the counties of Alachua, Bay, Calhoun, Dixie, Escambia, Franklin, Gadsden, Gilchrist, Gulf, Holmes, Jackson, Jefferson, Lafayette, Leon, Levy, Liberty, Okaloosa, Santa Rosa, Taylor, Wakulla, Walton, and Washington.**

**Court for the Northern District shall be held at Gainesville, Marianna, Panama City, Pensacola, and Tallahassee.**

#### *Middle District*

**(b) The Middle District comprises the counties of Baker, Bradford, Brevard, Charlotte, Citrus, Clay, Columbia, De Soto, Duval, Flagler, Hamilton, Hardee, Hernando, Hillsborough, Lake, Lee, Madison, Manatee, Marion, Nassau, Orange, Osceola, Pasco, Pinellas, Polk, Putnam, Saint Johns, Sarasota, Seminole, Sumter, Suwannee, Union, and Volusia.**

**Court for the Middle District shall be held at Fernandina, Fort Myers, Jacksonville, Live Oak, Ocala, Orlando, Saint Petersburg, and Tampa.**

#### *Southern District*

**(c) The Southern District comprises the counties of Broward, Collier, Dade, Glades, Hendry, Highlands, Indian River, Martin, Monroe, Okeechobee, Palm Beach, and Saint Lucie.**

**Court for the Southern District shall be held at Fort Lauderdale, Fort Pierce, Key West, Miami, and West Palm Beach.**

**(June 25, 1948, ch. 646, 62 Stat. 876; July 17, 1952, ch. 929, 66 Stat. 757; May 19, 1961, Pub. L. 87-36, § 3(f), 75 Stat. 83; July 30, 1962, Pub. L. 87-562, § 1, 76 Stat. 247; June 2, 1970, Pub. L. 91-272, § 10, 84 Stat. 298.)**

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 149 (Mar. 3, 1911, ch. 231, § 76, 36 Stat. 1108; June 15, 1933, ch. 77, 48 Stat. 147; Aug. 25, 1937, ch. 763, § 1, 50 Stat. 800).

A provision requiring rooms and accommodations to be furnished at Orlando without cost to the United States was omitted as obsolete, upon advice of the Director of the Administrative Office for the United States Courts that Federal accommodations are now available in Orlando.

A provision requiring court to be open at all times was omitted as covered by section 452 of this title.

A provision that no deputy clerk or deputy marshal should be appointed at Fort Pierce, was omitted as incongruous with other sections of this title. See sections 541, 542, and 751 of this title.

The provision respecting court accommodations at Fort Pierce and Panama City was omitted as covered by section 142 of this title.

Changes in arrangement and phraseology were made.

### AMENDMENTS

1970—Subsec. (c). Pub. L. 91-272 added Fort Lauderdale to the enumeration of cities in which court for the Southern District may be held.

1962—Pub. L. 87-562 eliminated provisions which authorized court for the Northern District to be held at Live Oak, and for the Southern District at Fernandina, Fort Myers, Jacksonville, Ocala, Orlando, and Tampa, and removed the counties of Baker, Bradford, Brevard, Charlotte, Citrus, Clay, Columbia, De Soto, Duval, Flagler, Hamilton, Hardee, Hernando, Hillsborough, Lake, Lee, Madison, Manatee, Marion, Nassau, Orange, Osceola, Pasco, Pinellas, Polk, Putnam, Saint Johns, Sarasota, Seminole, Sumter, Suwannee, Union, and Volusia from the Southern District and created the Middle District to comprise such counties.

1961—Subsec. (a). Pub. L. 87-36 provided for the holding of a term of court at Live Oak.

1952—Subsec. (b). Act July 17, 1952, provided for a term of court at Fort Myers and West Palm Beach.

### EFFECTIVE DATE OF 1962 AMENDMENT

Section 5 of Pub. L. 87-562 provided that: "This Act [amending this section and section 133 of this title, and enacting provisions set out as notes under this section and section 142 of this title] shall become effective ninety days after the date of enactment [July 30, 1962]."

### DISTRICT JUDGES, UNITED STATES ATTORNEYS, AND UNITED STATES MARSHALS DESIGNATIONS; TENURE; APPOINTMENTS

Section 2 of Pub. L. 87-562 provided that:

"(a) The district judge appointed September 26, 1950, the district judge appointed August 13, 1955, and the district judge appointed March 8, 1961, all for the Southern District of Florida, shall hereafter be designated as district judges for the Middle District of Florida.

"(b) The district judge for the Northern and Southern Districts of Florida shall hereafter be designated as the district judge for the Northern, Middle, and Southern Districts of Florida.

"(c) Nothing in this Act [amending this section and section 133 of this title, and enacting provisions set out as notes under this section and section 142 of this title] shall in any manner affect the tenure of office of the United States Attorney and the United States Marshal for the Northern District of Florida who are in office at the time of the enactment of this Act [July 30, 1962], and who shall be during the remainder of their present terms of office the United States Attorney and Marshal for such district as constituted by this Act.

"(d) Nothing in this Act [amending this section and section 133 of this title, and enacting provisions set out as notes under this section and section 142 of this title] shall in any manner affect the tenure of office of the United States Attorney and the United States Marshal for the Southern District of Florida who are in office at the time of the enactment of this Act [July 30, 1962], and who shall be during the remainder of their present terms of office the United States Attorney and Marshal for the Middle District of Florida as constituted by this Act.

"(e) The President is authorized to appoint, by and with the advice and consent of the Senate, a United States Attorney and a United States Marshal for the Southern District of Florida."

### ELIMINATION OF DISTRICT JUDGESHIP FOR NORTHERN, MIDDLE, AND SOUTHERN DISTRICTS OF FLORIDA

District judgeship for northern, middle, and southern districts changed to district judgeship for middle district only, see section 2(b) of Pub. L. 89-372, set out as a note under section 133 of this title.

## § 90. Georgia

Georgia is divided into three judicial districts to be known as the Northern, Middle, and Southern Districts of Georgia.

### *Northern District*

(a) The Northern District comprises four divisions.

(1) The Gainesville Division comprises the counties of Banks, Barrow, Dawson, Forsyth, Habersham, Hall, Jackson, Lumpkin, Rabun, Stephens, Towns, Union, and White.

Court for the Gainesville Division shall be held at Gainesville.

(2) The Atlanta Division comprises the counties of Cherokee, Clayton, Cobb, De Kalb, Douglas, Fannin, Fulton, Gilmer, Gwinnett, Henry, Newton, Pickens, and Rockdale.

Court for the Atlanta Division shall be held at Atlanta.

(3) The Rome Division comprises the counties of Bartow, Catoosa, Chattooga, Dade, Floyd, Gordon, Murray, Paulding, Polk, Walker, and Whitfield.

Court for the Rome Division shall be held at Rome.

(4) The Newnan Division comprises the counties of Carroll, Coweta, Fayette, Haralson, Heard, Meriwether, Pike, Spalding, and Troup.

Court for the Newnan Division shall be held at Newnan.

### *Middle District*

(b) The Middle District comprises seven divisions.

(1) The Athens Division comprises the counties of Clarke, Elbert, Franklin, Greene, Hart, Madison, Morgan, Oconee, Oglethorpe, and Walton.

Court for the Athens Division shall be held at Athens.

(2) The Macon Division comprises the counties of Baldwin, Bibb, Bleckley, Butts, Crawford, Hancock, Houston, Jasper, Jones, Lamar, Monroe, Peach, Pulaski, Putnam, Twiggs, Upson, Washington, and Wilkinson.

Court for the Macon Division shall be held at Macon.

(3) The Columbus Division comprises the counties of Chattahoochee, Clay, Harris, Marion, Muscogee, Quitman, Randolph, Stewart, Talbot, and Taylor.

Court for the Columbus Division shall be held at Columbus.

(4) The Americus Division comprises the counties of Ben Hill, Crisp, Dooly, Lee, Macon, Schley, Sumter, Terrell, Webster, and Wilcox.

Court for the Americus Division shall be held at Americus.

(5) The Albany Division comprises the counties of Baker, Calhoun, Dougherty, Early, Miller, Mitchell, Turner, and Worth.

Court for the Albany Division shall be held at Albany.

(6) The Valdosta Division comprises the counties of Berrien, Clinch, Cook, Echols, Irwin, Lanier, Lowndes, and Tift.

Court for the Valdosta Division shall be held at Valdosta.

(7) The Thomasville Division comprises the counties of Brooks, Colquitt, Decatur, Grady, Seminole, and Thomas.

Court for the Thomasville Division shall be held at Thomasville.

### *Southern District*

(c) The Southern District comprises six divisions.

(1) The Augusta Division comprises the Counties of Burke, Columbia, Glascock, Lincoln, McDuffie, Richmond, Taliaferro, Warren, and Wilkes.

Court for the Augusta Division shall be held at Augusta.

(2) The Dublin Division comprises the counties of Dodge, Johnson, Laurens, Montgomery, Telfair, Treutlen, and Wheeler.

Court for the Dublin Division shall be held at Dublin.

(3) The Savannah Division comprises the counties of Bryan, Chatham, Effingham, Evans, Liberty, Screven, and Tattnall.

Court for the Savannah Division shall be held at Savannah.

(4) The Waycross Division comprises the counties of Atkinson, Bacon, Brantley, Charlton, Coffee, Pierce, and Ware.

Court for the Waycross Division shall be held at Waycross.

(5) The Brunswick Division comprises the counties of Appling, Camden, Glynn, Jeff Davis, Long, McIntosh, and Wayne.

Court for the Brunswick Division shall be held at Brunswick.

(6) The Swainsboro Division comprises the counties of Bulloch, Candler, Emanuel, Jefferson, Jenkins, and Toombs.

Court for the Swainsboro Division shall be held at Swainsboro.

(June 25, 1948, ch. 646, 62 Stat. 876; Aug. 16, 1949, ch. 444, 63 Stat. 610; Oct. 31, 1951, ch. 655, § 36a, 65 Stat. 723.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 150 (Mar. 3, 1911, ch. 231, § 77, 36 Stat. 1108; May 28, 1926, ch. 414, §§ 1, 2, 44 Stat. 670; Aug. 22, 1935, ch. 603, §§ 1–3, 49 Stat. 680, 681; June 20, 1936, ch. 639, 49 Stat. 1561; Aug. 21, 1937, ch. 728, §§ 1, 2, 50 Stat. 739, 740; Mar. 6, 1942, ch. 153, §§ 1–3, 56 Stat. 139; Oct. 29, 1945, ch. 435, 59 Stat. 550).

Provisions for furnishing rooms and accommodations at Americus and Dublin were omitted as obsolete upon advice of the Director of the Administrative Office of the United States Courts that Federal accommodations are now available in each of those places.

The provisions respecting court accommodations at Brunswick, Newnan, or Thomasville were omitted as covered by section 142 of this title.

Since the latest amendment of section 150 of title 28, U.S.C., 1940 ed., the former counties of Campbell and Milton were merged with Fulton County in the Atlanta Division of the Northern District.

Changes in arrangement and phraseology were made.

#### Amendments

1951—Subsec. (c)(6). Act Oct. 31, 1951, struck out "Washington,".

1949—Subsec. (c). Act Aug. 16, 1949, created a Swainsboro division and provided for holding terms of court there.

## § 91. Hawaii

Hawaii constitutes one judicial district which includes the Midway Islands, Wake Island, Johnston Island, Sand Island, Kingman Reef, Palmyra Island, Baker Island, Howland Island, Jarvis Island, Canton Island, and Enderbury Island: *Provided*, That the inclusion of Canton and Enderbury Islands in such judicial district shall in no way be construed to be prejudicial to the claims of the United Kingdom to said Islands in accordance with the agreement of April 6, 1939, between the Governments of the United States and of the United Kingdom to set up a regime for their use in common.

Court shall be held at Honolulu.

(June 25, 1948, ch. 646, 62 Stat. 877; May 24, 1949, ch. 139, § 64a, 63 Stat. 99; Mar. 18, 1959, Pub. L. 86–3, § 14(i), 73 Stat. 11; July 12, 1960, Pub. L. 86–624, § 19, 74 Stat. 416.)

#### Historical and Revision Notes

Based on sections 641 and 642a of title 48, U.S.C., 1940 ed., Territories and Insular Possessions (Apr. 30, 1900, ch. 339, § 86, 31 Stat. 158; Mar. 3, 1909, ch. 269, § 1, 35 Stat. 838; July 9, 1921, ch. 42, § 313, 42 Stat. 119; Feb. 12, 1925, ch. 220, 43 Stat. 890; Dec. 13, 1926, ch. 6, § 1, 44 Stat. 919; Aug. 13, 1940, ch. 662, 54 Stat. 784).

Section consolidates parts of sections 641 and 642a of title 48, U.S.C., 1940 ed.

The provisions of section 641 of title 48, U.S.C., 1940 ed., with reference to regular and special terms and the times of holding same were omitted as covered by sections 138 and 141 of this title.

Provisions of section 642a of title 48, U.S.C., 1940 ed., relating to jurisdiction of civil actions and criminal offenses, were omitted as covered by the general jurisdictional provisions of this title and revised title 18 (H. R. 3190, 80th Cong.).

Provisions of section 642a of title 48, U.S.C., 1940 ed., as to appeals were omitted as covered by section 1295 of this title. Provisions of said section 642a with reference to juries and jury trials were omitted as covered by chapter 121 of this title.

Other provisions of section 641 of title 48, U.S.C., 1940 ed., are incorporated in sections 132 and 133 of this title.

Changes were made in phraseology.

#### Amendments

1960—Pub. L. 86–624 eliminated Kure Island.

1959—Pub. L. 86–3 included Palmyra Island.

1949—Act May 24, 1949, added provisions relating to the inclusion of Canton and Enderbury Islands.

#### Effective Date of 1959 Amendment

Amendment by Pub. L. 86–3 effective upon the admission of the State of Hawaii into the Union, see Effective Date of 1959 Amendment note set out under section 1252 of this title.

#### Admission of Hawaii as State

Admission of Hawaii into the Union was accomplished Aug. 21, 1959, upon issuance of Proc. No. 3309, Aug. 21, 1959, 25 F.R. 6868, 73 Stat. c74, as required by sections 1 and 7(c) of Pub. L. 86–3, Mar. 18, 1959, 73 Stat. 4, set out as notes preceding section 491 of Title 48, Territories and Insular Possessions.

### CONTINUATION OF SUITS

Section 12 of Pub. L. 86-3 provided that:

"No writ, action, indictment, cause, or proceeding pending in any court of the Territory of Hawaii or in the United States District Court for the District of Hawaii shall abate by reason of the admission of said State into the Union, but the same shall be transferred to and proceeded with in such appropriate State courts as shall be established under the constitution of said State, or shall continue in the United States District Court for the District of Hawaii, as the nature of the case may require. And no writ, action, indictment, cause or proceeding shall abate by reason of any change in the courts, but shall be proceeded with in the State or United States courts according to the laws thereof, respectively. And the appropriate State courts shall be the successors of the courts of the Territory as to all cases arising within the limits embraced within the jurisdiction of such courts, respectively, with full power to proceed with the same, and award mesne or final process therein, and all the files, records, indictments, and proceedings relating to any such writ, action, indictment, cause or proceeding shall be transferred to such appropriate State courts and the same shall be proceeded with therein in due course of law.

"All civil causes of action and all criminal offenses which shall have arisen or been committed prior to the admission of said State, but as to which no writ, action, indictment or proceeding shall be pending at the date of such admission, shall be subject to prosecution in the appropriate State courts or in the United States District Court for the District of Hawaii in like manner, to the same extent, and with like right of appellate review, as if said State had been created and said State courts had been established prior to the accrual of such causes of action or the commission of such offenses. The admission of said State shall effect no change in the substantive or criminal law governing such causes of action and criminal offenses which shall have arisen or been committed; and such of said criminal offenses as shall have been committed against the laws of the Territory shall be tried and punished by the appropriate courts of said State, and such as shall have been committed against the laws of the United States shall be tried and punished in the United States District Court for the District of Hawaii."

### APPEALS

Section 13 of Pub. L. 86-3 provided that: "Parties shall have the same rights of appeal from and appellate review of final decisions of the United States District Court for the District of Hawaii or the Supreme Court of the Territory of Hawaii in any case finally decided prior to admission of said State into the Union, whether or not an appeal therefrom shall have been perfected prior to such admission, and the United States Court of Appeals for the Ninth Circuit and the Supreme Court of the United States shall have the same jurisdiction therein, as by law provided prior to admission of said State into the Union, and any mandate issued subsequent to the admission of said State shall be to the United States District Court for the District of Hawaii or a court of the State, as may be appropriate. Parties shall have the same rights of appeal from and appellate review of all orders, judgments, and decrees of the United States District Court for the District of Hawaii and of the Supreme Court of the State of Hawaii as successor to the Supreme Court of the Territory of Hawaii, in any case pending at the time of admission of said State into the Union, and the United States Court of Appeals for the Ninth Circuit and the Supreme Court of the United States shall have the same jurisdiction therein, as by law provided in any case arising subsequent to the admission of said State into the Union."

### COURT OF THE UNITED STATES; DISTRICT JUDGES

Section 9(a) of Pub. L. 86-3 provided that:

"The United States District Court for the District of Hawaii established by and existing under title 28 of the United States Code shall thence forth be a court of the United States with judicial power derived from article III, section 1, of the Constitution of the United States: *Provided, however,* That the terms of office of the district judges for the district of Hawaii then in office shall terminate upon the effective date of this section and the President, pursuant to sections 133 and 134 of title 28, United States Code, as amended by this Act, shall appoint, by and with the advice and consent of the Senate, two district judges for the said district who shall hold office during good behavior."

Section 9 of Pub. L. 86-3 provided in part that subsec. (a) of that section should be effective upon the admission of the State of Hawaii into the Union.

### EXTENSION OF CIVIL AND CRIMINAL LAWS TO MIDWAY, WAKE, JOHNSON, SAND, ETC., ISLANDS

Laws of the United States relating to civil acts or offenses consummated or committed on the high seas on board a vessel belonging to the United States were extended to the Midway Islands, Wake, Johnson, Sand, etc., Islands by section 644a of Title 48, Territories and Insular Possessions.

### FEDERAL RULES OF CRIMINAL PROCEDURE

Application of rules, see note by Advisory Committee under rule 54, Title 18, Appendix, Crimes and Criminal Procedure.

## § 92. Idaho

Idaho, exclusive of Yellowstone National Park, constitutes one judicial district.

Court shall be held at Boise, Coeur d'Alene, Moscow, and Pocatello.

(June 25, 1948, ch. 646, 62 Stat. 877; June 2, 1970, Pub. L. 91-272, § 5, 84 Stat. 297.)

### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 151 (Mar. 3, 1911, ch. 231, § 78, 36 Stat. 1109; May 11, 1939, ch. 121, 53 Stat. 738).

All of Yellowstone National Park is included in the judicial district of Wyoming by section 131 of this title. Those parts of the park lying in Idaho are accordingly excluded from the judicial district of Idaho.

A provision as to the places for maintenance of the clerk's offices, and requiring that they be open at all times, was omitted as covered by sections 452-751 of this title.

Changes in arrangement and phraseology were made.

### AMENDMENTS

1970—Pub. L. 91-272 struck out provisions which had divided the judicial district of Idaho into a Northern Division, a Central Division, a Southern Division, and an Eastern Division.

## § 93. Illinois

Illinois is divided into three judicial districts to be known as the Northern, Southern, and Eastern Districts of Illinois.

### *Northern District*

(a) The Northern District comprises two divisions.

(1) The Eastern Division comprises the counties of Cook, De Kalb, Du Page, Grundy, Kane, Kendall, Lake, La Salle, McHenry, and Will.

Court for the Eastern Division shall be held at Chicago.

(2) The Western Division comprises the counties of Boone, Carroll, Jo Daviess,

Lee, Ogle, Stephenson, Whiteside, and Winnebago.

Court for the Western Division shall be held at Freeport and Rockford.

*Southern District*

(b) The Southern District comprises two divisions.

(1) The Northern Division comprises the counties of Bureau, Fulton, Henderson, Henry, Knox, Livingston, McDonough, Marshall, Mercer, Peoria, Putnam, Rock Island, Stark, Tazewell, Warren, and Woodford.

Court for the Northern Division shall be held at Peoria and Rock Island.

(2) The Southern Division comprises the counties of Adams, Bond, Brown, Calhoun, Cass, Christian, De Witt, Greene, Hancock, Jersey, Logan, McLean, Macaupin, Macon, Madison, Mason, Menard, Montgomery, Morgan, Pike, Sangamon, Schuyler, and Scott.

Court for the Southern Division shall be held at Alton, Quincy, and Springfield.

*Eastern District*

(c) The Eastern District of Illinois comprises the counties of Alexander, Champaign, Clark, Clay, Clinton, Coles, Crawford, Cumberland, Douglas, Edgar, Edwards, Effingham, Fayette, Ford, Franklin, Gallatin, Hamilton, Hardin, Iroquois, Jackson, Jasper, Jefferson, Johnson, Kankakee, Lawrence, Marion, Massac, Monroe, Moultrie, Perry, Piatt, Pope, Pulaski, Randolph, Richland, St. Clair, Saline, Shelby, Union, Vermilion, Wabash, Washington, Wayne, White, and Williamson.

Court for the Eastern District shall be held at Benton, Cairo, Danville, and East Saint Louis.

(June 25, 1948, ch. 646, 62 Stat. 878; Aug. 10, 1950, ch. 675, § 1, 64 Stat. 438; May 19, 1961, Pub. L. 87-36, § 3(c), 75 Stat. 83; June 2, 1970, Pub. L. 91-272, § 8, 84 Stat. 297.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 152 (Mar. 3, 1911, ch. 231, § 79, 36 Stat. 1110; Aug. 12, 1937, ch. 594, 50 Stat. 624; June 6, 1940, ch. 247, 54 Stat. 237).

Provisions relating to appointment of deputy marshals and maintenance of offices by deputy marshals and deputy clerks were omitted as covered by sections 452, 541, 542, and 751 of this title.

Changes in arrangement and phraseology were made.

#### AMENDMENTS

1970—Subsec. (a)(2). Pub. L. 91-272 added Rockford as a city in which court for the Western Division of the Northern District may be held.

1961—Subsec. (b)(2). Pub. L. 87-36 provided for the holding of a term of court at Alton.

1950—Subsec. (b)(1). Act Aug. 10, 1950, provided for the holding of a term of court at Rock Island.

### § 94. Indiana

Indiana is divided into two judicial districts to be known as the Northern and Southern Districts of Indiana.

*Northern District*

(a) The Northern District comprises three divisions.

(1) The Fort Wayne Division comprises the counties of Adams, Allen, Blackford, De Kalb, Grant, Huntington, Jay, Lagrange, Noble, Steuben, Wells, and Whitley.

Court for the Fort Wayne Division shall be held at Fort Wayne.

(2) The South Bend Division comprises the counties of Cass, Elkhart, Fulton, Kosciusko, La Porte, Marshall, Miami, Pulaski, St. Joseph, Starke, and Wabash.

Court for the South Bend Division shall be held at South Bend.

(3) The Hammond Division comprises the counties of Benton, Carroll, Jasper, Lake, Newton, Porter, Tippecanoe, Warren, and White.

Court for the Hammond Division shall be held at Hammond and Lafayette.

*Southern District*

(b) The Southern District comprises four divisions.

(1) The Indianapolis Division comprises the counties of Bartholomew, Boone, Brown, Clinton, Decatur, Delaware, Fayette, Fountain, Franklin, Hamilton, Hancock, Hendricks, Henry, Howard, Johnson, Madison, Marion, Monroe, Montgomery, Morgan, Randolph, Rush, Shelby, Tipton, Union, and Wayne.

Court for the Indianapolis Division shall be held at Indianapolis and Richmond.

(2) The Terre Haute Division comprises the counties of Clay, Greene, Knox, Owen, Parke, Putnam, Sullivan, Vermilion, and Vigo.

Court for the Terre Haute Division shall be held at Terre Haute.

(3) The Evansville Division comprises the counties of Davies, Dubois, Gibson, Martin, Perry, Pike, Posey, Spencer, Vanderburgh, and Warrick.

Court for the Evansville Division shall be held at Evansville.

(4) The New Albany Division comprises the counties of Clark, Crawford, Dearborn, Floyd, Harrison, Jackson, Jefferson, Jennings, Lawrence, Ohio, Orange, Ripley, Scott, Switzerland, and Washington.

Court for the New Albany Division shall be held at New Albany.

(June 25, 1948, ch. 646, 62 Stat. 878; Feb. 10, 1954, ch. 6, § 2(b)(7), 68 Stat. 11; June 2, 1970, Pub. L. 91-272, § 9, 84 Stat. 298.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 153 (Mar. 3, 1911, ch. 231, § 80, 36 Stat. 1110; Apr. 21, 1928, ch. 393, 45 Stat. 437).

Words "when the time fixed as above for the sitting of a court shall fall on a legal holiday the terms shall begin on the next day following," were omitted as within the discretion of the court and coverable by rule of court.

A provision that terms should not be limited to any particular number of days, and that a term about to commence in another division might be adjourned until the business of the court in session was concluded, was omitted as covered by section 140 of this title.

A provision authorizing indictments for offenses committed in divisions other than that wherein a grand jury is sitting was omitted as covered by Federal Rules of Criminal Procedure, Rules 6, 7.

Provisions as to maintenance of clerks' offices were omitted as covered by sections 452 and 751 of this title.

The following provisions were omitted as either executed or covered by section 501 et seq. and section 541 et seq. of this title, containing similar provisions as to United States attorneys and marshals:

"A. The senior district judge for the district of Indiana in office immediately prior to April 21, 1928, shall be the district judge for the southern district as constituted by this section; the junior district judge for the district of Indiana immediately prior to April 21, 1928, shall be the district judge for the northern district as constituted by this section; and the district attorney and marshal for the district of Indiana in office immediately prior to April 21, 1928, shall be during the remainder of their present terms of office the district attorney and marshal for the southern district as constituted by this section.

"B. The President is authorized and directed to appoint, by and with the advice and consent of the Senate, a district attorney and a marshal for the United States District Court for the Northern District of Indiana."

Changes in arrangement and phraseology were made.

#### AMENDMENTS

1970—Subsec. (b)(1). Pub. L. 91-272 added Richmond as a city in which court for the Indianapolis Division of the Southern District may be held.

1954—Subsec. (a)(3). Act Feb. 10, 1954, provided for the holding of court at Lafayette.

### § 95. Iowa

Iowa is divided into two judicial districts to be known as the Northern and Southern Districts of Iowa.

#### *Northern District*

(a) The Northern District comprises four divisions.

(1) The Cedar Rapids Division comprises the counties of Benton, Cedar, Grundy, Hardin, Iowa, Jones, Linn, and Tama.

Court for the Cedar Rapids Division shall be held at Cedar Rapids.

(2) The Eastern Division comprises the counties of Allamakee, Black Hawk, Bremer, Buchanan, Chickasaw, Clayton, Delaware, Dubuque, Fayette, Floyd, Howard, Jackson, Mitchell, and Winneshiek.

Court for the Eastern Division shall be held at Dubuque and Waterloo.

(3) The Western Division comprises the counties of Buena Vista, Cherokee, Clay, Crawford, Dickinson, Ida, Lyon, Monona, O'Brien, Osceola, Plymouth, Sac, Sioux, and Woodbury.

Court for the Western Division shall be held at Sioux City.

(4) The Central Division comprises the counties of Butler, Calhoun, Carroll, Cerro Gordo, Emmet, Franklin, Hamilton, Hancock, Humboldt, Kossuth, Palo Alto, Pocahontas, Webster, Winnebago, Worth and Wright.

Court for the Central Division shall be held at Fort Dodge and Mason City.

#### *Southern District*

(b) The Southern District comprises six divisions.

(1) The Central Division comprises the counties of Boone, Dallas, Greene, Guthrie, Jasper, Madison, Marion, Marshall, Polk, Poweshiek, Story, and Warren.

Court for the Central Division shall be held at Des Moines.

(2) The Eastern Division comprises the counties of Des Moines, Henry, Lee, Louisa, and Van Buren.

Court for the Eastern Division shall be held at Keokuk.

(3) The Western Division comprises the counties of Audubon, Cass, Harrison, Mills, Montgomery, Pottawattamie, and Shelby.

Court for the Western Division shall be held at Council Bluffs.

(4) The Southern Division comprises the counties of Adair, Adams, Clarke, Decatur, Fremont, Lucas, Page, Ringgold, Taylor, Union, and Wayne.

Court for the Southern Division shall be held at Creston.

(5) The Davenport Division comprises the counties of Clinton, Johnson, Muscatine, Scott, and Washington.

Court for the Davenport Division shall be held at Davenport.

(6) The Ottumwa Division comprises the counties of Appanoose, Davis, Jefferson, Keokuk, Mahaska, Monroe, and Wapello.

Court for the Ottumwa Division shall be held at Ottumwa.

(June 25, 1948, ch. 646, 62 Stat. 877.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§ 156 and 156a (Mar. 3, 1911, ch. 231, § 81, 36 Stat. 1111; Mar. 3, 1913, ch. 122, 37 Stat. 734; Feb. 23, 1916, ch. 32, 39 Stat. 12; Apr. 27, 1916, ch. 90, 39 Stat. 55; Mar. 4, 1923, ch. 256, 42 Stat. 1483; Jan. 28, 1925, ch. 104, 43 Stat. 794; July 5, 1937, ch. 428, 50 Stat. 474).

A provision relating to the maintenance of clerk's office was omitted as covered by section 751 of this title.

Changes in arrangement and phraseology were made.

### § 96. Kansas

Kansas constitutes one judicial district.

Court shall be held at Kansas City, Leavenworth, Salina, Topeka, Hutchinson, Wichita, Dodge City, and Fort Scott.

(June 25, 1948, ch. 646, 62 Stat. 880; Aug. 27, 1949, ch. 516, 63 Stat. 666.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 157 (Mar. 3, 1911, ch. 231, § 82, 36 Stat. 1112; Sept. 6, 1916, ch. 447, 39 Stat. 725; June 7, 1924, ch. 319, 43 Stat. 607; June 13, 1938, ch. 349, 52 Stat. 673).

Provisions as to the appointment and residence of deputy marshals and deputy clerks and maintenance of offices by them were omitted. See sections 541, 542, and 751 of this title.

A provision making inoperative the terms of the last paragraph of this section, whenever, upon the recommendation of the Attorney General, court accommodations should be provided in Federal buildings, was omitted as unnecessary. When such buildings become available the Director of the Administrative Office of the United States Courts will, under section 604 of this title, provide court accommodations therein.

The provision respecting court accommodations at Hutchinson was omitted as covered by section 142 of this title.

Changes in arrangement and phraseology were made.

#### AMENDMENTS

1949—Act Aug. 27, 1949, abolished the three divisions which constituted the judicial district, and added Dodge City as an additional place for holding court.

### § 97. Kentucky

Kentucky is divided into two judicial districts to be known as the Eastern and Western Districts of Kentucky.

#### *Eastern District*

(a) The Eastern District comprises the counties of Anderson, Bath, Bell, Boone, Bourbon, Boyd, Boyle, Bracken, Breathitt, Campbell, Carroll, Carter, Clark, Clay, Elliott, Estill, Fayette, Fleming, Floyd, Franklin, Gallatin, Garrard, Grant, Greenup, Harlan, Harrison, Henry, Jackson, Jessamine, Johnson, Kenton, Knott, Knox, Laurel, Lawrence, Lee, Leslie, Letcher, Lewis, Lincoln, McCreary, Madison, Magoffin, Martin, Mason, Menifee, Mercer, Montgomery, Morgan, Nicholas, Owen, Owsley, Pendleton, Perry, Pike, Powell, Pulaski, Robertson, Rockcastle, Rowan, Scott, Shelby, Trimble, Wayne, Whitley, Wolfe, and Woodford.

Court for the Eastern District shall be held at Catlettsburg, Covington, Frankfort, Jackson, Lexington, London, Pikeville, and Richmond.

#### *Western District*

(b) The Western District comprises the counties of Adair, Allen, Ballard, Barren, Breckenridge, Bullitt, Butler, Caldwell, Calloway, Carlisle, Casey, Christian, Clinton, Crittenden, Cumberland, Daviess, Edmonson, Fulton, Graves, Grayson, Green, Hancock, Hardin, Hart, Henderson, Hickman, Hopkins, Jefferson, Larue, Livingston, Logan, Lyon, McCracken, McLean, Marion, Marshall, Meade, Metcalfe, Monroe, Muhlenberg, Nelson, Ohio, Oldham, Russell, Simpson, Spencer, Taylor, Todd, Trigg, Union, Warren, Washington, and Webster.

Court for the Western District shall be held at Bowling Green, Louisville, Owensboro, and Paducah.

(June 25, 1948, ch. 646, 62 Stat. 880.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 158 (Mar. 3, 1911, ch. 231, § 83, 36 Stat. 1112; Jan. 29, 1920, ch. 57, 41 Stat. 400; June 22, 1936, ch. 707, 49 Stat. 1822).

Last paragraph of section 158 of title 28, U.S.C., 1940 ed., relating to process, was omitted as covered by Rule 4 of the Federal Rules of Civil Procedure.

Provisions relating to maintenance of clerk's offices were omitted as covered by sections 452 and 751 of this title.

Provisions for furnishing rooms and accommodations at Lexington and Pikeville were omitted as obsolete on advice of the Director of the Administrative Office of the United States Courts that Federal accommodations are now available in each of those places.

Words "with the waters thereof," after the list of counties in each district, were omitted as unnecessary and inconsistent with other sections of this chapter.

McCreary County of the Eastern District was formed from parts of the counties of Pulaski, Wayne, and Whitley since the latest amendment of the Judicial Code.

Changes in arrangement and phraseology were made.

### § 98. Louisiana

Louisiana is divided into three judicial districts to be known as the Eastern, Middle, and Western Districts of Louisiana.

#### *Eastern District*

(a) The Eastern District comprises the parishes of Assumption, Jefferson, Lafourche, Orleans, Plaquemines, Saint Bernard, Saint Charles, Saint James, Saint John the Baptist, Saint Tammany, Tangipahoa, Terrebonne, and Washington.

Court for the Eastern District shall be held at New Orleans.

#### *Middle District*

(b) The Middle District comprises the parishes of Ascension, East Baton Rouge, East Feliciana, Iberville, Livingston, Pointe Coupee, Saint Helena, West Baton Rouge, and West Feliciana.

Court for the Middle District shall be held at Baton Rouge.

#### *Western District*

(c) The Western District comprises six divisions.

(1) The Opelousas Division comprises the parishes of Evangeline and Saint Landry.

Court for the Opelousas Division shall be held at Opelousas.

(2) The Alexandria Division comprises the parishes of Avoyelles, Catahoula, Grant, La Salle, Rapides, and Winn.

Court for the Alexandria Division shall be held at Alexandria.

(3) The Shreveport Division comprises the parishes of Bienville, Bossier, Caddo, Claiborne, De Soto, Natchitoches, Red River, Sabine, and Webster.

Court for the Shreveport Division shall be held at Shreveport.

(4) The Monroe Division comprises the parishes of Caldwell, Concordia, East Carroll, Franklin, Jackson, Lincoln, Madison, Morehouse, Ouachita, Richland, Tensas, Union, and West Carroll.

Court for the Monroe Division shall be held at Monroe.

(5) The Lake Charles Division comprises the parishes of Allen, Beauregard, Calcasieu, Cameron, Jefferson Davis, and Vernon.

Court for the Lake Charles Division shall be held at Lake Charles.

(6) The Lafayette Division comprises the parishes of Acadia, Iberia, Lafayette, Saint Martin, Saint Mary, and Vermilion.

Court for the Lafayette Division shall be held at Lafayette.

(June 25, 1948, ch. 646, 62 Stat. 881; May 19, 1961, Pub. L. 87-36, § 4, 75 Stat. 83; Dec. 18, 1971, Pub. L. 92-208, § 3(a), 85 Stat. 741.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 159 (Mar. 3, 1911, ch. 231, § 84, 36 Stat. 1113).

Provisions relating to the maintenance of offices by the clerks were omitted as covered by sections 452 and 751 of this title.

The parishes of Allen, Beauregard, and Jefferson Davis of the Lake Charles Division of the Western District were formed out of part of Calcasieu Parish since the enactment of the Judicial Code.

Changes in arrangement and phraseology were made.

#### AMENDMENTS

1971—Pub. L. 92-208 created a Middle District consisting of the nine parishes formerly making up the Baton Rouge Division of the Eastern District and designated as the entire Eastern District the thirteen parishes formerly making up the New Orleans Division of the Eastern District.

1961—Pub. L. 87-36 eliminated from enumeration in subsec. (a)(1) the parishes of Iberia and Saint Mary, in subsec. (b)(1) Lafayette, Saint Martin and Vermilion, and in subsec. (b)(5) Acadia, and created the sixth division of subsec. (b), consisting of such parishes.

#### EFFECTIVE DATE OF 1971 AMENDMENT

Section 3(f) of Pub. L. 92-208 provided that: "The provisions of this section [amending sections 98, 133, and 134 of this title and enacting provisions set out as a note under this section] shall become effective one hundred and twenty days after the date of enactment of this Act [Dec. 18, 1971]."

#### DISTRICT JUDGE, UNITED STATES ATTORNEY, AND UNITED STATES MARSHAL FOR MIDDLE DISTRICT; DESIGNATION; TENURE; APPOINTMENT

Section 3(b), (c) of Pub. L. 92-208 provided that:

"(b) The district judge for the Eastern District of Louisiana holding office on the day immediately prior to the effective date of this section [see Effective Date of 1971 Amendment Note above], and whose official station on such date is Baton Rouge, shall, on and after such date, be the district judge for the Middle District of Louisiana. All other district judges for the Eastern District of Louisiana holding office on the day immediately prior to the effective date of this section shall be district judges for the Eastern District of Louisiana as constituted by this section.

"(c)(1) Nothing in this section shall in any manner affect the tenure of office of the United States attorney and the United States marshal for the Eastern District of Louisiana who are in office on the effective date of this section, and who shall be during the remainder of their present terms of office the United States attorney and marshal for the Eastern District of Louisiana as constituted by this section.

"(2) The President shall appoint, by and with the advice and consent of the Senate, a United States attorney and marshal for the Middle District of Louisiana."

### § 99. Maine

Maine constitutes one judicial district comprising two divisions.

(1) The Northern Division comprises the counties of Aroostook, Hancock, Penobscot, Piscataquis, Somerset, Waldo, and Washington.

Court for the Northern Division shall be held at Bangor.

(2) The Southern Division comprises the counties of Androscoggin, Cumberland, Franklin, Kennebec, Knox, Lincoln, Oxford, Sagadahoc, and York.

Court for the Southern Division shall be held at Portland.

(June 25, 1948, ch. 646, 62 Stat. 881.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 160 (Mar. 3, 1911, ch. 231, § 85, 36 Stat. 1114; Dec. 22, 1911, ch. 7, 37 Stat. 51; Sept. 8, 1916, ch. 475, §§ 1, 3, 39 Stat. 850; Mar. 4, 1923, ch. 279, 42 Stat. 1506).

Changes in arrangement and phraseology were made.

### § 100. Maryland

Maryland constitutes one judicial district.

Court shall be held at Baltimore, Cumberland, Denton, and at a suitable site in Prince Georges County not more than five miles from the boundary of Montgomery and Prince Georges Counties.

(June 25, 1948, ch. 646, 62 Stat. 882; Dec. 14, 1970, Pub. L. 91-546, § 4, 84 Stat. 1412.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 166 (Mar. 3, 1911, ch. 231, § 86, 36 Stat. 1114; Mar. 3, 1925, ch. 422, 43 Stat. 1106).

Provisions relating to appointment of a deputy clerk and a deputy marshal and the maintenance of offices by such deputies were omitted as covered by sections 541, 542, and 751 of this title.

The provisions respecting court accommodations at Denton were omitted as covered by section 142 of this title.

Changes in arrangement and phraseology were made.

#### AMENDMENTS

1970—Pub. L. 91-546 added a suitable site in Prince Georges County not more than five miles from the boundary of Montgomery and Prince Georges Counties to the list of enumerated places for holding court in Maryland.

### § 101. Massachusetts

Massachusetts constitutes one judicial district.

Court shall be held at Boston, New Bedford, Springfield, and Worcester.

(June 25, 1948, ch. 646, 62 Stat. 882.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 167 (Mar. 3, 1911, ch. 231, § 87, 36 Stat. 1114; May 1, 1922, ch. 173, 42 Stat. 503; May 17, 1926, ch. 306, 44 Stat. 559).

Words "and the terms at Boston shall not be terminated or affected by the terms at Springfield, New Bedford, or Worcester," were omitted as covered by section 138 of this title.

Provisions relating to appointment of deputy clerks and deputy marshals, and maintenance of office by said deputies were omitted as covered by sections 541, 542, and 751 of this title.

Provisions for furnishing rooms and accommodations at Springfield and Worcester were omitted as obsolete upon advice of Director of the Administrative Office of the United States Courts that federal accommodations have been provided at such places.

A provision requiring the return of all process to the terms at Boston and the keeping of all court papers in the clerk's office at Boston, unless otherwise specially ordered by the court, was omitted, since such matters can be regulated more appropriately by court rule or order. See Federal Rules of Civil Procedure, Rule 4(g).

The provision respecting court accommodations at New Bedford was omitted as covered by section 142 of this title.

Changes in arrangement and phraseology were made.

### § 102. Michigan

Michigan is divided into two judicial districts to be known as the Eastern and Western Districts of Michigan.

*Eastern District*

(a) The Eastern District comprises two divisions.

(1) The Southern Division comprises the counties of Genesee, Jackson, Lapeer, Lenawee, Livingston, Macomb, Monroe, Oakland, Saint Clair, Sanilac, Shiawassee, Washtenaw, and Wayne.

Court for the Southern Division shall be held at Ann Arbor, Detroit, Flint, and Port Huron.

(2) The Northern Division comprises the counties of Alcona, Alpena, Arenac, Bay, Cheboygan, Clare, Crawford, Gladwin, Gratiot, Huron, Iosco, Isabella, Midland, Montmorency, Ogemaw, Oscoda, Otsego, Presque Isle, Roscommon, Saginaw, and Tuscola.

Court for the Northern Division shall be held at Bay City.

*Western District*

(b) The Western District comprises two divisions.

(1) The Southern Division comprises the counties of Allegan, Antrim, Barry, Benzie, Berrien, Branch, Calhoun, Cass, Charlevoix, Clinton, Eaton, Emmet, Grand Traverse, Hillsdale, Ingham, Ionia, Kalamazoo, Kalkaska, Kent, Lake, Leelanau, Manistee, Mason, Mecosta, Missaukee, Montcalm, Muskegon, Newaygo, Oceana, Osceola, Ottawa, Saint Joseph, Van Buren, and Wexford.

Court for the Southern Division shall be held at Grand Rapids, Kalamazoo, Lansing, and Traverse City.

(2) The Northern Division comprises of counties of Alger, Baraga, Chippewa, Delta, Dickinson, Gogebic, Houghton, Iron, Keweenaw, Luce, Mackinac, Marquette, Menominee, Ontonagon, and Schoolcraft.

Court for the Northern Division shall be held at Marquette and Sault Sainte Marie.

(June 25, 1948, ch. 646, 62 Stat. 882; Feb. 10, 1954, ch. 6 § 2(b)(8), 68 Stat. 11; May 19, 1961, Pub. L. 87-36, § 3(d), 75 Stat. 83; Oct. 6, 1964, Pub. L. 88-627, 78 Stat. 1003; June 2, 1970, Pub. L. 91-272, § 11, 84 Stat. 298.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 168 (Mar. 3, 1911, ch. 231, § 88, 36 Stat. 1114; July 9, 1912, ch. 222, 37 Stat. 190; Mar. 31, 1930, ch. 101, 46 Stat. 138).

Provisions of section 168 of title 28, U.S.C., 1940 ed., relating to venue, were omitted as covered by section 1391 et seq. of this title.

A provision for a special or adjourned term at Bay City for the hearing of admiralty cases, beginning in February of each year, was omitted. Adequate provision is made for such terms by section 141 of this title.

Words "and mileage on service of process in said northern division shall be computed from Bay City," at the end of the section, were omitted as covered by section 553 of this title.

Provisions relating to appointment and residence of deputy clerks and deputy marshals and maintenance of offices by such deputies were omitted as covered by sections 541, 542, and 751 of this title.

Changes in arrangement and phraseology were made.

#### AMENDMENTS

1970—Subsec. (b)(1). Pub. L. 91-272 added Traverse City to the enumeration of cities in which court for the Southern Division of the Western District may be held.

1964—Subsec. (a). Pub. L. 88-627 transferred the counties of Genesee and Shiawassee from the Northern Division to the Southern Division, added Ann Arbor and Flint as places of court for the Southern Division, and eliminated Flint as a place of court for the Northern Division.

1961—Subsec. (b)(1). Pub. L. 87-36 provided for the holding of a term of court at Lansing instead of Mason.

1954—Subsec. (a)(1). Act Feb. 10, 1954, § 2(b)(8)(a), struck out the counties of Branch, Calhoun, Clinton, Hillsdale, and Ingham, with respect to the Southern Division of the Eastern District.

Subsec. (a)(2). Act Feb. 10, 1954, § 2(b)(8)(b), substituted "Flint" for "Port Huron", as one of the places for holding court.

Subsec. (b)(1). Act Feb. 10, 1954, § 2(b)(8)(c) inserted a reference to the counties of Branch, Calhoun, Clinton, Hillsdale, and Ingham, with respect to composition of the Southern Division of the Western District; and added references to Kalamazoo and Mason as additional places for holding court in such division.

### § 103. Minnesota

Minnesota constitutes one judicial district comprising six divisions.

(1) The First Division comprises the counties of Dodge, Fillmore, Houston, Mower, Olmsted, Steele, Wabasha, and Winona.

Court for the First Division shall be held at Winona.

(2) The Second Division comprises the counties of Blue Earth, Brown, Cottonwood, Faribault, Freeborn, Jackson, Lac qui Parle, Le Sueur, Lincoln, Lyon, Martin, Murray, Nicollet, Nobles, Pipestone, Redwood, Rock, Sibley, Waseca, Watonwan, and Yellow Medicine.

Court for the Second Division shall be held at Mankato.

(3) The Third Division comprises the counties of Chisago, Dakota, Goodhue, Ramsey, Rice, Scott, and Washington.

Court for the Third Division shall be held at Saint Paul.

(4) The Fourth Division comprises the counties of Anoka, Carver, Chippewa, Hennepin, Isanti, Kandiyohi, McLeod, Meeker, Renville, Sherburne, Swift, and Wright.

Court for the Fourth Division shall be held at Minneapolis.

(5) The Fifth Division comprises the counties of Aitkin, Benton, Carlton, Cass, Cook, Crow Wing, Itasca, Kanabec,

Koochiching, Lake, Mille Lacs, Morrison, Pine, and Saint Louis.

Court for the Fifth Division shall be held at Duluth.

(6) The Sixth Division comprises the counties of Becker, Beltrami, Big Stone, Clay, Clearwater, Douglas, Grant, Hubbard, Kittson, Lake of the Woods, Mahnomen, Marshall, Norman, Otter Tail, Pennington, Polk, Pope, Red Lake, Roseau, Stearns, Stevens, Todd, Traverse, Wadena, and Wilkin.

Court for the Sixth Division shall be held at Fergus Falls.

(June 25, 1948, ch. 646, 62 Stat. 882.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 169 (Mar. 3, 1911, ch. 231, § 89, 36 Stat. 1115; Apr. 10, 1926, ch. 113, 44 Stat. 238).

Provisions relating to the appointment and residence of deputy clerks and the maintenance of offices by them were omitted as covered by section 751 of this title.

The counties of Pennington and Lake of the Woods, in the Sixth Division, were created since the enactment of the Judicial Code.

Changes in arrangement and phraseology were made.

### § 104. Mississippi

Mississippi is divided into two judicial districts to be known as the northern and southern districts of Mississippi.

#### *Northern District*

(a) The northern district comprises four divisions.

(1) Eastern division comprises the counties of Alcorn, Attala, Chickasaw, Choctaw, Clay, Itawamba, Lee, Lowndes, Monroe, Oktibbeha, Prentiss, Tishomingo, and Winston.

Court for the eastern division shall be held at Aberdeen and Ackerman.

(2) The western division comprises the counties of Benton, Calhoun, Grenada, Lafayette, Marshall, Montgomery, Pontotoc, Tippah, Union, Webster, and Yalobusha.

Court for the Western division shall be held at Oxford.

(3) The Delta division comprises the counties of Bolivar, Coahoma, De Soto, Panola, Quitman, Tallahatchie, Tate, and Tunica.

Court for the Delta division shall be held at Clarksdale.

(4) The Greenville division comprises the counties of Carroll, Humphreys, Leflore, Sunflower, and Washington.

Court for the Greenville division shall be held at Greenville.

#### *Southern District*

(b) The southern district comprises five divisions.

(1) The Jackson division comprises the counties of Amite, Copiah, Franklin, Hinds, Holmes, Leake, Lincoln, Madison, Pike, Rankin, Scott, Simpson, and Smith.

Court for the Jackson division shall be held at Jackson.

(2) The eastern division comprises the counties of Clarke, Jasper, Kemper, Lauderdale, Neshoba, Newton, Noxubee, and Wayne.

Court for the eastern division shall be held at Meridian.

(3) The western division comprises the counties of Adams, Claiborne, Issaquena, Jefferson, Sharkey, Warren, Wilkinson, and Yazoo.

Court for the western division shall be held at Natchez and Vicksburg: *Provided*, That court shall be held at Natchez if suitable quarters and accommodations are furnished at no cost to the United States.

(4) The southern division comprises the counties of George, Hancock, Harrison, Jackson, Pearl River, and Stone.

Court for the southern division shall be held at Biloxi and Gulfport.

(5) The Hattiesburg division comprises the counties of Covington, Forrest, Greene, Jefferson Davis, Jones, Lamar, Lawrence, Marion, Perry, and Walthall.

Court for the Hattiesburg division shall be held at Hattiesburg.

(June 25, 1948, ch. 646, 62 Stat. 883; Aug. 7, 1950, ch. 601, 64 Stat. 415; Sept. 27, 1967, Pub. L. 90-92, 81 Stat. 229; Dec. 14, 1970, Pub. L. 91-546, §§ 2, 3, 84 Stat. 1412.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 170 (Mar. 3, 1911, ch. 231, § 90, 36 Stat. 1116; Feb. 5, 1912, ch. 28, 37 Stat. 59; May 27, 1912, ch. 136, 37 Stat. 118; Feb. 12, 1925, ch. 212, 43 Stat. 882; May 19, 1936, ch. 428, 49 Stat. 1362; May 8, 1939, ch. 116, § 1, 53 Stat. 684).

Provisions relating to the maintenance of offices by the clerks and marshals were omitted as covered by sections 452, 541, 542 and 751 of this title.

Changes in arrangement and phraseology were made.

#### AMENDMENTS

1970—Subsec. (b)(3). Pub. L. 91-546, § 3, added Natchez to the list of enumerated places for holding court in the Western Division of the Southern District, provided that suitable quarters and accommodations are furnished at no cost to the United States.

Subsec. (b)(4). Pub. L. 91-546, § 2, added Gulfport to the list of enumerated places for holding court in the Southern Division of the Southern District.

1967—Subsec. (a)(1). Pub. L. 90-92 included Ackerman in the places for holding court in the eastern division.

1950—Act Aug. 7, 1950, created Greenville division in the northern district with terms of courts to be held at Greenville.

### § 105. Missouri

Missouri is divided into two judicial districts to be known as the Eastern and Western Districts of Missouri.

#### *Eastern District*

(a) The Eastern District comprises three divisions.

(1) The Eastern Division comprises the counties of Audrain, Crawford, Dent, Franklin, Gasconade, Iron, Jefferson, Lincoln, Maries, Montgomery, Phelps,

Saint Charles, Saint Francois, Saint Genevieve, Saint Louis, Warren, and Washington, and the city of Saint Louis.

Court for the Eastern Division shall be held at Saint Louis.

(2) The Northern Division comprises the counties of Adair, Chariton, Clark, Knox, Lewis, Linn, Macon, Marion, Monroe, Pike, Ralls, Randolph, Schuyler, Scotland, and Shelby.

Court for the Northern Division shall be held at Hannibal.

(3) The Southeastern Division comprises the counties of Bollinger, Butler, Cape Girardeau, Carter, Dunklin, Madison, Mississippi, New Madrid, Pemiscot, Perry, Reynolds, Ripley, Scott, Shannon, Stoddard, and Wayne.

Court for the Southeastern Division shall be held at Cape Girardeau.

*Western District*

(b) The Western District comprises five divisions.

(1) The Western Division comprises the counties of Bates, Carroll, Cass, Clay, Henry, Jackson, Johnson, Lafayette, Ray, Saint Clair, and Saline.

Court for the Western Division shall be held at Kansas City.

(2) The Southwestern Division comprises the counties of Barton, Barry, Jasper, Lawrence, McDonald, Newton, Stone, and Vernon.

Court for the Southwestern Division shall be held at Joplin.

(3) The Saint Joseph Division comprises the counties of Andrew, Atchison, Buchanan, Caldwell, Clinton, Daviess, De Kalb, Gentry, Grundy, Harrison, Holt, Livingston, Mercer, Nodaway, Platte, Putnam, Sullivan, and Worth.

Court for the Saint Joseph Division shall be held at Saint Joseph.

(4) The Central Division comprises the counties of Benton, Boone, Callaway, Camden, Cole, Cooper, Hickory, Howard, Miller, Moniteau, Morgan, Osage, and Pettis.

Court for the Central Division shall be held at Jefferson City.

(5) The Southern Division comprises the counties of Cedar, Christian, Dade, Dallas, Douglas, Greene, Howell, Laclede, Oregon, Ozark, Polk, Pulaski, Taney, Texas, Webster, and Wright.

Court for the Southern Division shall be held at Springfield.

(June 25, 1948, ch. 646, 62 Stat. 884; May 31, 1962, Pub. L. 87-461, 76 Stat. 85.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 171 (Mar. 3, 1911, ch. 231, § 91, 36 Stat. 1117; Dec. 22, 1911, ch. 8, 37 Stat. 51).

Provisions for furnishing rooms and accommodations at Chillicothe were omitted as obsolete upon advice of Director of the Administrative Office of the United States Courts that Federal accommodations are now available in such place.

"Rolla" was omitted as a place for holding court in the Eastern Division of the Eastern District, and the provision for furnishing quarters there without cost to the United States was also omitted on advice from the clerk of court that no term of court has been held there since 1920. All cases arising in Phelps county in which Rolla is situated are heard at St. Louis.

Provisions relating to the maintenance of offices by the clerks and marshals or their deputies were omitted as covered by sections 452, 541, 542, and 751 of this title.

Changes in arrangement and phraseology were made.

#### AMENDMENTS

1962—Subsec. (b). Pub. L. 87-461 transferred the counties of Caldwell, Grundy, Livingston, Mercer, Putnam, and Sullivan from the Western Division to the Saint Joseph Division, and omitted Chillicothe as a place where the Western Division shall hold court.

### § 106. Montana

Montana, exclusive of Yellowstone National Park, constitutes one judicial district.

Court shall be held at Billings, Butte, Glasgow, Great Falls, Havre, Helena, Kalispell, Lewistown, Livingston, Miles City, and Missoula.

(June 25, 1948, ch. 646, 62 Stat. 884.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 172 (Mar. 3, 1911, ch. 231, § 92, 36 Stat. 1118; July 3, 1926, ch. 748, 44 Stat. 825; July 5, 1937, ch. 430, 50 Stat. 474; Aug. 26, 1937, ch. 819, § 2, 50 Stat. 837; Aug. 7, 1939, ch. 506, 53 Stat. 1236).

All of Yellowstone National Park is included in the judicial district of Wyoming by section 131 of this title. Those parts of the park lying in Montana are accordingly excluded from the judicial district of Montana.

A provision for furnishing rooms and accommodations at Havre was omitted as obsolete on advice of the Director of the Administrative Office of the United States Courts that Federal accommodations are now available there.

A provision for transfer of causes, civil or criminal, from one place of holding court to another was omitted. Such provision, as to civil cases, is covered by section 1404 of this title, and, as to criminal cases, is rendered unnecessary because of inherent power of the court and Rules 18–20 of the Federal Rules of Criminal Procedure, relating to venue.

A provision for the making of any interlocutory order at any place designated for holding court was omitted as unnecessary in view of Federal Rules of Civil Procedure, Rule 77-(b).

The provisions respecting court accommodations at Kalispell, Lewistown, and Livingston were omitted as covered by section 142 of this title.

Changes were made in arrangement and phraseology.

### § 107. Nebraska

Nebraska constitutes one judicial district.

Court shall be held at Lincoln, North Platte, and Omaha.

(June 25, 1948, ch. 646, 62 Stat. 884; Aug. 9, 1955, ch. 627, § 1, 69 Stat. 546.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 173 (Mar. 3, 1911, ch. 231, § 93, 36 Stat. 1118).

Provisions for furnishing rooms and accommodations at the various places for holding court were omitted as obsolete upon advice of Director of the Administrative Office of the United States Courts that Federal accommodations are now available at such places.

A provision relating to the appointment and residence of deputy clerks and the places for keeping offices was omitted as covered by section 751 of this title.

The county of Arthur in the North Platte Division was created since the enactment of the Judicial Code.

Changes in arrangement and phraseology were made.

### Amendments

1955—Act Aug. 9, 1955, eliminated the separate divisions of the district and reduced the number of places of holding terms.

### Effective Date of 1955 Amendment

Section 2 of act Aug. 9, 1955, provided that the amendment of this section by section 1 of act Aug. 9, 1955, should take effect on Sept. 1, 1955.

## § 108. Nevada

Nevada constitutes one judicial district.

Court shall be held at Carson City, Elko, Las Vegas and Reno.

(June 25, 1948, ch. 646, 62 Stat. 885.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 174 (Mar. 3, 1911, ch. 231, § 94, 36 Stat. 1118; June 24, 1930, ch. 595, 46 Stat. 806; Nov. 15, 1945, ch. 482, 59 Stat. 582).

Changes in arrangement and phraseology were made.

## § 109. New Hampshire

New Hampshire constitutes one judicial district.

Court shall be held at Concord and Littleton.

(June 25, 1948, ch. 646, 62 Stat. 885.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 175 (Mar. 3, 1911, ch. 231, § 95, 36 Stat. 1119; Aug. 23, 1912, ch. 344, 37 Stat. 357; Feb. 20, 1926, ch. 23, 44 Stat. 8).

Changes in arrangement and phraseology were made.

## § 110. New Jersey

New Jersey constitutes one judicial district.

Court shall be held at Camden, Newark and Trenton.

(June 25, 1948, ch. 646, 62 Stat. 885.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 176 (Mar. 3, 1911, ch. 231, § 96, 36 Stat. 1119; Aug. 9, 1912, ch. 277, 37 Stat. 265; Feb. 14, 1913, ch. 53, 37 Stat. 674; May 17, 1926, ch. 311, 44 Stat. 561).

Provisions relating to maintenance of offices by the clerk and marshal were omitted as covered by sections 452, 541, 542, and 751 of this title.

Changes in arrangement and phraseology were made.

## § 111. New Mexico

New Mexico constitutes one judicial district.

Court shall be held at Albuquerque, Las Cruces, Las Vegas, Roswell, Santa Fe, and Silver City.

(June 25, 1948, ch. 646, 62 Stat. 885.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 177 (June 20, 1910, ch. 310, § 13, 36 Stat. 565; Mar. 4, 1921, ch. 149, 41 Stat. 1361; June 7, 1924, ch. 332, 43 Stat. 642).

The reference to Raton as a place of holding court was omitted on advice of the clerk that court is no longer held there.

Provisions for furnishing rooms and accommodations at Las Vegas were omitted as obsolete upon advice of Director of the Administrative Office of the United States Courts that Federal accommodations are now available.

Provision for adjournment or continuance in case of insufficient business by orders made anywhere in the district was omitted as covered by section 138 of this title.

Provisions for transfer of causes, civil or criminal, from one place of holding court to another were omitted. Such provisions, as to civil cases, are covered by section 1404 of this title, and, as to criminal cases, are rendered unnecessary because of inherent power of the court, and Rules 18-20 of the Federal Rules of Criminal Procedure, relating to venue.

Provisions for appointment of deputy clerks and deputy marshals and maintenance of offices at various cities were omitted as covered by sections 541, 542, and 751 of this title.

The provision respecting court accommodations at Silver City was omitted as covered by section 142 of this title.

Changes in arrangement and phraseology were made.

## § 112. New York

New York is divided into four judicial districts to be known as the Northern, Southern, Eastern, and Western Districts of New York.

### *Northern District*

(a) The Northern District comprises the counties of Albany, Broome, Cayuga, Chenango, Clinton, Cortland, Delaware, Essex, Franklin, Fulton, Hamilton, Herkimer, Jefferson, Lewis, Madison, Montgomery, Oneida, Onondaga, Oswego, Otsego, Rensselaer, Saint Lawrence, Saratoga, Schenectady, Schoharie, Tioga, Tompkins, Warren, and Washington.

Court for the Northern District shall be held at Albany, Auburn, Binghamton, Malone, Syracuse, and Utica.

### *Southern District*

(b) The Southern District comprises the counties of Bronx, Columbia, Dutchess, Greene, New York, Orange, Putnam, Rockland, Sullivan, Ulster, and Westchester and concurrently with the Eastern District, the waters within the Eastern District.

Court for the Southern District shall be held at New York.

### *Eastern District*

(c) The Eastern District comprises the counties of Kings, Nassau, Queens, Richmond, and Suffolk and concurrently with the Southern District, the waters within the counties of Bronx and New York.

Court for the Eastern District shall be held at Brooklyn, Mineola, and Westbury.

### *Western District*

(d) The Western District comprises the counties of Allegany, Cattaraugus, Chautauqua, Chemung, Erie, Genesee, Livingston, Monroe, Niagara, Ontario, Orleans, Schuyler, Seneca, Steuben, Wayne, Wyoming, and Yates.

Court for the Western District shall be held at Buffalo, Canandaigua, Elmira, Jamestown, and Rochester.

(June 25, 1948, ch. 646, 62 Stat. 885; Dec. 18, 1967, Pub. L. 90-217, 81 Stat. 662; Dec. 14, 1970, Pub. L. 91-546, § 1, 84 Stat. 1412.)

### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§ 178 and 178a (Mar. 3, 1911, ch. 231, § 97, 36 Stat. 1119; Jan. 21, 1920, ch. 50, 41 Stat. 394; July 1, 1922, ch. 260, 42 Stat. 812; Aug. 12, 1937, ch. 591, 50 Stat. 623).

A reference in section 178 of title 28, U.S.C., 1940 ed., to Franklin County in the list of Counties in the Northern District, in which one term might be held annually, in the discretion of the judge, was omitted as superseded by the provisions of said section 178a of title 28, requiring an annual term to be held at Malone, which is in Franklin County.

References to seizures made, matters done and processes or orders issued respecting waters within the concurrent jurisdiction of the southern and eastern districts, were omitted as unnecessary and covered by the revised language.

Provision for 20 days' notice of the special term authorized in the discretion of the court in the counties of Clinton, Jefferson, Onondaga, Oswego, Rensselaer, St. Lawrence, Saratoga, and Schenectady was omitted as unnecessary, in view of section 141 of this title providing for such notice as the district judge orders.

The special provision permitting any district judge in New York to act as judge in any other district in that State upon request of the resident district judge was omitted, thus making applicable the uniform procedure for designation and assignment of district judges throughout the United States, provided by section 292 of this title.

Words "with the waters thereof" after the list of counties in each district were omitted as unnecessary and inconsistent with other sections of this chapter.

The provisions with reference to the return of process in admiralty cases, the designation of judges and their powers, and the holding of sessions for the hearing of motions and for proceedings in bankruptcy and admiralty, were omitted as unnecessary and more properly the subject of rule of court.

The provisions of sections 178 and 178a of title 28, U.S.C., 1940 ed., respecting court accommodations at Malone and in the counties of Schenectady, Rensselaer, Saratoga, Onondaga, St. Lawrence, Clinton, Jefferson, Oswego, and Franklin, were omitted as covered by section 142 of this title.

The county of Bronx, in the southern district, was formed out of a part of New York County in 1912.

Lockport was omitted as a place of holding court in the Western District. Court has not been held there for 32 years.

Changes were made in arrangement and phraseology.

### AMENDMENTS

1970—Subsec. (c). Pub. L. 91-546 added Westbury to the list of enumerated places for holding court in the Eastern District.

1967—Subsec. (c). Pub. L. 90-217 added Mineola to the list of enumerated places for holding court in the Eastern District.

## § 113. North Carolina

North Carolina is divided into three judicial districts to be known as the Eastern, Middle, and Western Districts of North Carolina.

### *Eastern District*

(a) The Eastern District comprises the counties of Beaufort, Bertie, Bladen, Brunswick, Camden, Carteret, Chowan, Columbus, Craven, Cumberland, Currituck, Dare, Duplin, Edgecombe, Franklin, Gates, Granville, Greene, Halifax, Harnett, Hertford, Hyde, Johnston, Jones, Lenoir, Martin, Nash, New Hanover, Northampton, Onslow, Pamlico, Pasquotank, Pender, Perquimans, Pitt, Robeson, Sampson, Tyrrell, Vance, Wake, Warren, Washington, Wayne, and Wilson.

Court for the Eastern District shall be held at Clinton, Elizabeth City, Fayetteville, New Bern, Raleigh, Washington, Wilmington, and Wilson.

### *Middle District*

(b) The Middle District comprises the counties of Alamance, Alleghany, Ashe, Cabarrus, Caswell, Chatham, Davidson, Davie, Durham, Forsythe, Guilford, Hoke, Lee, Montgomery, Moore, Orange, Person, Randolph, Richmond, Rockingham, Rowan, Scotland, Stanly, Stokes, Surry, Watauga, Wilkes, and Yadkin.

Court for the Middle District shall be held at Durham, Greensboro, Rockingham, Salisbury, Wilkesboro, and Winston-Salem.

### *Western District*

(c) The Western District comprises the counties of Alexander, Anson, Avery, Buncombe, Burke, Caldwell, Catawba, Cherokee, Clay, Cleveland, Gaston, Graham, Haywood, Henderson, Iredell, Jackson, Lincoln, McDowell, Macon, Madison, Mecklenburg, Mitchell, Polk, Rutherford, Swain, Transylvania, Union, and Yancey.

Court for the Western District shall be held at Asheville, Bryson City, Charlotte, Shelby, and Statesville.

(June 25, 1948, ch. 646, 62 Stat. 886; Nov. 2, 1965, Pub. L. 89-319, 79 Stat. 1186.)

### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 179 (Mar. 3, 1911, ch. 231, § 98, 36 Stat. 1120; Oct. 7, 1914, ch. 318, 38 Stat. 728; Mar. 17, 1920, ch. 101, § 1, 41 Stat. 531; June 7, 1924, ch. 359, § 1, 43 Stat. 661; Dec. 24, 1924, ch. 18, 43 Stat. 721; June 12, 1926, ch. 566, 44 Stat. 734; June 22, 1926, ch. 645, 44 Stat. 758; June 22, 1926, ch. 646, 44 Stat. 758; Mar. 2, 1927, ch. 276, 44 Stat. 1339; Apr. 25, 1928, ch. 432, 45 Stat. 457; May 10, 1928, ch. 516, 45 Stat. 495; Feb. 20, 1933, ch. 107, 47 Stat. 859; Feb. 28, 1933, ch. 133, 47 Stat. 1350; June 28, 1935, ch. 330, §§ 1, 2, 49 Stat. 429; June 24, 1936, ch. 744, 49 Stat. 1898; June 24, 1936, ch. 759, 49 Stat. 1910; Aug. 17, 1937, ch. 688, 50 Stat. 671).

References to civil and criminal terms at Raleigh were omitted as more properly the subject of rule of court.

The following language at the end of section 179 of title 28, U.S.C., 1940 ed., was omitted: "There shall be a judge appointed for the said middle district in the manner now provided by law who shall receive the salary provided by law for the judges of the eastern and western districts, and a district attorney, marshal, clerk, and other officers in the manner and at the salary now provided by law. All causes in the said middle district in equity, bankruptcy, or admiralty, in which orders and decrees have already been made and which are now in process of trial, shall continue and remain subject to the jurisdiction of the judge of that district by whom the same shall have been made and before whom the same shall have been partially tried and determined."

The first sentence is superfluous in view of other sections of this title governing the appointment and compensation of the judges, clerks and marshals of the district courts and of district attorneys. The last sentence is obsolete, having been enacted in 1927, and being limited to cases affected by the creation of the middle district.

Provisions for maintenance of offices by the clerks at certain cities were omitted. (See Reviser's Note under sections 452 and 751 of this title.)

Provisions for furnishing rooms and accommodations at Durham, Rockingham, and Winston-Salem were omitted as obsolete upon advice of the Director of the Administrative Office of the United States Courts that Federal accommodations are now available in such places.

The provisions respecting court accommodations at Bryson City and Shelby were omitted as covered by section 142 of this title.

Changes in arrangement and phraseology were made.

###### AMENDMENTS

1965—Pub. L. 89-319 added "Clinton" to the list of places where court for the Eastern District shall be held.

### § 114. North Dakota

North Dakota constitutes one judicial district comprising four divisions.

(1) The Southwestern Division comprises the counties of Adams, Billings, Bowman, Burleigh, Dunn, Emmons, Golden Valley, Grant, Hettinger, Kidder, Logan, McIntosh, McLean, Mercer, Morton, Oliver, Sioux, Slope, and Stark.

Court for the Southwestern Division shall be held at Bismarck.

(2) The Southeastern Division comprises the counties of Barnes, Cass, Dickey, Eddy, Foster, Griggs, La Moure, Ransom, Richland, Sargent, Sheridan, Steele, Stutsman, and Wells.

Court for the Southeastern Division shall be held at Fargo.

(3) The Northeastern Division comprises the counties of Benson, Bottineau, Cavalier, Grand Forks, McHenry, Nelson, Pembina, Pierce, Ramsey, Rolette, Towner, Traill, and Walsh.

Court for the Northeastern Division shall be held at Grand Forks.

(4) The Northwestern Division comprises the counties of Burke, Divide, McKenzie, Mountrail, Renville, Ward, and Williams.

Court for the Northwestern Division shall be held at Minot.

(June 25, 1948, ch. 646, 62 Stat. 886.)

###### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 180 (Mar. 3, 1911, ch. 231, § 99, 36 Stat. 1121; Feb. 5, 1912, ch. 28, 37 Stat. 60; July 17, 1916, ch. 248, 39 Stat. 386; Apr. 10, 1926, ch. 112, 44 Stat. 237; June 3, 1930, ch. 394, 46 Stat. 495; June 29, 1932, ch. 305, 47 Stat. 341; June 19, 1934, ch. 664, 48 Stat. 1120; Dec. 16, 1944, ch. 604, 58 Stat. 814).

A provision relating to maintenance of offices by the clerk was omitted as covered by section 751 of this title.

The provision that Indian reservations shall constitute parts of the divisions within which they are situated was omitted as surplusage. Similar provisions, relating to reservations in South Dakota and Washington, respectively, appeared in sections 187 and 193 of said title 28, on which sections 122 and 128 of this title are based. They were omitted for the same reason. Such provisions did not appear in sections respecting other States containing Indian reservations.

Jamestown and Devils Lake were omitted as places of holding court. The Director of the Administrative Office of the United States Courts, the district judge, and the senior circuit judge advise that court has not been held in these places for many years.

Changes in arrangement and phraseology were made.

### § 115. Ohio

Ohio is divided into two judicial districts to be known as the Northern and Southern Districts of Ohio.

*Northern District*

(a) The Northern District comprises two divisions.

(1) The Eastern Division comprises the counties of Ashland, Ashtabula, Carroll, Columbiana, Crawford, Cuyahoga, Geauga, Holmes, Lake, Lorain, Mahoning, Medina, Portage, Richland, Stark, Summit, Trumbull, Tuscarawas, and Wayne.

Court for the Eastern Division shall be held at Cleveland, Youngstown, and Akron.

(2) The Western Division comprises the counties of Allen, Auglaize, Defiance, Erie, Fulton, Hancock, Hardin, Henry, Huron, Lucas, Marion, Mercer, Ottawa, Paulding, Putnam, Sandusky, Seneca, Van Wert, Williams, Woods, and Wyandot.

Court for the Western Division shall be held at Lima and Toledo.

*Southern District*

(b) The Southern District comprises two divisions.

(1) The Western Division comprises the counties of Adams, Brown, Butler, Champaign, Clark, Clermont, Clinton, Darke, Greene, Hamilton, Highland, Lawrence, Miami, Montgomery, Preble, Scioto, Shelby, and Warren.

Court for the Western Division shall be held at Cincinnati and Dayton.

(2) The Eastern Division comprises the counties of Athens, Belmont, Coshocton, Delaware, Fairfield, Fayette, Franklin, Gallia, Guernsey, Harrison, Hocking, Jackson, Jefferson, Knox, Licking, Logan, Madison, Meigs, Monroe, Morgan, Morrow, Muskingum, Noble, Perry, Pickaway, Pike, Ross, Union, Vinton, and Washingston.

Court for the Eastern Division shall be held at Columbus and Steubenville.

(June 25, 1948, ch. 646, 62 Stat. 887; Feb. 10, 1954, ch. 6, § 2(b)(9), 68 Stat. 11.)

###### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 181 (Mar. 3, 1911, ch. 231, § 100, 36 Stat. 1121; Mar. 4, 1915, ch. 159, 38 Stat. 1187; Feb. 14, 1923, ch. 78, 42 Stat. 1246).

Other provisions of said section 181 of title 28, U.S.C., 1940 ed., are incorporated in section 1865 of this title.

Provisions relating to the place of institution or trial of prosecutions and civil actions and transfer thereof were omitted. Such provisions, as to civil cases, are covered by section 1391 et seq. of this title, and as to criminal cases, are rendered unnecessary because of inherent power of the court and Rules 18-20 of the Federal Rules of Criminal Procedure relating to venue.

The provision respecting court accommodations at Lima was omitted as covered by section 142 of this title.

Changes were made in arrangement and phraseology.

#### AMENDMENTS

1954—Subsec. (a)(1). Act Feb. 10, 1954, added a reference to Akron as an additional place for holding court in the Eastern Division of the Northern District.

### § 116. Oklahoma

Oklahoma is divided into three judicial districts to be known as the Northern, Eastern, and Western Districts of Oklahoma.

*Northern District*

(a) The Northern District comprises the counties of Craig, Creek, Delaware, Mayes, Nowata, Osage, Ottawa, Pawnee, Rogers, Tulsa, and Washington.

Court for the Northern District shall be held at Bartlesville, Miami, Pawhuska, Tulsa, and Vinita.

*Eastern District*

(b) The Eastern District comprises the counties of Adair, Atoka, Bryan, Carter, Cherokee, Choctaw, Coal, Haskell, Hughes, Johnston, Latimer Le Flore Love, McCurtain, McIntosh, Marshall, Murray, Muskogee, Okfuskee, Okmulgee, Pittsburg, Pontotoc, Pushmataha, Seminole, Sequoyah, and Wagoner.

Court for the Eastern District shall be held at Ada, Ardmore, Durant, Hugo, Muskogee, Okmulgee, Poteau, and S. McAlester.

*Western District*

(c) The Western District comprises the counties of Alfalfa, Beaver, Beckham, Blaine, Caddo, Canadian, Cimarron, Cleveland, Comanche, Cotton, Custer, Dewey, Ellis, Garfield, Garvin, Grady, Grant, Greer, Harmon, Harper, Jackson, Jefferson, Kay, Kingfisher, Kiowa, Lincoln, Logan, McClain, Major, Noble, Oklahoma, Payne, Pottawatomie, Roger Mills, Stephens, Texas, Tillman, Washita, Woods, and Woodward.

Court for the Western District shall be held at Chickasha, Enid, Guthrie, Lawton, Mangum, Oklahoma City, Pauls Valley, Ponca City, Shawnee, and Woodward.

(June 25, 1948, ch. 646, 62 Stat. 887; Aug. 4, 1966, Pub. L. 89-526, § 1, 80 Stat. 335.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§ 182, 182a (Mar. 3, 1911, ch. 231, § 101, 36 Stat. 1122; Feb. 20, 1917, ch. 102, 39 Stat. 927; June 13, 1918, ch. 98, 40 Stat. 604; Feb. 26, 1919, ch. 54, 40 Stat. 1184; June 5, 1924, ch. 259, 43 Stat. 387; Jan. 10, 1925, chs. 68, 69, 43 Stat. 730, 731; Feb. 16, 1925, ch. 233, § 1, 43 Stat. 945; May 7, 1926, ch. 255, 44 Stat. 408; Apr. 21, 1928, ch. 395, 45 Stat. 440; Mar. 2, 1929, ch. 539, 45 Stat. 1518; June 28, 1930, ch. 714, 46 Stat. 829; May 13, 1936, ch. 386, 49 Stat. 1271; Aug. 12, 1937, ch. 595, 50 Stat. 625).

Provisions for furnishing rooms and accommodations at Ada, Bartlesville, Mangum, Miami, Okmulgee, and Ponca City were omitted as obsolete, on advice of the Director of the Administrative Office of the United States Courts that Federal accommodations are now available at such places.

A provision making inoperative the requirement for furnishing court accommodations without cost to the United States whenever the same shall be provided in federal buildings at Shawnee, was omitted as unnecessary. When such buildings become available the Director will, under section 604 of this title, provide court accommodations therein.

A provision for adjournment of any term by an order made in chambers, is incorporated in section 140 of this title.

Provisions relating to maintenance of offices by the clerks were omitted as covered by section 751 of this title.

The provisions respecting court accommodations at Durant, Hugo, Poteau, Pauls Valley, Pawhuska, and Shawnee were omitted as covered by section 142 of this title.

Changes in arrangement and phraseology were made.

#### AMENDMENTS

1966—Pub. L. 89-526 transferred from the Eastern District in subsec. (b) to the Western District in subsec. (c) the counties of Garvin, Grady, Jefferson, McClain, and Stephens and the places for holding court at Chickasha and Pauls Valley.

#### EFFECTIVE DATE OF 1966 AMENDMENT

Section 2 of Pub. L. 89-526 provided that: "The amendments made by this Act [to subsecs. (b) and (c) of this section] shall take effect on the sixtieth day after the date of enactment of this Act [Aug. 4, 1966]."

### § 117. Oregon

Oregon constitutes one judicial district.

Court shall be held at Coquille, Eugene, Klamath Falls, Medford, Pendleton, and Portland.

(June 25, 1948, ch. 646, 62 Stat. 888; Aug. 3, 1950, ch. 514, 64 Stat. 393; June 2, 1970, Pub. L. 91-272, § 7, 84 Stat. 297.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 183 (Mar. 3, 1911, ch. 231, § 102, 36 Stat. 1122; Nov. 6, 1945, ch. 447, 59 Stat. 555).

Provisions relating to appointment and residence of deputies by the clerk and marshal, and maintenance of offices by said officers, were omitted as covered by sections 541, 542, and 751 of this title.

Changes in arrangement and phraseology were made.

#### AMENDMENTS

1970—Pub. L. 91-272 added Coquille to the enumeration of cities in which court may be held.

1950—Act Aug. 3, 1950, provided for holding term of court at Eugene.

### § 118. Pennsylvania

Pennsylvania is divided into three judicial districts to be known as the Eastern, Middle, and Western Districts of Pennsylvania.

*Eastern District*

(a) The Eastern District comprises the counties of Berks, Bucks, Chester, Delaware, Lancaster, Lehigh, Montgomery, Northampton, Philadelphia, and Schuylkill.

Court for the Eastern District shall be held at Allentown, Easton, Reading, and Philadelphia.

### *Middle District*

(b) The Middle District comprises the counties of Adams, Bradford, Cameron, Carbon, Centre, Clinton, Columbia, Cumberland, Dauphin, Franklin, Fulton, Huntingdon, Juniata, Lackawanna, Lebanon, Luzerne, Lycoming, Mifflin, Monroe, Montour, Northumberland, Perry, Pike, Potter, Snyder, Sullivan, Susquehanna, Tioga, Union, Wayne, Wyoming, and York.

Court for the Middle District shall be held at Harrisburg, Lewisburg, Scranton, Wilkes-Barre, and Williamsport.

### *Western District*

(c) The Western District comprises the counties of Allegheny, Armstrong, Beaver, Bedford, Blair, Butler, Cambria, Clarion, Clearfield, Crawford, Elk, Erie, Fayette, Forest, Greene, Indiana, Jefferson, Lawrence, McKean, Mercer, Somerset, Venango, Warren, Washington, and Westmoreland.

Court for the Western District shall be held at Erie and Pittsburgh.

(June 25, 1948, ch. 646, 62 Stat. 888; June 2, 1970, Pub. L. 91-272, § 6, 84 Stat. 297.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 184 (Mar. 3, 1911, ch. 231, § 103, 36 Stat. 1123; Mar. 3, 1913, ch. 113, 37 Stat. 730; June 6, 1914, ch. 104, 38 Stat. 385; Sept. 9, 1914, ch. 296, 38 Stat. 713; Apr. 26, 1926, ch. 185, 44 Stat. 324; June 27, 1930, ch. 634, 46 Stat. 820; Aug. 3, 1935, ch. 433, 49 Stat. 514; May 13, 1936, ch. 385, 49 Stat. 1271; June 13, 1938, ch. 351, 52 Stat. 674; Mar. 5, 1942, ch. 143, 56 Stat. 132).

Provisions relating to maintenance of offices at certain places by the clerks and marshals were omitted as covered by sections 541 and 751 of this title.

Provisions for the continuance of terms were omitted as covered by section 139 of this title.

Provisions with respect to the return of process, and the places of keeping court papers, were omitted as matters for determination by rule of court or for the action of the judicial council in cooperation with the Administrative Office of the United States Courts.

The provisions for trial of cases at Lewisburg and Erie unless counsel consent to trial elsewhere were omitted as inconsistent with the uniform practice provided by this title.

Changes were made in phraseology and arrangement.

#### SENATE REVISION AMENDMENT

By Senate amendment to the bill, Blair County was transferred from the Middle District to the Western District of Pennsylvania. This was in conformity with Act July 11, 1947, ch. 224, 61 Stat. 310, which so amended section 184 of title 28, U.S.C., 1940 ed., the source of this section. See 80th Congress Senate Report No. 1559.

#### AMENDMENTS

1970—Subsec. (a). Pub. L. 91-272 added Allentown and Reading to the enumeration of cities in which court for the Eastern District may be held.

### § 119. Puerto Rico

Puerto Rico constitutes one judicial district.

Court shall be held at Mayaguez, Ponce, and San Juan.

(June 25, 1948, ch. 646, 62 Stat. 889.)

#### HISTORICAL AND REVISION NOTES

Based on sections 863 and 864 of title 48, U.S.C., 1940 ed., Territories and Insular Possessions (Apr. 12, 1900, ch. 191, §§ 34, 35, 31 Stat. 84, 85; Jan. 7, 1913, ch. 6, 37 Stat. 648; Mar. 2, 1917, ch. 145, §§ 41, 42, 39 Stat. 965, 966; Mar. 4, 1921, ch. 161, § 1, 41 Stat. 1412; Feb. 13, 1925, ch. 229, §§ 1, 13, 43 Stat. 936, 942; Dec. 13, 1926, ch. 6, § 1, 44 Stat. 919; Jan. 31, 1928, ch. 14, § 1, 45 Stat. 54; May 17, 1932, ch. 190, 47 Stat. 158; Mar. 26, 1938, ch. 51, § 2, 52 Stat. 118).

Section consolidates parts of sections 863 and 864 of title 48, U.S.C., 1940 ed., with changes in phraseology necessary to effect consolidation.

The provision of sections 863 of title 48, U.S.C., 1940 ed., for appointment of a district judge is incorporated in section 133 of this title; for tenure, in section 134 of this title, and for salary was omitted as covered by section 135 of this title.

The provisions of section 863 of title 48, U.S.C., 1940 ed., for appointment and tenure of United States attorneys and marshals are incorporated in sections 501, 504, and 541 of this title.

The provisions of section 863 of title 48, U.S.C., 1940 ed., for appointment of United States Commissioners and other court officers are incorporated in sections 631 and 751 of this title.

The provision of section 864 of title 48, U.S.C., 1940 ed., as to the holding of regular and special terms of court was omitted as covered by sections 138 and 141 of this title.

The provision of section 864 of title 48, U.S.C., 1940 ed., that the district court shall be attached to the first circuit is incorporated in section 41 of this title.

The provision of section 864 of title 48, U.S.C., 1940 ed., for appeals to the circuit court of appeals is incorporated in section 1295 of this title.

Other provisions of sections 863 and 864 of title 48, U.S.C., 1940 ed., are retained in title 48.

### § 120. Rhode Island

Rhode Island constitutes one judicial district.

Court shall be held at Providence.

(June 25, 1948, ch. 646, 62 Stat. 889.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 185 (Mar. 3, 1911, ch. 231, § 104, 36 Stat. 1123; Feb. 1, 1912, ch. 27, 37 Stat. 59).

Changes in phraseology were made.

### § 121. South Carolina

South Carolina constitutes one judicial district comprising ten divisions.

(1) The Charleston Division comprises the counties of Beaufort, Berkeley, Charleston, Clarendon, Colleton, Dorchester, Georgetown, and Jasper.

Court for the Charleston Division shall be held at Charleston.

(2) The Columbia Division comprises the counties of Kershaw, Lee, Lexington, Richland, and Sumter.

Court for the Columbia Division shall be held at Columbia.

(3) The Florence Division comprises the counties of Chesterfield, Darlington, Dillon, Florence, Horry, Marion, Marlboro, and Williamsburg.

Court for the Florence Division shall be held at Florence.

(4) The Aiken Division comprises the counties of Aiken, Allendale, Barnwell, and Hampton.

Court for the Aiken Division shall be held at Aiken.

(5) The Orangeburg Division comprises the counties of Bamberg, Calhoun, and Orangeburg.

Court for the Orangeburg Division shall be held at Orangeburg.

(6) The Greenville Division comprises the counties of Greenville and Laurens.

Court for the Greenville Division shall be held at Greenville.

(7) The Rock Hill Division comprises the counties of Chester, Fairfield, Lancaster, and York.

Court for the Rock Hill Division shall be held at Rock Hill.

(8) The Greenwood Division comprises the counties of Abbeville, Edgefield, Greenwood, McCormick, Newberry, and Saluda.

Court for the Greenwood Division shall be held at Greenwood.

(9) The Anderson Division comprises the counties of Anderson, Oconee, and Pickens.

Court for the Anderson Division shall be held at Anderson.

(10) The Spartanburg Division comprises the counties of Cherokee, Spartanburg, and Union.

Court for the Spartanburg Division shall be held at Spartanburg.

(June 25, 1948, ch. 646, 62 Stat. 889; Oct. 7, 1965, Pub. L. 89-242, § 1(a), 79 Stat. 951.)

### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 186 (Mar. 3, 1911, ch. 231, § 105, 36 Stat. 1123; Feb. 5, 1912, ch. 28, 37 Stat. 60; Mar. 3, 1915, ch. 100, § 5, 38 Stat. 961; Sept. 1, 1916, ch. 434, 39 Stat. 721; Mar. 4, 1923, ch. 261, 42 Stat. 1486; Jan. 30, 1925, ch. 118, 43 Stat. 800; June 26, 1926, ch. 696, §§ 1-3, 44 Stat. 773; June 20, 1936, ch. 637, §§ 1-3, 49 Stat. 1558, 1559; June 12, 1940, ch. 335, 54 Stat. 344; June 28, 1943, ch. 173, title II, § 204, 57 Stat. 244; Dec. 13, 1944, ch. 556, 58 Stat. 801).

The last sentence of section 186 of title 28, U.S.C., 1940 ed., relating to trial of criminal cases in the division in which the offense was committed, was omitted as fully covered by Rules 18-22 of the Federal Rules of Criminal Procedure.

A provision relating to the places of the clerks' offices was omitted as covered by section 751 of this title.

The provision respecting court accommodations at Orangeburg was omitted as covered by section 142 of this title.

Changes in arrangement and phraseology were made.

### AMENDMENTS

1965—Pub. L. 89-242 consolidated into a single district the 10 divisions of the state which had formerly been divided into an Eastern and a Western District.

### EFFECTIVE DATE OF 1965 AMENDMENT

Section 6 of Pub. L. 89-242 provided that: "The provisions of this Act [amending this section and section 133 of this title and enacting provisions set out as notes under this section] shall become effective on the first day of the month following the date of enactment of this Act [Oct. 7, 1965]."

### CONSOLIDATION OF SOUTH CAROLINA INTO A SINGLE JUDICIAL DISTRICT

Sections 2 to 5 of Pub. L. 89-242 provided for the consolidation, in compliance with section 132 of this title, of the Eastern and Western Districts of South Carolina into a single district with continuing jurisdiction over civil cases and criminal acts pending or committed prior to Nov. 1, 1965, and appropriate provisions for the appointment or transfer of United States attorneys, marshalls, and other court personnel, then serving, from the two districts to the consolidated district.

## § 122. South Dakota

South Dakota constitutes one judicial district comprising four divisions.

(1) The Northern Division comprises the counties of Brown, Campbell, Clark, Codington, Corson, Day, Deuel, Edmonds, Grant, Hamlin, McPherson, Marshall, Roberts, Spink, and Walworth.

Court for the Northern Division shall be held at Aberdeen.

(2) The Southern Division comprises the counties of Aurora, Beadle, Bon Homme, Brookings, Brule, Charles Mix, Clay, Davison, Douglas, Hanson, Hutchinson, Kingsbury, Lake, Lincoln, McCook, Miner, Minnehaha, Moody, Sanborn, Turner, Union, and Yankton.

Court for the Southern Division shall be held at Sioux Falls.

(3) The central division comprises the counties of Buffalo, Dewey, Faulk, Gregory, Haakon, Hand, Hughes, Hyde, Jackson, Jerauld, Jones, Lyman, Mellette, Potter, Stanley, Sully, Todd, Tripp, and Ziebach.

Court for the Central Division shall be held at Pierre.

(4) The Western Division comprises the counties of Bennett, Butte, Custer, Fall River, Harding, Lawrence, Meade, Pennington, Perkins, Shannon, Washabaugh, and Washington.

Court for the Western Division shall be held at Deadwood and Rapid City.

(June 25, 1948, ch. 646, 62 Stat. 889; Oct. 10, 1966, Pub. L. 89-638, 80 Stat. 883; Aug. 10, 1972, Pub. L. 92-376, 86 Stat. 529.)

### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 187 (Mar. 3, 1911, ch. 231, § 106, 36 Stat. 1123; June 11, 1932, ch. 242, 47 Stat. 300).

A provision relating to maintenance of offices by the clerk was omitted as covered by sections 452 and 751 of this title.

Provisions that the Northern Division included Lake Traverse Indian Reservation and that part of Standing Rock Indian Reservation lying in South Dakota; that the Southern Division included the Yorkton Indian Reservation; that the Central Division included the Cheyenne River, Lower Brule, and Crow Creek Indian Reservations; and that the Western Division included Rosebud and Pine Ridge Indian Reservations, were all omitted as surplusage. (See Reviser's Note under section 114 of this title.)

Changes in arrangement and phraseology were made.

### AMENDMENTS

1972—Par. (2). Pub. L. 92-376, § 1(a) removed Gregory County from the Southern Division.

Par. (3). Pub. L. 92-376, § 1(b), added Gregory, Mellette, Todd and Tripp counties to the Central Division and removed Armstrong county from the Central Division.

Par. (4). Pub. L. 92-376, § 1(c) removed Mellette, Todd and Tripp counties from the Western Division.

1966—Pub. L. 89-638 authorized the Court for the Western Division to sit at Rapid City.

### § 123. Tennessee

Tennessee is divided into three judicial districts to be known as the Eastern, Middle, and Western Districts of Tennessee.

#### *Eastern District*

(a) The Eastern District comprises four divisions.

(1) The Northern Division comprises the counties of Anderson, Blount, Campbell, Claiborne, Grainger, Jefferson, Knox, Loudon, Monroe, Morgan, Roane, Scott, Sevier, and Union.

Court for the Northern Division shall be held at Knoxville.

(2) The Northeastern Division comprises the counties of Carter, Cocke, Greene, Hamblen, Hancock, Hawkins, Johnson, Sullivan, Unicoi, and Washington.

Court for the Northeastern Division shall be held at Greenville.

(3) The Southern Division comprises the counties of Bledsoe, Bradley, Hamilton, McMinn, Marion, Meigs, Polk, Rhea, and Sequatchie.

Court for the Southern Division shall be held at Chattanooga.

(4) The Winchester Division comprises the counties of Bedford, Coffee, Franklin, Grundy, Lincoln, Moore, Van Buren, and Warren.

Court for the Winchester Division shall be held at Winchester.

#### *Middle District*

(b) The Middle District comprises three divisions.

(1) The Nashville Division comprises the counties of Cannon, Cheatham, Davidson, Dickson, Houston, Humphreys, Montgomery, Robertson, Rutherford, Stewart, Sumner, Trousdale, Williamson, and Wilson.

Court for the Nashville Division shall be held at Nashville.

(2) The Northeastern Division comprises the counties of Clay, Cumberland, De Kalb, Fentress, Jackson, Macon, Overton, Pickett, Putnam, Smith, and White.

Court for the Northeastern Division shall be held at Cookeville.

(3) The Columbia Division comprises the counties of Giles, Hickman, Lawrence, Lewis, Marshall, Maury, and Wayne.

Court for the Columbia Division shall be held at Columbia.

#### *Western District*

(c) The Western District comprises two divisions.

(1) The Eastern Division comprises the counties of Benton, Carroll, Chester, Crockett, Decatur, Gibson, Hardeman, Hardin, Haywood, Henderson, Henry, Lake, McNairy, Madison, Obion, Perry, and Weakley.

The Eastern Division also includes the waters of Tennessee River to low-water mark on the eastern shore wherever such river forms the boundary between the western and middle districts from the north line of Alabama north to the point in Henry County, Tennessee, where the south boundary of Kentucky strikes the east bank of the river.

Court for the Eastern Division shall be held at Jackson.

(2) The Western Division comprises the counties of Dyer, Fayette, Lauderdale, Shelby, and Tipton.

Court for the Western Division shall be held at Memphis and Dyersburg.

The district judge for the Eastern District in office on November 27, 1940, shall hold court in the Northern and Northeastern Divisions. The other judge of that district shall hold the terms of court in the Southern and Winchester Divisions. Each may appoint and remove all officers and employees of the court whose official headquarters are located in the divisions within which he holds court and whose appointments are vested by law in a district judge or chief judge of a district.

(June 25, 1948, ch. 646, 62 Stat. 890; May 19, 1961, Pub. L. 87-36, § 3(e), 75 Stat. 83; July 11, 1961, Pub. L. 87-86, 75 Stat. 203; June 2, 1970, Pub. L. 91-272, § 12, 84 Stat. 298.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 188 (Mar. 3, 1911, ch. 231, § 107, 36 Stat. 1124; Aug. 20, 1912, ch. 306, 37 Stat. 314; June 22, 1916, ch. 161, 39 Stat. 232; Mar. 4, 1923, ch. 289, 42 Stat. 1520; May 17, 1926, ch. 310, 44 Stat. 561; Mar. 1, 1927, ch. 244, 44 Stat. 1262; May 13, 1932, ch. 179, 47 Stat. 153; June 16, 1933, ch. 94, 48 Stat. 253; July 30, 1937, ch. 539, 50 Stat. 546; June 12, 1940, ch. 341, 54 Stat. 348; Nov. 27, 1940, ch. 920, § 1, 54 Stat. 1216; Dec. 3, 1943, ch. 332, 57 Stat. 595).

Words "The said judge shall possess the same powers, perform the same duties, and receive the same compensation as other district judges," and words, "The President is authorized to appoint, by and with the consent of the Senate, a successor or successors to said judge as vacancies may occur. Nothing herein contained shall be construed to prevent said judge or his successors from becoming the senior district judge by succession, or from exercising the powers and rights of senior district judge of said district. The judge designated herein to hold regular and special terms of court at Winchester and Chattanooga shall make all necessary orders for the disposition of business and assignment of cases for trial in said divisions," were deleted as superfluous, in view of sections 132 and 141 of this title.

Words "The district attorneys and marshals for the eastern, middle, and western districts of Tennessee in office immediately prior to November 27, 1940, shall be during the remainder of their present terms of office the district attorneys and marshals for such districts as constituted by this section. The district judge for the middle district of Tennessee shall be the district judge for the middle district of Tennessee as constituted by this section and shall hold regular and special terms of court at Nashville, Columbia, and Cookeville. The district judge for the western district of Tennessee shall hold regular and special terms of court at Memphis and Jackson," at the end of the section, were deleted as temporary, and as superfluous, in view of the remainder of the section, prescribing the places for holding terms of court.

A provision for furnishing rooms and accommodations by the local authorities for holding court at Columbia "but only until such time as such accommodations shall be provided upon the recommendation of the Director of the Administrative Office of the United States Courts in a public building or other quarters provided by the Federal Government for such purpose," was omitted on advice of the Director of the Administrative Office of the United States Courts that Federal accommodations are now available.

An identical provision with reference to Winchester is retained in part, but the words quoted above were omitted as unnecessary since, when such buildings become available, the Director will, under section 604 of this title, provide court accommodations therein.

The last paragraph of the revised section consolidates the provisions of paragraphs (e) and (f) of section 188 of title 28, U.S.C., 1940 ed., relating to the terms of court to be held in the two divisions of the eastern district by the two judges, and their respective powers of appointment of court officers and employees.

Provisions relating to appointment and residence of deputy marshals and maintenance of clerk's office, were omitted as covered by sections 542 and 751 of this title.

The clerk of court in a letter dated February 7, 1945, calls attention to a rule of court providing for hearing of all bankruptcy matters arising in Haywood County at Jackson in the eastern division of the western district.

The provision respecting court accommodations at Winchester was omitted as covered by section 142 of this title.

Changes in arrangement and phraseology were made.

#### CODIFICATION

Section 3(e) of Pub. L. 87-36 provided that "The second sentence of section 123(c)(2), title 18, United States Code, is amended to read as follows:". Pub. L. 87-86 corrected such reference to "title 18" to "title 28."

#### AMENDMENTS

1970—Subsec. (c)(1). Pub. L. 91-272, § 12(a), added Haywood County to the enumeration of counties comprising the Eastern Division of the Western District.

Subsec. (c)(2). Pub. L. 91-272, § 12(b), struck out Haywood County from the enumeration of counties comprising the Western Division of the Western District.

1961—Subsec. (c)(2). Pub. L. 87-36, as amended by Pub. L. 87-86, provided for the holding of a term of court at Dyersburg.

### § 124. Texas

Texas is divided into four judicial districts to be known as the Northern, Southern, Eastern, and Western Districts of Texas.

#### *Northern District*

(a) The Northern District comprises seven divisions.

(1) The Dallas Division comprises the counties of Dallas, Ellis, Hunt, Johnson, Kaufman, Navarro, and Rockwall.

Court for the Dallas Division shall be held at Dallas.

(2) The Fort Worth Division comprises the counties of Comanche, Erath, Hood, Jack, Palo Pinto, Parker, Tarrant, and Wise.

Court for the Fort Worth Division shall be held at Fort Worth.

(3) The Abilene Division comprises the counties of Callahan, Eastland, Fisher, Haskell, Howard, Jones, Mitchell, Nolan, Shackleford, Stephens, Stonewall, Taylor, and Throckmorton.

Court for the Abilene Division shall be held at Abilene.

(4) The San Angelo Division comprises the counties of Brown, Coke, Coleman, Concho, Crockett, Glasscock, Irion, Menard, Mills, Reagan, Runnels, Schleicher, Sterling, Sutton, and Tom Green.

Court for the San Angelo Division shall be held at San Angelo.

(5) The Amarillo Division comprises the counties of Armstrong, Brisco, Carson, Castro, Childress, Collingsworth, Dallam, Deaf Smith, Donley, Gray, Hall, Hansford, Hartley, Hemphill, Hutchinson, Lipscomb, Moore, Ochiltree, Oldham, Parmer, Potter, Randall, Roberts, Sherman, Swisher, and Wheeler.

Court for the Amarillo Division shall be held at Amarillo.

(6) The Wichita Falls Division comprises the counties of Archer, Baylor, Clay, Cottle, Foard, Hardeman, King, Knox, Montague, Wichita, Wilbarger, and Young.

Court for the Wichita Falls Division shall be held at Wichita Falls.

(7) The Lubbock Division comprises the counties of Bailey, Borden, Cochran, Crosby, Dawson, Dickens, Floyd, Gaines, Garza, Hale, Hockley, Kent, Lamb, Lubbock, Lynn, Motley, Scurry, Terry, and Yoakum.

Court for the Lubbock Division shall be held at Lubbock.

#### *Southern District*

(b) The Southern District comprises six divisions.

(1) The Galveston Division comprises the counties of Brazoria, Chambers, Galveston, and Matagorda.

Court for the Galveston Division shall be held at Galveston.

(2) The Houston Division comprises the counties of Austin, Brazos, Colorado, Fayette, Fort Bend, Grimes, Harris, Madison, Montgomery, Polk, San Jacinto, Trinity, Walker, Waller, and Wharton.

Court for the Houston Division shall be held at Houston.

(3) The Laredo Division comprises the counties of Jim Hogg, La Salle, McMullen, Webb, and Zapata.

Court for the Laredo Division shall be held at Laredo.

(4) The Brownsville Division comprises the counties of Cameron, Hidalgo, Starr, and Willacy.

Court for the Brownsville Division shall be held at Brownsville.

(5) The Victoria Division comprises the counties of Calhoun, DeWitt, Goliad, Jackson, Lavaca, Refugio, and Victoria.

Court for the Victoria Division shall be held at Victoria.

(6) The Corpus Christi Division comprises the counties of Aransas, Bee, Brooks,

Duval, Jim Wells, Kenedy, Kleberg, Live Oak, Nueces, and San Patricio.

Court for the Corpus Christi Division shall be held at Corpus Christi.

### *Eastern District*

(c) The Eastern District comprises six divisions.

(1) The Tyler Division comprises the counties of Anderson, Angelina, Cherokee, Gregg, Henderson, Houston, Nacogdoches, Panola, Rains, Rusk, Shelby, Smith, Van Zandt, and Wood.

Court for Tyler Division will be held at Tyler.

(2) The Beaumont Division comprises the counties of Hardin, Jasper, Jefferson, Liberty, Newton, Orange, Sabine, San Augustine, and Tyler.

Court for the Beaumont Division is to be held at Beaumont.

(3) The Sherman Division comprises the counties of Collin, Cook, Denton, and Grayson.

Court for the Sherman Division shall be held at Sherman.

(4) The Paris Division comprises the counties of Delta, Fannin, Hopkins, Lamar, and Red River.

Court for the Paris Division shall be held at Paris.

(5) The Marshall Division comprises the counties of Camp, Cass, Harrison, Marion, Morris, and Upshur.

Court for the Marshall Division shall be held at Marshall.

(6) The Texarkana Division comprises the counties of Bowie, Franklin, and Titus.

Court for the Texarkana Division shall be held at Texarkana.

### *Western District*

(d) The Western District comprises seven divisions.

(1) The Austin Division comprises the counties of Bastrop, Blanco, Burleson, Burnet, Caldwell, Gillespie, Hays, Kimble, Lampasas, Lee, Llano, Mason, McCulloch, San Saba, Travis, Washington, and Williamson.

Court for the Austin Division shall be held at Austin.

(2) The Waco Division comprises the counties of Bell, Bosque, Coryell, Falls, Freestone, Hamilton, Hill, Leon, Limestone, McLennan, Milam, Robertson, and Somervell.

Court for the Waco Division shall be held at Waco.

(3) The El Paso Division comprises the county of El Paso.

Court for the El Paso Division shall be held at El Paso.

(4) The San Antonio Division comprises the counties of Atascosa, Bandera, Bexar, Comal, Dimmit, Frio, Gonzales, Guadalupe, Karnes, Kendall, Kerr, Medina, Real, and Wilson.

Court for the San Antonio Division shall be held at San Antonio.

(5) The Del Rio Division comprises the counties of Edwards, Kinney, Maverick, Terrell, Uvalde, Val Verde, and Zavalla.

Court for the Del Rio Division shall be held at Del Rio.

(6) The Pecos Division comprises the counties of Brewster, Culberson, Jeff Davis, Hudspeth, Loving, Pecos, Presidio, Reeves, Ward and Winkler.

Court for the Pecos Division shall be held at Pecos.

(7) The Midland-Odessa, Division comprises the counties of Andrews, Crane, Ector, Martin, Midland, and Upton.

Court for the Midland-Odessa Division shall be held at Midland. Court may be held, in the discretion of the court, in Odessa, when courtroom facilities are made available at no expense to the Government.

(June 25, 1948, ch. 646, 62 Stat. 891; Feb. 10, 1954, ch. 6, § 2(b)(9)(a), (b), 68 Stat. 11; Sept. 4, 1957, Pub. L. 85-298, §§ 1, 2, 71 Stat. 618; Oct. 4, 1961, Pub. L. 87-352, 75 Stat. 772; Mar. 11, 1964, Pub. L. 88-282, 78 Stat. 163; Aug. 30, 1964, Pub. L. 88-512, 78 Stat. 695; Dec. 18, 1967, Pub. L. 90-216, 81 Stat. 661.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 189 (Mar. 3, 1911, ch. 231, § 108, 36 Stat. 1125; May 29, 1912, ch. 144, 37 Stat. 120; Feb. 5, 1913, ch. 28, §§ 1, 2, 37 Stat. 663; Feb. 26, 1917, ch. 122, 39 Stat. 939; Mar. 1, 1919, ch. 87, 40 Stat. 1270; Mar. 2, 1923, ch. 172, §§ 1, 2, 42 Stat. 1373; Apr. 3, 1924, ch. 82, 43 Stat. 64; May 29, 1924, ch. 211, §§ 1, 2, 43 Stat. 244; May 26, 1928, ch. 752, § 1, 45 Stat. 747; June 6, 1930, ch. 408, 46 Stat. 521; June 24, 1930, ch. 596, 46 Stat. 807; Feb. 20, 1932, ch. 51, 47 Stat. 52; July 25, 1939, ch. 356, § 1, 53 Stat. 1082; June 6, 1940, ch. 252, 54 Stat. 241.)

Words "and all prosecutions against persons for offenses committed in the county of Reagan shall be tried in the court at San Angelo: Provided, That no civil or criminal cause begun and pending prior to May 29, 1924, shall be in any way affected," words "and all prosecutions against persons for offenses committed in the county of Pecos shall be tried in the district court at El Paso, or Pecos City: Provided, That no civil or criminal cause begun and pending prior to March 2, 1923, shall be in any way affected," and words "Provided, That no civil or criminal cause commenced prior to June 24, 1930, shall be in any way affected," were all deleted as superseded by Federal Rules of Criminal Procedure, Rules 18-22, and as obsolete, in view of the lapse of time after the dates included in such provisions.

Provisions for furnishing rooms and accommodations at Pecos and Wichita Falls were omitted as obsolete, on advice of the Director of the Administrative Office of the United States Courts that Federal accommodations are now available at such places.

Provisions relating to the maintenance of offices at various cities by the clerks were omitted as covered by sections 452 and 751 of this title.

Provisions that process against residents of Pecos County shall issue from and be returnable to the court at Pecos City and against residents of Reagan County at San Angelo, were omitted since such matter can be regulated more appropriately by court rule or order. (See Rule 4 of Federal Rules of Civil Procedure.)

The provisions requiring notice to be given for time of holding court in Pecos division and at Corpus Christi, were omitted as covered by section 141 of this title.

Five counties included in this section were created since the enactment of section 189 of title 28. These were Kleberg County and Kenedy County of the Corpus Christi division of the southern district, Culberson County and Hudspeth County of the El Paso division of the western district, and Real County of the San Antonio division of the western district. Pecos County is included in the Pecos division and omitted from the El Paso division of the western district to conform to the practice of the court.

Changes in arrangement and phraseology were made.

#### AMENDMENTS

1967—Subsec. (d). Pub. L. 90-216, § 1(4), enlarged from six to seven the number of divisions comprising the Western District.

Subsec. (d)(3). Pub. L. 90-216, § 1(1), transferred the counties of Brewster, Culberson, Hudspeth, and Presidio from the El Paso Division to the Pecos Division.

Subsec. (d)(6). Pub. L. 90-216, § 1(2), added the counties of Brewster, Culberson, Hudspeth and Presidio to the Pecos Division from the El Paso Division, and transferred the counties of Andrews, Crane, Ector, Martin, Midland, and Upton from the Pecos Division to the Midland-Odessa Division.

Subsec. (d)(7). Pub. L. 90-216, § 1(3), added subsec. (d)(7), which created the Midland-Odessa Division, comprised of the counties of Andrews, Crane, Ector, Martin, Midland, and Upton, transferred from the Pecos Division.

1964—Subsec. (b)(1). Pub. L. 88-282, § 1(a), eliminated Austin, Fort Bend, and Wharton counties from the list comprising the Galveston Division.

Subsec. (b)(2). Pub. L. 88-282, § 1(b), added Austin, Fort Bend, and Wharton counties to the list comprising the Houston Division.

Subsec. (c)(4). Pub. L. 88-512, § 1(a), added the county of Hopkins to the Paris Division.

Subsec. (c)(5). Pub. L. 88-512, § 1(b), eliminated the county of Hopkins from the Marshall Division.

1961—Subsec. (c)(5). Pub. L. 87-352 changed the name of the Division from Jefferson to Marshall, and provided that the court be held at Marshall.

1957—Subsec. (c)(1). Pub. L. 85-298, § 2, inserted Shelby County in the list of counties comprising the Tyler Division.

Subsec. (c)(2). Pub. L. 85-298, § 1, eliminated Shelby County from the list of counties comprising the Beaumont Division.

1954—Subsec. (d)(4). Act Feb. 10, 1954, § 2(b)(9)(a), struck Edwards County out of the list of counties comprising the San Antonio Division of the Western District.

Subsec. (d)(5). Act Feb. 10, 1954, § 2(b)(9)(b), inserted a reference to Edwards County in the list of counties comprising the Del Rio Division of the Western District.

### § 125. Utah

Utah constitutes one judicial district comprising two divisions.

(1) The Northern Division comprises the counties of Box Elder, Cache, Davis, Morgan, Rich, and Weber.

Court for the Northern Division shall be held at Ogden.

(2) The Central Division comprises the counties of Beaver, Carbon, Daggett, Duchesne, Emery, Garfield, Grand, Iron, Juab, Kane, Millard, Piute, Salt Lake, San Juan, Sanpete, Sevier, Summit, Tooele, Uintah, Utah, Wasatch, Washington, and Wayne.

Court for the Central Division shall be held at Salt Lake City.

(June 25, 1948, ch. 646, 62 Stat. 893.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 190 (Mar. 3, 1911, ch. 231, § 109, 36 Stat. 1127).

A provision relating to the maintenance of offices by the clerk was omitted as covered by section 751 of this title.

Changes in arrangement and phraseology were made.

### § 126. Vermont

Vermont constitutes one judicial district.

Court shall be held at Brattleboro, Burlington, Montpelier, Rutland, Saint Johnsbury, and Windsor.

(June 25, 1948, ch. 646, 62 Stat. 893; May 28, 1964, Pub. L. 88-312, 78 Stat. 201.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 191 (Mar. 3, 1911, ch. 231, § 110, 36 Stat. 1127; Feb. 1, 1912, ch. 26, 37 Stat. 58; Feb. 28, 1929, ch. 360, 45 Stat. 1345).

Provision that "any stated term may, when adjourned, be adjourned to meet at any of the other places at Montpelier or Newport," was omitted as unnecessary and inconsistent with sections 140 and 141 of this title.

Changes in arrangement and phraseology were made.

#### AMENDMENTS

1964—Pub. L. 88-312 provided for holding terms of the court at Montpelier and Saint Johnsbury.

### § 127. Virginia

Virginia is divided into two judicial districts, to be known as the Eastern and Western districts of Virginia.

*Eastern District*

(a) The Eastern District comprises the counties of Accomac, Amelia, Arlington, Brunswick, Caroline, Charles City, Chesterfield, Culpeper, Dinwiddie, Elizabeth City, Essex, Fairfax, Fauquier, Gloucester, Goochland, Greensville, Hanover, Henrico, Isle of Wight, James City, King and Queen, King George, King William, Lancaster, Loudoun, Louisa, Lunenburg, Mathews, Mecklenburg, Middlesex, Nansemond, New Kent, Norfolk, Northampton, Northumberland, Nottoway, Orange, Powhatan, Prince Edward, Prince George, Prince William, Princess Anne, Richmond, Southampton, Spotsylvania, Stafford, Surry, Sussex Warwick, Westmoreland, and York.

Court for the Eastern District shall be held at Alexandria, Newport News, Norfolk, and Richmond.

*Western District*

(b) The Western District comprises the counties of Albemarle, Alleghany, Amherst, Appomattox, Augusta, Bath, Bedford, Bland, Botetourt, Buchanan, Buckingham, Campbell, Carroll, Charlotte, Clarke, Craig, Cumberland, Dickenson, Floyd, Fluvanna, Franklin, Frederick, Giles, Grayson, Greene, Halifax, Henry, Highland, Lee, Madison, Montgomery, Nelson, Page, Patrick, Pittsylvania, Pulaski, Rappahannock, Roanoke, Rockbridge, Rockingham, Russell, Scott, Shenandoah, Smyth, Tazewell, Warren, Washington, Wise, and Wythe.

Court for the Western District shall be held at Abingdon, Big Stone Gap, Charlottesville, Danville, Harrisonburg, Lynchburg, and Roanoke.

(c) Cities and incorporated towns are included in that district in which are included the counties within the exterior boundaries of which such cities and incorporated towns are geographically located or out of the territory of which they have been incorporated.

(June 25, 1948, ch. 646, 62 Stat. 983; July 5, 1968, Pub. L. 90-383, 82 Stat. 292.)

#### HISTORICAL AND REVISION

Based on title 28, U.S.C., 1940 ed., §§ 192 and 192a, and section 403c-2 of title 16, U.S.C., 1940 ed., Conservation (Mar. 3, 1911, ch. 231, § 111, 36 Stat. 1127; June 13, 1918, ch. 100, 40 Stat. 605; Apr. 30, 1924, ch. 144, 43 Stat. 114; Feb. 21, 1925, ch. 290, 43 Stat. 962; Jan. 20, 1930, ch. 20, § 1, 46 Stat. 56; Aug. 19, 1937, ch. 703, § 2, 50 Stat. 701; June 13, 1938, ch. 350, 52 Stat. 674; Oct. 31, 1945, ch. 443, § 202, 59 Stat. 554).

A provision of section 192 of title 28 relating to the maintenance of offices by the clerk of the western district was omitted as covered by sections 452 and 751 of this title.

Changes in arrangement and phraseology were made.

#### SENATE REVISION AMENDMENT

By Senate amendment, "Newport News" was inserted after "Alexandria" in second paragraph of subsection (a) of this section. See 80th Congress Senate Report No. 1559.

#### AMENDMENTS

1968—Subsec. (c). Pub. L. 90-383 added subsec. (c).

### § 128. Washington

Washington is divided into two judicial districts to be known as the Eastern and Western Districts of Washington.

*Eastern District*

(a) The Eastern District comprises the counties of Adams, Asotin, Benton, Chelan, Columbia, Douglas, Ferry, Franklin, Garfield, Grant, Kittitas, Klickitat, Lincoln, Okanogan, Pend Oreille, Spokane, Stevens, Walla Walla, Whitman, and Yakima.

Court for the Eastern District shall be held at Spokane, Yakima, Walla Walla, and Richland.

*Western District*

(b) The Western District comprises the counties of Clallam, Clark, Cowlitz, Grays Harbor, Island, Jefferson, King, Kitsap, Lewis, Mason, Pacific, Pierce, San Juan, Skagit, Skamania, Snohomish, Thurston, Wahkiakum, and Whatcom.

Court for the Western District shall be held at Bellingham, Seattle, and Tacoma.

(June 25, 1948, ch. 646, 62 Stat. 894; Sept. 25, 1962, Pub. L. 87-699, 76 Stat. 598; June 2, 1970, Pub. L. 91-272, § 4, 84 Stat. 297.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 193 (Mar. 3, 1911, ch. 231, § 112, 36 Stat. 1128; June 15, 1937, ch. 351, 50 Stat. 260; Dec. 28, 1945, ch. 596, 59 Stat. 661).

Words "with the waters thereof," after the list of counties in each division, were omitted as unnecessary, and in view of the absence of such words in most similar sections relating to other States.

A provision relating to the maintenance of offices by the clerks were omitted as covered by section 751 of this title.

Provisions that the counties in both divisions of the eastern district included all Indian reservations in such counties and that the counties in both divisions of the western district included all Indian reservations in such counties were omitted as surplusage. (See Reviser's Note under section 114 of this title.)

Pend Oreille County of the northern division of the eastern district and Grays Harbor of the southern division of the western district were created since the enactment of the Judicial Code.

Changes in arrangement and phraseology were made.

#### AMENDMENTS

1970—Subsec. (a). Pub. L. 91-272, § 4(a), struck out provisions which had divided the Eastern District into a Northern Division and a Southern Division.

Subsec. (b). Pub. L. 91-272, § 4(b), struck out provisions which had divided the Western District into a Northern Division and a Southern Division.

1962—Subsec. (a)(2). Pub. L. 87-699 authorized the Court for the Southern Division to sit at Richland.

### § 129. West Virginia

West Virginia is divided into two judicial districts to be known as the Northern and Southern Districts of West Virginia.

*Northern District*

(a) The Northern District comprises the counties of Barbour, Berkeley, Brooke, Calhoun, Doddridge, Gilmer, Grant, Hampshire, Hancock, Hardy, Harrison, Jefferson, Lewis, Marion, Marshall, Mineral, Monongalia, Morgan, Ohio, Pendleton, Pleasants, Preston, Randolph, Ritchie, Taylor, Tucker, Tyler, Upshur, Wetzel, Wirt, and Wood.

Court for the Northern District shall be held at Clarksburg, Elkins, Fairmont, Martinsburg, Parkersburg, and Wheeling.

*Southern District*

(b) The Southern District comprises the counties of Boone, Braxton, Cabell, Clay, Fayette, Greenbrier, Jackson, Kanawha, Lincoln, Logan, McDowell, Mason, Mercer, Mingo, Monroe, Nicholas, Pocahontas, Putnam, Raleigh, Roane, Summers, Wayne, Webster, and Wyoming.

Court for the Southern District shall be held at Beckley, Bluefield, Charleston, Huntington, and Lewisburg.

(June 25, 1948, ch. 646, 62 Stat. 894.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 194 (Mar. 3, 1911, ch. 231, § 113, 36 Stat. 1129; Mar. 23, 1912, ch. 63, 37 Stat. 76; Aug. 22, 1914, ch. 265, 38 Stat. 702; Feb. 27, 1922, ch. 83, 42 Stat. 398; June 22, 1936, ch. 695, 49 Stat. 1805; Aug. 23, 1937, ch. 737, 50 Stat. 744; June 29, 1938, ch. 817, 52 Stat. 1245).

Words "with the waters thereof," after the list of counties in each district, were omitted as unnecessary, and in view of the absence of such words in similar sections relating to other States.

Provisions relating to special terms of court were omitted as covered by section 141 of this title.

A provision that the term at Fairmont be held "when suitable rooms and accommodations for holding terms of the court shall be furnished at Fairmont free of cost to the United States or until, subject to the recommendation of the Attorney General of the United States with respect to providing such rooms and accommodations for holding court at Fairmont, a

Federal building containing such suitable rooms and accommodations for holding court shall be erected at such place," was omitted as obsolete on advice of the Director of the Administrative Office of the United States Courts that Federal accommodations are now available.

Provisions respecting court accommodations at Beckley and Lewisburg were omitted as covered by section 142 of this title.

Changes were made in arrangement and phraseology.

### § 130. Wisconsin

Wisconsin is divided into two judicial districts to be known as the Eastern and Western districts of Wisconsin.

#### *Eastern District*

(a) The Eastern District comprises the counties of Brown, Calumet, Dodge, Door, Florence, Fond du Lac, Forest, Green Lake, Kenosha, Kewaunee, Langlade, Manitowoc, Marinette, Marquette, Menominee, Milwaukee, Oconto, Outagamie, Ozaukee, Racine, Shawano, Sheboygan, Walworth, Washington, Waukesha, Waupaca, Waushara, and Winnebago.

Court for the Eastern District shall be held at Green Bay, Milwaukee, and Oshkosh.

#### *Western District*

(b) The Western District comprises the counties of Adams, Ashland, Barron, Bayfield, Buffalo, Burnett, Chippewa, Clark, Columbia, Crawford, Dane, Douglas, Dunn, Eau Claire, Grant, Green, Iowa, Iron, Jackson, Jefferson, Juneau, La Crosse, Lafayette, Lincoln, Marathon, Monroe, Oneida, Pepin, Pierce, Polk, Portage, Price, Richland, Rock, Rusk, Saint Croix, Sauk, Sawyer, Taylor, Trempealeau, Vernon, Vilas, Washburn, and Wood.

Court for the Western District shall be held at Eau Claire, La Crosse, Madison, Superior, and Wausau.

(June 25, 1948, ch. 646, 62 Stat. 894; Aug. 6, 1962, Pub. L. 87-573, 76 Stat. 307.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 195 (Mar. 3, 1911, ch. 231, § 114, 36 Stat. 1129; July 24, 1935, ch. 413, 49 Stat. 495).

Provisions for keeping the courts and their offices open at all times were omitted as covered by section 452 of this title.

Provisions for maintenance of offices by the clerk and marshal, and for the appointment and residence of a deputy marshal for Superior, were omitted as covered by sections 541, 542, and 751 of this title.

Words "All causes and proceedings instituted in the court at Superior shall be tried therein, unless by consent of the parties, or upon the order of the court, they are transferred to another place for trial," were omitted as unnecessary. Such provision, as to civil cases, is covered by section 1404 of this title, and, as to criminal cases, is rendered unnecessary because of inherent power of the court and Rules 18-20 of the Federal Rules of Criminal Procedure.

Provisions for the return of process, including criminal warrants, at Superior and other places in the western district and for the keeping of records in the clerk's office at Superior, were omitted, since such matters can be regulated more appropriately by court rule or order. (See Federal Rules of Civil Procedure, Rule 4, and Federal Rules of Criminal Procedure, Rule 4(g).)

Changes in arrangement and phraseology were made.

#### AMENDMENTS

1962—Subsec. (a). Pub. L. 87-573 added the county of Menominee to the territory comprising the Eastern District.

### § 131. Wyoming

Wyoming and those portions of Yellowstone National Park situated in Montana and Idaho constitute one judicial district.

Court shall be held at Casper, Cheyenne, Evanston, Lander, and Sheridan.

(June 25, 1948, ch. 646, 62 Stat. 895.)

#### HISTORICAL AND REVISION NOTES

Based on section 27 of title 16, U.S.C., 1940 ed., Conservation, and title 28, U.S.C., 1940 ed., § 196 (May 7, 1894, ch. 72, § 5, 28 Stat. 74; Mar. 3, 1911, ch. 231, §§ 115, 291, 36 Stat. 1130, 1167; June 5, 1924, ch. 260, 43 Stat. 388; June 28, 1938, ch. 778, § 1, 52 Stat. 1213).

Section consolidates section 196 of title 28, U.S.C., 1940 ed., with a portion of section 27 of title 16, U.S.C., 1940 ed., with necessary changes in arrangement and phraseology. Reference to parts of Yellowstone National Park in Montana and Idaho is derived from said section 27. Other provisions of said section are incorporated in sections 631 and 632 of this title.

A provision of section 196 of title 28, U.S.C., 1940 ed., for furnishing rooms and accommodations at Casper was omitted as obsolete, upon advice of the Director of the Administrative Office of the United States Courts that Federal accommodations are now available there.

Provisions of section 196 of title 28, U.S.C., 1940 ed., for appointment of deputies and maintenance of offices by the clerk and marshal were omitted as covered by sections 541, 542, and 751 of this title.

### § 132. Creation and composition of district courts

(a) There shall be in each judicial district a district court which shall be a court of record known as the United States District Court for the district.

(b) Each district court shall consist of the district judge or judges for the district in regular active service. Justices or judges designated or assigned shall be competent to sit as judges of the court.

(c) Except as otherwise provided by law, or rule or order of court, the judicial power of a district court with respect to any action, suit or proceeding may be exercised by a single judge, who may preside alone and hold a regular or special session of court at the same time other sessions are held by other judges.

(June 25, 1948, ch. 646, 62 Stat. 895; Nov. 13, 1963, Pub. L. 88-176, § 2, 77 Stat. 331.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 1, and section 641 of title 48, U.S.C., 1940 ed., Territories and Insular Possessions (Apr. 30, 1900, ch. 339, § 86, 31 Stat. 158; Mar. 3, 1909, ch. 269, § 1, 35 Stat. 838; Mar. 3, 1911, ch. 231, § 1, 36 Stat. 1087; July 30, 1914, ch. 216, 38 Stat. 580; July 19, 1921, ch. 42, § 313, 42 Stat. 119; Feb. 12, 1925, ch. 220, 43 Stat. 890; Dec. 13, 1926, ch. 6, § 1, 44 Stat. 19).

Section consolidates section 1 of title 28, U.S.C., 1940 ed., and section 641 of title 48, U.S.C., 1940 ed., with changes in phraseology necessary to effect the consolidation.

Subsection (c) is derived from section 641 of title 48, U.S.C., 1940 ed., which applied only to the Territory of Hawaii. The revised section, by extending it to all districts, merely recognizes established practice.

Other portions of section 1 of title 28, U.S.C., 1940 ed., are incorporated in sections 133 and 134 of this title. The remainder of section 641 of title 48, U.S.C., 1940 ed., is incorporated in sections 91 and 133 of this title.

AMENDMENTS

1963—Subsec. (b). Pub. L. 88-176 inserted "regular" preceding "active service".

CONTINUATION OF ORGANIZATION OF COURT

Section 2(b) of act June 25, 1948, provided in part that the provisions of this title as set out in section 1 of act June 25, 1948, with respect to the organization of the court, shall be construed as a continuation of existing law, and the tenure of the judges, officers, and employees thereof and of the United States attorneys and marshals and their deputies and assistants, in office on Sept. 1, 1948, shall not be affected by its enactment, but each of them shall continue to serve in the same capacity under the appropriate provisions of this title pursuant to his prior appointment.

CROSS REFERENCES

Guam and Virgin Islands district courts, see sections 1424, 1424b and 1611 et seq. of Title 48, Territories and Insular Possessions.

Assignment of district judges to other districts or courts, see section 292 et seq. of this title.

Authority to create courts inferior to Supreme Court, see U.S. Const., Art. 3, § 1.

Jurisdiction and venue of district courts, see sections 1331 et seq. and 1391 et seq. of this title.

Three-judge courts, composition and procedure, see section 2284 of this title.

### § 133. Appointment and number of district judges

The President shall appoint, by and with the advice and consent of the Senate, district judges for the several judicial districts, as follows:

| *Districts* | *Judges* |
|---|---|
| Alabama: | |
| Northern | 4 |
| Middle | 2 |
| Southern | 2 |
| Alaska | 2 |
| Arizona | 5 |
| Arkansas: | |
| Eastern | 1 |
| Western | 1 |
| Eastern and Western | 2 |
| California: | |
| Northern | 11 |
| Eastern | 3 |
| Central | 16 |
| Southern | 5 |
| Colorado | 4 |
| Connecticut | 4 |
| Delaware | 3 |
| District of Columbia | 15 |
| Florida: | |
| Northern | 2 |
| Middle | 6 |
| Southern | 7 |
| Georgia: | |
| Northern | 6 |
| Middle | 2 |
| Southern | 2 |
| Hawaii | 2 |
| Idaho | 2 |
| Illinois: | |
| Northern | 13 |
| Southern | 2 |
| Eastern | 2 |
| Indiana: | |
| Northern | 3 |
| Southern | 4 |
| Iowa: | |
| Northern | 1 |
| Southern | 1 |
| Northern and Southern | 1 |
| Kansas | 4 |
| Kentucky: | |
| Eastern | 2 |
| Western | 3 |
| Eastern and Western | 1 |
| Louisiana: | |
| Eastern | 9 |
| Middle | 1 |
| Western | 4 |
| Maine | 1 |
| Maryland | 7 |
| Massachusetts | 6 |
| Michigan: | |
| Eastern | 10 |
| Western | 2 |
| Minnesota | 4 |
| Mississippi: | |
| Northern | 2 |
| Southern | 3 |
| Missouri: | |
| Eastern | 3 |
| Western | 3 |
| Eastern and Western | 2 |
| Montana | 2 |
| Nebraska | 3 |
| Nevada | 2 |
| New Hampshire | 1 |
| New Jersey | 9 |
| New Mexico | 3 |
| New York: | |
| Northern | 2 |
| Southern | 27 |
| Eastern | 9 |
| Western | 3 |
| North Carolina: | |
| Eastern | 2 |
| Western | 2 |
| Middle | 2 |
| North Dakota | 2 |
| Ohio: | |
| Northern | 8 |
| Southern | 5 |
| Oklahoma: | |
| Northern | 1 |
| Eastern | 1 |
| Western | 2 |
| Northern, Eastern, and Western | 2 |
| Oregon | 3 |
| Pennsylvania: | |
| Eastern | 19 |
| Middle | 3 |
| Western | 10 |
| Puerto Rico | 3 |
| Rhode Island | 2 |
| South Carolina | 5 |
| South Dakota | 2 |
| Tennessee: | |
| Eastern | 3 |
| Middle | 2 |
| Western | 3 |
| Texas: | |
| Northern | 6 |
| Southern | 8 |
| Eastern | 3 |

| *Districts* | *Judges* |
|---|---|
| Western | 5 |
| Utah | 2 |
| Vermont | 2 |
| Virginia: | |
| Eastern | 6 |
| Western | 2 |
| Washington: | |
| Eastern | 1 |
| Western | 3 |
| Eastern and Western | 1 |
| West Virginia: | |
| Northern | 1 |
| Southern | 2 |
| Northern and Southern | 1 |
| Wisconsin: | |
| Eastern | 3 |
| Western | 1 |
| Wyoming | 1 |

(June 25, 1948, ch. 646, 62 Stat. 895; Aug. 3, 1949, ch. 387, § 2(a), 63 Stat. 493; Aug. 14, 1950, ch. 708, 64 Stat. 443; Aug. 29, 1950, ch. 819, § 1, 64 Stat. 562; Sept. 5, 1950, ch. 848, § 1, 64 Stat. 578; Feb. 10, 1954, ch. 6, § 2(a)(3), 68 Stat. 9; Sept. 7, 1957, Pub. L. 85-310, 71 Stat. 631; July 7, 1958, Pub. L. 85-508, § 12(c), 72 Stat. 348; Mar. 18, 1959, Pub. L. 86-3, § 9(b), 73 Stat. 8; May 19, 1961, Pub. L. 87-36, § 2(d), 75 Stat. 81; July 30, 1962, Pub. L. 87-562, § 3, 76 Stat. 248; Oct. 7, 1965, Pub. L. 89-242, § 1(c), 79 Stat. 951; Mar. 18, 1966, Pub. L. 89-372, § 4, 80 Stat. 77; June 7, 1970, Pub. L. 91-272, § 1(d), 84 Stat. 295; Dec. 18, 1971, Pub. L. 92-208, § 3(d), 85 Stat. 742.)

### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 1 and notes; sections 641, 643, 863, and 864 of title 48, U.S.C., 1940 ed., Territories and Insular Possessions; District of Columbia Code, 1940 ed., § 11-301 (Apr. 12, 1900, ch. 191, §§ 34, 35, 31 Stat. 84, 85; Apr. 30, 1900, ch. 339, § 86, 31 Stat. 158; Mar. 3, 1901, ch. 854, § 60, 31 Stat. 1199; Mar. 3, 1909, ch. 269, § 1, 35 Stat. 838; Mar. 3, 1911, ch. 231, § 1, 36 Stat. 1087; Jan. 7, 1913, ch. 6, 37 Stat. 648; July 30, 1914, ch. 216, 38 Stat. 580; Mar. 3, 1915, ch. 100, § 1, 38 Stat. 961; Apr. 11, 1916, ch. 64, § 1, 39 Stat. 48; Feb. 26, 1917, ch. 120, 39 Stat. 938; Mar. 2, 1917, ch. 145, §§ 41, 42, 39 Stat. 965, 966; Feb. 26, 1919, ch. 50, § 1, 40 Stat. 1183; Mar. 4, 1921, ch. 161, § 1, 41 Stat. 1412; July 9, 1921, ch. 42, § 313, 42 Stat. 119; Sept. 14, 1922, ch. 306, § 1, 42 Stat. 837; Jan. 16, 1925, ch. 83, § 3, 43 Stat. 752; Feb. 12, 1925, ch. 220, 43 Stat. 890; Feb. 13, 1925, ch. 229, §§ 1, 13, 43 Stat. 936, 942; Feb. 16, 1925, ch. 233, §§ 2, 3, 43 Stat. 946; Mar. 2, 1925, ch. 397, §§ 1-3, 43 Stat. 1098; Mar. 3, 1927, ch. 297, § 1, 44 Stat. 1346; Mar. 3, 1927, ch. 298, 44 Stat. 1347; Mar. 3, 1927, ch. 300, § 1, 44 Stat. 1348; Mar. 3, 1927, ch. 332, 44 Stat. 1370; Mar. 3, 1927, ch. 336, §§ 1, 2, 44 Stat. 1372; Mar. 3, 1927, ch. 338, 44 Stat. 1374; Mar. 3, 1927, ch. 344, 44 Stat. 1380; Jan. 31, 1928, ch. 14, § 1, 45 Stat. 54; Apr. 21, 1928, ch. 393, § 5, 45 Stat. 439; May 29, 1928, ch. 882, 45 Stat. 974; Dec. 20, 1928, ch. 41, 45 Stat. 1056; Jan. 17, 1929, ch. 72, § 1, 45 Stat. 1081; Feb. 26, 1929, ch. 334, 45 Stat. 1317; Feb. 26, 1929, ch. 337, 45 Stat. 1319; Feb. 28, 1929, ch. 358, § 1, 45 Stat. 1344; Feb. 28, 1929, ch. 380, 45 Stat. 1409; May 28, 1930, ch. 346, § 1, 46 Stat. 431; June 19, 1930, ch. 537, 46 Stat. 785; June 27, 1930, ch. 633, 46 Stat. 819; June 27, 1930, ch. 635, § 1, 46 Stat. 820; July 3, 1930, ch. 852, 46 Stat. 1006; Feb. 20, 1931, ch. 244, 46 Stat. 1196; Feb. 20, 1931, ch. 245, 46 Stat. 1197; Feb. 25, 1931, ch. 296, 46 Stat. 1417; May 17, 1932, ch. 190, 47 Stat. 158; May 20, 1932, ch. 196, 47 Stat. 161; Aug. 2, 1935, ch. 425, 49 Stat. 508; Aug. 19, 1935, ch. 558, §§ 1, 2, 49 Stat. 659; Aug. 28, 1935, ch. 793, 49 Stat. 945; June 5, 1936, ch. 515, 49 Stat. 1476; June 15, 1936, ch. 544, 49 Stat. 1491; June 16, 1936, ch. 585, § 1, 49 Stat. 1523; June 22, 1936, ch. 693, 49 Stat. 1804; June 22, 1936, ch. 694, 49 Stat. 1804; June 22, 1936, ch. 696, 49 Stat. 1806; Aug. 25, 1937, ch. 771, § 1, 50 Stat. 805; Mar. 18, 1938, ch. 47, 52 Stat. 110; Mar. 26, 1938, ch. 51, § 2, 52 Stat. 118; May 31, 1938, ch. 290, §§ 4, 5, 6, 52 Stat. 584, 585; June 20, 1938, ch. 528, 52 Stat. 780; Jan. 20, 1940, ch. 11, 54 Stat. 16; May 24, 1940, ch. 209, § 2(c), 54 Stat. 220; June 8, 1940, ch. 282, 54 Stat. 253; Nov. 27, 1940, ch. 92, § 1, 54 Stat. 1216; Nov. 21, 1941, ch. 479, 55 Stat. 773; July 7, 1942, ch. 489, 56 Stat. 648; Dec. 24, 1942, ch. 817, 56 Stat. 1083; Dec. 24, 1942, ch. 827, 56 Stat. 1092; Dec. 7, 1944, ch. 521, 58 Stat. 796; Dec. 22, 1944, ch. 663, 58 Stat. 887; Oct. 16, 1945, ch. 419, §§ 1, 2, 59 Stat. 545, 546; June 15, 1946, ch. 413, 60 Stat. 260; July 24, 1946, chs. 600, 602, 60 Stat. 654).

Section consolidates provisions of section 1 of title 28, U.S.C., 1940 ed., and sections 641, 643, 863, and 864 of title 48, U.S.C., 1940 ed., with changes in phraseology necessary to effect consolidation.

Provisions of section 1 of title 28, U.S.C., 1940 ed., relating to residence of judges, are covered by section 134 of this title.

The act of Dec. 7, 1944, amended section 2 of the act of May 24, 1940, 54 Stat. 219, section 1, note, of title 28, U.S.C., 1940 ed., to read as follows: "(a) Provided, That the first vacancy in the office of district judge in each of said districts except in the eastern district of Pennsylvania, shall not be filled."

The act of Dec. 22, 1944, amended the same section to read as follows: "(a) Provided, That the first vacancy occurring in the office of district judge in each of said districts except the district of New Jersey shall not be filled."

The act of July 24, 1946, ch. 600, § 1, 60 Stat. 654, amended the proviso in the 1940 act to read as follows: "Provided, That the first vacancy occurring in the office of district judge in each of said districts, except the district of New Jersey and the eastern district of Pennsylvania, shall not be filled."

The following additional but temporary judgeships, authorized by Congress, are not included in the revised section:

| *Districts* | *Judges* |
|---|---|
| Delaware | 1 |
| Florida, Northern and Southern | 1 |
| Georgia, Northern | 1 |
| Kansas | 1 |
| Missouri, Eastern and Western | 1 |
| Ohio, Northern | 1 |
| Oklahoma, Western | 1 |
| Pennsylvania, Eastern, Middle and Western | 1 |
| West Virginia, Northern and Southern | 1 |

Other provisions of said section 11-301 of the District of Columbia Code, 1940 ed., are incorporated in section 136 of this title.

A part of section 641 of title 48, U.S.C., 1940 ed., is incorporated in sections 91 and 132 of this title.

Parts of sections 863 and 864 of title 48, U.S.C., 1940 ed., are retained in title 48. For other parts of those sections, see Distribution Table.

Other provisions of section 643 of title 48, U.S.C., 1940 ed., are incorporated in sections 501, 504, and 541 of this title.

### SENATE REVISION AMENDMENT

Provisions for one district judge in the Southern District of Indiana were inserted in this section by Senate amendment. See 80th Congress Senate Report No. 1559.

### AMENDMENTS

1971—Pub. L. 92-208 created a Middle District in the Louisiana listing with one judge and reduced from 10 to 9 the number of judges for the Eastern District of Louisiana.

1970—Pub. L. 91-272 altered the number of permanent district judgeships in the named districts as follows:

| *State* | *Former* | *New* |
|---|---|---|
| Alabama: | | |
| Northern | 3 | 4 |
| Middle | 1 | 2 |
| Southern | 1 | 2 |
| Middle and Southern | 1 | 0 |
| Arizona | 4 | 5 |
| California: | | |
| Northern | 9 | 11 |
| Central | 13 | 16 |
| Southern | 2 | 5 |
| Colorado | 3 | 4 |
| Florida: | | |
| Middle | 5 | 6 |
| Southern | 5 | 7 |
| Georgia: | | |
| Northern | 3 | 6 |
| Southern | 1 | 2 |
| Illinois: Northern | 11 | 13 |
| Kansas | 3 | 4 |
| Kentucky: | | |
| Eastern | 1 | 2 |
| Western | 2 | 3 |
| Louisiana: | | |
| Eastern | 8 | 10 |
| Western | 3 | 4 |
| Maryland | 5 | 7 |
| Michigan: Eastern | 8 | 10 |
| Missouri: Eastern | 2 | 3 |
| Nebraska | 2 | 3 |
| New Jersey | 8 | 9 |
| New Mexico | 2 | 3 |
| New York: | | |
| Southern | 24 | 27 |
| Eastern | 8 | 9 |
| Ohio: | | |
| Northern | 7 | 8 |
| Southern | 4 | 5 |
| Pennsylvania: | | |
| Eastern | 11 | 19 |
| Western | 8 | 10 |
| Puerto Rico | 2 | 3 |
| South Carolina | 4 | 5 |
| Tennessee: Western | 2 | 3 |
| Texas: | | |
| Northern | 5 | 6 |
| Southern | 7 | 8 |
| Eastern | 2 | 3 |
| Western | 4 | 5 |
| Virginia: Eastern | 5 | 6 |
| West Virginia: Southern | 1 | 2 |
| Wisconsin: Eastern | 2 | 3 |

1966—Pub. L. 89–372 altered the number of permanent district judgeships in the named districts as follows:

| *State* | *Former* | *New* |
|---|---|---|
| Alabama: Middle and Southern | 0 | 1 |
| Arizona | 3 | 4 |
| California: | | |
| Northern | 9 | 9 |
| Eastern | 0 | 3 |
| Central | 0 | 13 |
| Southern | 13 | 2 |
| Florida: | | |
| Northern | 1 | 2 |
| Middle | 3 | 5 |
| Southern | 3 | 5 |
| Northern, Middle, and Southern | 1 | 0 |
| Illinois: Northern | 10 | 11 |
| Indiana: Southern | 3 | 4 |
| Louisiana: Eastern | 4 | 8 |
| Maryland | 4 | 5 |
| Mississippi: | | |
| Northern | 1 | 2 |
| Southern | 2 | 3 |
| New York: Western | 2 | 3 |
| Ohio: | | |
| Northern | 6 | 7 |
| Southern | 3 | 4 |
| Rhode Island | 1 | 2 |
| Texas: | | |
| Southern | 5 | 7 |
| Western | 3 | 4 |
| Vermont | 1 | 2 |
| Virginia: Eastern | 3 | 5 |

1965—Pub. L. 89–242 changed the South Carolina listing by removing references to an Eastern and Western District, with 1 judge listed for the Eastern, 1 judge for the Western, and 2 judges for the Eastern and Western combined, and substituted therefor a single reference to a South Carolina District with 4 judges.

1962—Pub. L. 87–562 amended the Florida listing by adding the Middle District with its designation of 3 judges, substituted "Northern, Middle, and Southern" for "Northern and Southern", and reduced the number of judges in the Southern District from 6 to 3.

1961—Pub. L. 87–36 increased the number of permanent district judgeships in the named districts as follows:

| *State* | *Former* | *New* |
|---|---|---|
| Alabama: | | |
| Northern | 2 | 3 |
| Alaska | 1 | 2 |
| Arizona | 2 | 3 |
| Arkansas: | | |
| Eastern and Western | 1 | 2 |
| California: | | |
| Northern | 7 | 9 |
| Southern | 11 | 13 |
| Colorado | 2 | 3 |
| Connecticut | 2 | 4 |
| Florida: | | |
| Southern | 4 | 6 |
| Georgia: | | |
| Northern | 2 | 3 |
| Middle | 1 | 2 |
| Illinois: | | |
| Northern | 8 | 10 |
| Indiana: | | |
| Northern | 2 | 3 |
| Southern | 2 | 3 |
| Iowa: | | |
| Northern and Southern | 0 | 1 |
| Kansas | 2 | 3 |
| Louisiana: | | |
| Eastern | 2 | 4 |
| Western | 2 | 3 |
| Maryland | 2 | 4 |
| Massachusetts | 5 | 6 |
| Michigan: | | |
| Eastern | 6 | 8 |
| Mississippi: | | |
| Southern | 1 | 2 |
| Missouri: | | |
| Western | 2 | 3 |
| Nevada | 1 | 2 |
| New Jersey | 7 | 8 |
| New Mexico | 1 | 2 |
| New York: | | |
| Southern | 18 | 24 |
| Eastern | 6 | 8 |
| North Carolina: | | |
| Eastern | 1 | 2 |
| Western | 1 | 2 |
| Middle | 1 | 2 |
| Ohio: | | |
| Northern | 5 | 6 |
| Oklahoma: | | |
| Northern, Eastern, and Western | 1 | 2 |
| Pennsylvania: | | |
| Eastern | 8 | 11 |
| Middle | 2 | 3 |

| *State* | *Former* | *New* |
|---|---|---|
| Western | 5 | 8 |
| Puerto Rico | 1 | 2 |
| South Carolina: | | |
| Eastern and Western | 1 | 2 |
| Tennessee: | | |
| Eastern | 2 | 3 |
| Middle | 1 | 2 |
| Western | 1 | 2 |
| Texas: | | |
| Northern | 3 | 5 |
| Southern | 4 | 5 |
| Western | 2 | 3 |
| Utah | 1 | 2 |
| Washington: | | |
| Western | 2 | 3 |

1959—Pub. L. 86-3 eliminated provisions that restricted eligibility for appointment as district judges for the district of Hawaii to citizens of the Territory of Hawaii who have resided therein for at least three years.

1958—Pub. L. 85-508 inserted "Alaska ——— 1".

1957—Pub. L. 85-310 increased the number of permanent judgeships in the district of South Dakota from 1 to 2.

1954—Act Feb. 10, 1954, increased the number of permanent judgeships in the named districts as follows:

| *State* | *Former* | *New* |
|---|---|---|
| California: | | |
| Southern | 10 | 11 |
| Delaware | 2 | 3 |
| Florida: | | |
| Southern | 3 | 4 |
| Idaho | 1 | 2 |
| Indiana: | | |
| Northern | 1 | 2 |
| Southern | 1 | 2 |
| Kentucky: | | |
| Western | 1 | 2 |
| Massachusetts | 4 | 5 |
| Michigan: | | |
| Eastern | 5 | 6 |
| Western | 1 | 2 |
| Missouri: | | |
| Eastern and Western | 1 | 2 |
| New Jersey | 6 | 7 |
| New York: | | |
| Southern | 16 | 18 |
| North Dakota | 1 | 2 |
| Ohio: | | |
| Northern | 4 | 5 |
| Pennsylvania: | | |
| Eastern | 7 | 8 |
| Western | 4 | 5 |
| Texas: | | |
| Southern | 3 | 4 |
| Eastern | 1 | 2 |
| Virginia: | | |
| Eastern | 2 | 3 |
| West Virginia: | | |
| Northern and Southern | 0 | 1 |
| Wisconsin: | | |
| Eastern | 1 | 2 |

1950—Act Sept. 5, 1950, increased the number of permanent judgeships in the district of Delaware from 1 to 2.

Act Aug. 29, 1950, increased the number of permanent judgeships in the western district of Pennsylvania from 3 to 4.

Act Aug. 14, 1950, increased the number of permanent judgeships in the northern district of Illinois from 6 to 8.

1949—Act Aug. 3, 1949, increased the numbers of permanent judgeships in the named districts as follows:

| *State* | *Former* | *New* |
|---|---|---|
| California: | | |
| Northern | 5 | 7 |
| Southern | 8 | 10 |
| District of Columbia | 12 | 15 |
| Florida—Northern and Southern | 0 | 1 |
| Georgia—Northern | 1 | 2 |
| Kansas | 1 | 2 |
| New Jersey | 5 | 6 |
| New York—Southern | 12 | 16 |
| Ohio—Northern | 3 | 4 |
| Oklahoma—Western | 1 | 2 |
| Oregon | 2 | 3 |
| Pennsylvania—Eastern | 5 | 7 |
| Texas—Southern | 2 | 3 |

### Effective Date of 1971 Amendment

Amendment by Pub. L. 92-208 effective 120 days after Dec. 18, 1971, see section 3(f) of Pub. L. 92-208, set out as an Effective Date of 1971 Amendment note under section 98 of this title.

### Effective Date of 1965 Amendment

Amendment by Pub. L. 89-242 effective on the first day of the month following the date of enactment of Pub. L. 89-242, see section 6 of Pub. L. 89-242, set out as an Effective Date of 1965 Amendment note under section 121 of this title.

### Effective Date of 1962 Amendment

Amendment by Pub. L. 87-562 effective 90 days after July 30, 1962, see section 5 of Pub. L. 87-562, set out as an Effective Date of 1962 Amendment note under section 89 of this title.

### Effective Date of 1959 Amendment

Section 9 of Pub. L. 86-3 provided in part that the amendment of this section and section 134(a) of this title shall be effective upon the admission of the State of Hawaii into the Union. Admission of Hawaii into the Union was accomplished Aug. 21, 1959, upon issuance of Proc. No. 3309, Aug. 21, 1959, 25 F.R. 6868, 73 Stat. c74, as required by sections 1 and 7(c) of Pub. L. 86-3, Mar. 18, 1959, 73 Stat. 4, set out as notes preceding section 491 of Title 48, Territories and Insular Possessions.

### Effective Date of 1958 Amendment

Amendment by Pub. L. 85-508 effective Jan. 3, 1959, upon admission of Alaska into the Union pursuant to Proc. No. 3269, Jan. 3, 1959, 24 F.R. 81, 73 Stat. c16, as required by sections 1 and 8(c) of Pub. L. 85-508, see notes set out under section 81A of this title and preceding section 21 of Title 48, Territories and Insular Possessions.

### Appointment of Judges

Subsec. (a)(1) of section 2 of act Feb. 10, 1954, subsec. (a)(3) of which section amended the table in this section, provided for the appointment by the President, by and with the advice and consent of the Senate, of the additional judges for the districts for which additional permanent judgeships were provided in the amendment.

### Additional Judgeships

Section 1(a) of Pub. L. 91-272 provided that: "The President shall appoint, by and with the advice and consent of the Senate, one additional district judge for the northern district of Alabama, one additional district judge for the middle district of Alabama, one additional district judge for the district of Arizona, two additional district judges for the northern district of California, three additional district judges for the central district of California, three additional district judges for the southern district of California, one additional district judge for the district of Colorado, one additional district judge for the middle district of Florida, two additional district judges for the southern district of Florida, three additional district judges for the northern district of Georgia, one additional district judge for the southern district of Georgia, two additional district judges for the northern district of Illinois, one additional district judge for the eastern district of Kentucky, one additional district judge for the western district of Kentucky, two additional district judges for the eastern district of Louisiana, one additional district judge for the western district of Louisiana, two additional district judges for the district of Maryland, two additional district judges for the eastern district of Michigan, one additional district judge for the eastern district of Missouri, one additional district judge for the district of Nebraska, one additional district judge for the district of New Jersey, one additional district judge for the district of New Mexico, one additional district judge for the eastern district of New York, three additional district judges for the southern district of New York, one additional district judge for the northern district of Ohio, one additional district judge for the southern district of Ohio, six additional district judges for the eastern district of Pennsylvania, two additional district judges for the western district of Pennsylvania, one additional district judge for the district of Puerto Rico, one additional district judge for the district of South Carolina, one additional district judge for the western district of Tennessee, one additional district judge for the northern district of Texas, one additional district judge for the eastern district of Texas, one additional district judge for the southern district of Texas, one additional district judge for the western district of Texas, one additional district judge for the eastern district of Virginia, and one additional district judge for the southern district of West Virginia."

Section 2(a) of Pub. L. 89-372 provided that: The President shall appoint, by and with the advice and consent of the Senate, one district judge for the middle and southern districts of Alabama, one additional district judge for the district of Arizona, one additional district judge for the northern district of Florida, one additional district judge for the middle district of Florida, two additional district judges for the southern district of Florida, one additional district judge for the northern district of Illinois, one additional district judge for the southern district of Indiana, four additional district judges for the eastern district of Louisiana, one additional district judge for the district of Maryland, one additional district judge for the northern district of Mississippi, one additional district judge for the southern district of Mississippi, one additional district judge for the western district of New York, one additional district judge for the northern district of Ohio, one additional district judge for the southern district of Ohio, one additional district judge for the district of Rhode Island, two additional district judges for the southern district of Texas, one additional district judge for the western district of Texas, two additional district judges for the eastern district of Virginia, and one additional district judge for the district of Vermont."

Section 2(a) of Pub. L. 87-36 provided that: "The President shall appoint, by and with the advice and consent of the Senate, one additional district judge for the northern district of Alabama, one additional district judge for the district of Alaska, one additional district judge for the district of Arizona, one additional district judge for the eastern and western districts of Arkansas, two additional district judges for the northern district of California, two additional district judges for the southern district of California, one additional district judge for the district of Colorado, two additional district judges for the district of Connecticut, two additional district judges for the southern district of Florida, one additional district judge for the northern district of Georgia, two additional district judges for the northern district of Illinois, one additional district judge for the northern district of Indiana, one additional district judge for the southern district of Indiana, one additional district judge for the northern and southern districts of Iowa, one additional district judge for the district of Kansas, two additional district judges for the eastern district of Louisiana, one additional district judge for the western district of Louisiana, two additional district judges for the district of Maryland, one additional district judge for the district of Massachusetts, two additional district judges for the eastern district of Michigan, one additional district judge for the southern district of Mississippi, one additional district judge for the western district of Missouri, one additional district judge for the district of Nevada, one additional district judge for the district of New Jersey, two additional district judges for the eastern district of New York, six additional district judges for the southern district of New York, one additional district judge for the eastern district of North Carolina, one additional district judge for the middle district of North Carolina, one additional district judge for the western district of North Carolina, one additional district judge for the northern district of Ohio, one additional district judge for the northern, eastern, and western districts of Oklahoma, three additional district judges for the eastern district of Pennsylvania, one additional district judge for the middle district of Pennsylvania, two additional district judges for the western district of Pennsylvania, one additional district judge for the district of Puerto Rico, one additional district judge for the eastern and western districts of South Carolina, one additional district judge for the eastern district of Tennessee, one additional district judge for the middle district of Tennessee, one additional district judge for the western district of Tennessee, two additional district judges for the northern district of Texas, one additional district judge for the southern district of Texas, one additional district judge for the western district of Texas and one additional district judge for the eastern and western districts of Washington."

*Alabama.*—Section 1(b) of Pub. L. 91-272 provided that: "The existing district judgeship for the middle and southern districts of Alabama, heretofore provided for by section 133 of title 28 of the United States Code [this section], shall hereafter be a district judgeship for the southern district of Alabama only, and the present incumbent of such judgeship shall henceforth hold his office under such section 133, as amended by subsection (d) of this section."

*California.*—Section 3(h) of Pub. L. 89-372 provided that: "The President shall appoint, by and with the advice and consent of the Senate, three additional district judges for the central district of California, and two additional district judges for the northern district of California."

*Delaware.*—Act July 24, 1946, ch. 602, 60 Stat. 654, which authorized the appointment of an additional judge for the district of Delaware was repealed by section 2 of act Sept. 5, 1950, which by section 1 of act Sept. 5, 1950, made the additional judgeship permanent. However, section 2 of act Sept. 5, 1950 also provided that the repeal in no way affected the tenure of the present incumbent.

*Florida.*—Section 2(b) of Pub. L. 89-372 provided that: "The existing district judgeship for the northern, middle and southern districts of Florida heretofore provided for by section 133 of title 28, United States Code [this section], shall hereafter be a district judgeship for the middle district of Florida only, and the present incumbent of such judgeship shall henceforth hold his office under section 133, as amended by this Act."

*Georgia.*—Act Mar. 29, 1949, ch. 37, 63 Stat. 16, which authorized the appointment of an additional judge for the middle district, was repealed by section 2(b) of Pub. L. 87-36, which made the judgeship permanent and also provided that the incumbent of the judgeship created by act Mar. 29, 1949, should henceforth hold his office under this section, as amended by Pub. L. 87-36, § 2(d).

*Kansas.*—Section 5(a) of Pub. L. 89-372, Mar. 18, 1966, 80 Stat. 78, which authorized the appointment of an additional district judge for the eastern district of Kansas and which provided that the first vacancy which occurred in the office of district judge in such district not be filled was repealed by section 1(c) of Pub. L. 91-272, June 2, 1970, 84 Stat. 294, which provided, in part, that such judgeship be a permanent judgeship and that the present incumbent henceforth hold his office under section 133 of title 28, United States Code [this section], as amended by section 1(d) of Pub. L. 91-272.

*Missouri.*—The additional judgeship for the eastern and western districts, which was authorized by act Dec. 24, 1942, ch. 827, 56 Stat. 1083, was made permanent by section 2(a)(2) of act Feb. 10, 1954, which by section 2(b)(10) of act Feb. 10, 1954 provided that the incumbent of the judgeship created by act Dec. 24, 1942, should henceforth hold his office under this section, as amended by act Feb. 10, 1954, § 2(a)(3).

*Nevada.*—Section 2(b)(2) of act Feb. 10, 1954, provided: "The President shall appoint, by and with the advice and consent of the Senate, one additional district judge for the district of Nevada. The first vacancy occurring in the office of district judge in said district shall not be filled."

*New Jersey.*—Section 2(a) of Pub. L. 91-272 provided that: "The President shall appoint, by and with the advice and consent of the Senate, one additional district judge for the district of New Jersey. The first vacancy occurring in the office of district judge in that district shall not be filled."

*New Mexico.*—Act Feb. 10, 1954, ch. 6, § 2(b)(1), 68 Stat. 10, which authorized the appointment of an additional judge for the district, was repealed by section 2(b) of Pub. L. 87-36, which made the judgeship permanent and also provided that the incumbent of the judgeship created by act Feb. 10, 1954, should henceforth hold his office under this section, as amended by Pub. L. 87-36, § 2(d).

*North Carolina.*—Section 2(c) of Pub. L. 91-272 provided that: "The President shall appoint, by and with the advice and consent of the Senate, one additional district judge for the eastern district of North Carolina. The first vacancy occurring in the office of district judge in that district shall not be filled."

*Ohio.*—Act May 1, 1941, ch. 83, 55 Stat. 148, which provided for the appointment of an additional judge for the northern district was repealed by section 2(e) of act Aug. 3, 1949, which also provided that the incumbent of the judgeship created by act May 1, 1941, should henceforth hold his office under this section, as amended by act Aug. 3, 1949, § 2(a).

Section 2(e)(1), (2) of Pub. L. 87-36 provided that:

"(1) The President shall appoint, by and with the advice and consent of the Senate, one additional district judge for the southern district of Ohio. The first vacancy occurring in the office of district judge in said district shall not be filled.

"(2) The President shall appoint, by and with the advice and consent of the Senate, one additional district judge for the northern district of Ohio. The first vacancy occurring in the office of district judge in said district shall not be filled."

*Oklahoma.*—Act May 24, 1940, ch. 209, § 2(a), 54 Stat. 219, providing for additional judgeships was amended by section 2(b) of act Aug. 3, 1949, to strike out "western district of Oklahoma", and to make the incumbent of the judgeship created by act May 24, 1940, henceforth hold his office under this section, as amended by act Aug. 3, 1949, § 2(a).

*Pennsylvania.*—Section 2(b) of Pub. L. 91-272 provided that: "The President shall appoint, by and with the advice and consent of the Senate, one additional district judge for the middle district of Pennsylvania. The first vacancy occurring in the office of district judge in that district shall not be filled."

Section 5(b) of Pub. L. 89-372, Mar. 18, 1966, 80 Stat. 78, as amended by Pub. L. 90-90, Sept. 23, 1967, 81 Stat. 228, which authorized the appointment of three additional district judges for the eastern district of Pennsylvania and which provided that the second, third, and fourth vacancies occurring after Mar. 18, 1966, in the office of district judge in such district not be filled was repealed by section 1(c) of Pub. L. 91-272, June 2, 1970, 84 Stat. 294, which provided, in part, that such judgeships be permanent judgeships and that the present incumbents henceforth hold their offices under section 133 of title 28, United States Code [this section], as amended by section 1(d) of Pub. L. 81-272.

Act Feb. 10, 1954, ch. 6, § 2(b)(5), 68 Stat. 10, which authorized the appointment of an additional judge for the western district, was repealed by section 2(b) of Pub. L. 87-36, which made the judgeship permanent and also provided that the incumbent of the judgeship created by act Feb. 10, 1954, should henceforth hold his office under this section, was amended by Pub. L. 87-36, § 2(d).

Section 2 of act July 24, 1946, ch. 600, 60 Stat. 654, as amended by section 6 of act Feb. 10, 1954, ch. 6, 68 Stat. 14, provided:

"Sec. 2. The President is authorized to appoint, by and with the advice and consent of the Senate, one additional United States district judge, who shall be an additional district judge for the eastern, middle, and western districts of Pennsylvania. The judge so appointed shall at the time of his appointment be a resident and a citizen of the State of Pennsylvania: *Provided,* That when a vacancy occurs in said office it shall not be filled: *Provided further,* That unless the President shall submit a nomination to the Senate to fill the office hereby created within ninety days after the effective date of this Act [July 24, 1946], then in that event this Act shall be of no force and effect. If a vacancy arises in the office of district judge for the middle district of Pennsylvania while the judge appointed pursuant to this section is holding the office created by this section, such judge shall thereafter be a district judge for the middle district of Pennsylvania."

Section 2(c) of act Aug. 3, 1949, which provided for an additional temporary judgeship for the western district of Pennsylvania was repealed by section 2 of act Aug. 29, 1950, which by section 1 of act Aug. 29, 1950, made the additional judgeship permanent. However, section 2 of act Aug. 29, 1950 also provided that the repeal in no way affected the tenure of the present incumbent.

*South Carolina.*—Section 1(b) of Pub. L. 89-242 provided that: "The existing district judgeships for the Eastern District of South Carolina, the Western District of South Carolina, and the Eastern and Western Districts of South Carolina heretofore provided for by section 133 of title 28 of the United States Code [this section] shall hereafter be district judgeships for the District of South Carolina and the present incumbents of such judgeships shall henceforth hold their offices under section 133, as amended by this Act."

*South Dakota.*—Pub. L. 85-310 provided: "The President is authorized to appoint, by and with the advice and consent of the Senate an additional district judge for the district of South Dakota as authorized by paragraph (3) of section 2(b) of the act of February 10, 1954 [set out below]."

Section 2(b)(3) of act February 10, 1954, as amended by Pub. L. 85-310, provided: "The President shall appoint, by and with the advice and consent of the Senate, one additional district judge for the district of South Dakota."

*Tennessee.*—Section 2(b)(4) of act Feb. 10, 1954, provided: "The President shall appoint, by and with the advice and consent of the Senate, one additional district judge for the middle district of Tennessee. The first vacancy occurring in the office of district judge in said district shall not be filled."

*Texas.*—Act Aug. 3, 1949, ch. 387, § 2(d), 63 Stat. 495, which authorized the appointment of an additional judge for the Southern district, was repealed by section 2(b)(11) of act Feb. 10, 1954, which by section 2(a)(2) of act Feb. 10, 1954, made the additional judgeship permanent. Section 2(b)(11) of act Feb. 10, 1954 also provided that the incumbent of the judgeship created by section 2(d) of act Aug. 3, 1949, should henceforth hold his office under this section, as amended by act Feb. 10, 1954, § 2(a)(3).

*Utah.*—Act Feb. 10, 1954, ch. 6, § 2(b)(6), 68 Stat. 11, which authorized the appointment of an additional judge for the district, was repealed by section 2(b) of Pub. L. 87-36, which made the judgeship permanent and also provided that the incumbent of the judgeship created by act Feb. 10, 1954, should hence forth hold his office under this section, as amended by Pub. L. 87-36, § 2(d).

*Virgin Islands.*—Section 3(a) of Pub. L. 91-272 provided that: "The President shall appoint, by and with the advice and consent of the Senate, one additional judge for the District Court of the Virgin Islands, who shall hold office for the term of eight years and until his successor is chosen and qualified, unless sooner removed by the President for cause."

*Washington.*—Section 2(c) of Pub. L. 87-36 provided that: "The existing district judgeship for the eastern and western districts of Washington, heretofore provided for by section 133 of title 28 of the United States Code, shall hereafter be a district judgeship for the western district of Washington only, and the present incumbent of such judgeship shall henceforth hold his office under section 133, as amended by this Act [Pub. L. 87-36]."

*West Virginia.*—The additional judgeship for the northern and southern districts, which was authorized by act June 22, 1936, ch. 695, 49 Stat. 1805, was made permanent by section 2(a)(2) of act Feb. 10, 1954, which by section 2(b)(12) of act Feb. 10, 1954, provided that the incumbent of the judgeship created by act June 22, 1936, should henceforth hold his office under this section, as amended by act Feb. 10, 1954, § 2(a)(3).

*Wisconsin.*—Section 5(c) of Pub. L. 89-372, Mar. 18, 1966, 80 Stat. 78, which authorized the appointment of an additional district judge for the district of Wisconsin and which provided that the first vacancy occurring in the office of district judge in such district not be filled was repealed by section 1(c) of Pub. L. 91-272, June 2, 1970, 84 Stat. 294, which provided, in part, that such judgeship be a permanent judgeship and that the present incumbent henceforth hold his office under section 133 of title 28, United States Code [this section], as amended by section 1(d) of Pub. L. 91-272.

#### Residence of Additional Judge for Kansas

Section 2(b)(2) act Aug. 3, 1949, provided that: "The judge first appointed for the district of Kansas under the authority contained in subsection (a) [amendment of this section] shall reside at Wichita."

#### Cross References

Assignment of district judges to other districts or courts, see section 292 et seq. of this title.

Guam and Virgin Islands, appointment and number of district judges, see sections 1424b and 1614 of Title 48, Territories and Insular Possessions.

Judges to hold office during good behavior, see U.S. Const., Art. 3, § 1 and section 134 of this title.

Oath of judge, see section 453 of this title.

### § 134. Tenure and residence of district judges

(a) The district judges shall hold office during good behavior.

(b) Each district judge, except in the District of Columbia, shall reside in the district or one of the districts for which he is appointed.

(c) If the public interest and the nature of the business of a district court require that a district judge should maintain his abode at or near a particular place for holding court in the district or within a particular part of the district the judicial council of the circuit may so declare and may make an appropriate order. If the district judges of such a district are unable to agree as to which of them shall maintain his abode at or near the place or within the area specified in such an order the judicial council of the circuit may decide which of them shall do so.

(June 25, 1948, ch. 646, 62 Stat. 896; Aug. 3, 1949, ch. 387, § 2(b)(1), 63 Stat. 495; Feb. 10, 1954, ch. 6, § 2(b)(13)(a), 68 Stat. 12; Mar. 18, 1959, Pub. L. 86-3, § 9(c), 73 Stat. 8; May 19, 1961, Pub. L. 87-36, § 2(e)(3), 75 Stat. 83; Sept. 12, 1966, Pub. L. 89-571, § 1, 80 Stat. 764; Dec. 18, 1971, Pub. L. 92-208, § 3(e), 85 Stat. 742.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 1 and section 863 of title 48, U.S.C., 1940 ed., Territories and Insular Possessions (Apr. 12, 1900, ch. 191, § 34, 31 Stat. 84; Mar. 3, 1911, ch. 231, § 1, 36 Stat. 1087; Jan. 7, 1913; ch. 6, 37 Stat. 648; July 30, 1914, ch. 216, 38 Stat. 580; Mar. 2, 1917, ch. 145, § 41, 39 Stat. 965; Mar. 4, 1921, ch. 161, § 1, 41 Stat. 1412; Sept. 14, 1922, ch. 306, § 1, 42 Stat. 837; Mar. 26, 1938, ch. 51, § 2, 52 Stat. 118).

Section consolidates the last paragraph of section 1 of title 28, U.S.C., 1940 ed., with portions of section 863 of title 48, U.S.C., 1940 ed., with changes in phraseology necessary to effect consolidation.

Provisions of section 1 of title 28, U.S.C., 1940 ed., relating to the number of judges in the various districts are incorporated in section 133 of this title.

A portion of section 863 of title 48, U.S.C., 1940 ed., is retained in said title 48. For remainder of section 863, see Distribution Table.

The exception in subsection (b) "except in the District of Columbia" conforms with the recent decision in *U.S. ex. rel. Laughlin* v. *Eicher*, 1944, 56 F.Supp. 972, holding that residence requirement of section 1 of title 28, U.S.C., 1940 ed., did not apply to district judges in the District of Columbia. (See reviser's note under section 44 of this title.)

The clause in said last paragraph of section 1 of title 28 providing that any district judge, who violates the residence requirement, shall be deemed guilty of a high misdemeanor, was omitted. This penalty provision was attached to the residence requirement at the time of compilation of the Revised Statutes of 1878, although it is apparent that Congress only intended that the penalty should be invoked upon the unauthorized practice of law. See *U.S. ex. rel. Laughlin* v. *Eicher*, supra, in which an outline of the history of said section 1 of title 28 is given.

#### Amendments

1971—Subsec. (c). Pub. L. 92-208 struck out provision requiring that one of the district judges for the Eastern District of Louisiana reside in East Baton Rouge Parish, Louisiana.

1966—Subsec. (a). Pub. L. 89-571 struck out provisions which excepted district judges in Puerto Rico from tenure during good behavior and which instead set eight-year terms for them to be served until their successors were appointed and qualified.

1961—Subsec. (c). Pub. L. 87-36 required the residence of one of the district judges for the Eastern District of Louisiana to be in East Baton Rouge Parish, Louisiana.

1959—Subsec. (a). Pub. L. 86-3 eliminated provisions which limited district judges in Hawaii to a term of six years.

1954—Subsecs. (a) and (b) reenacted without change by act Feb. 10, 1954.

Subsec. (c). Act Feb. 10, 1954, substituted entirely new provisions giving the judicial council of the circuit the authority to determine residence of district judges when it is in the public interest and the nature of the business of the district court necessitates the presence of a judge at or near a particular place for holding court in the district or within a particular part of the district, for former provisions relating to residence of one of the district judges for the District of Kansas.

Subsecs. (d) and (e). Act Feb. 10, 1954, struck out subsecs. (d) and (e), which related to residence of one of the district judges for the Southern District of California, and one of the district judges for the Southern District of Texas.

1949—Subsecs. (c) to (e). Act Aug. 3, 1949, added subsecs. (c) to (e).

### EFFECTIVE DATE OF 1971 AMENDMENT

Amendment by Pub. L. 92-208 effective 120 days after Dec. 18, 1971, see section 3(f) of Pub. L. 92-208, set out as an Effective Date of 1971 Amendment note under section 98 of this title.

### EFFECTIVE DATE OF 1959 AMENDMENT

Amendment by Pub. L. 86-3 effective upon the admission of Hawaii into the Union, see Effective Date of 1959 Amendment note set out under section 133 of this title. Admission of Hawaii into the Union was accomplished Aug. 21, 1959, upon issuance of Proc. No. 3309, Aug. 21, 1959, 25 F.R. 6868, 73 Stat. c74, as required by sections 1 and 7(c) of Pub. L. 86-3, Mar. 18, 1959, 73 Stat. 4, set out as notes preceding section 491 of Title 48, Territories and Insular Possessions.

### TENURE AND SALARY RIGHTS OF JUDGES IN PUERTO RICO IN OFFICE ON SEPTEMBER 12, 1966

Section 4 of Pub. L. 89-571 provided that: "The amendments made by this section to sections 134 [this section] and 373 of title 28, United States Code, shall not affect the tenure of office or right to continue to receive salary after resignation, retirement, or failure of reappointment of any district judge for the district of Puerto Rico who is in office on the date of enactment of this Act [Sept. 12, 1966]."

### APPLICABILITY OF ORDERS UNDER 1954 AMENDMENT

Section 2(b)(13)(b) of act Feb. 10, 1954, provided: "Orders made by the judicial councils of the circuits under the second sentence of subsection (c) of section 134 of Title 28 [this section], as amended by this section, determining that a specified district judge shall maintain his abode at or near a place or within an area which the council has theretofore designated for the abode of a district judge under the first sentence of such subsection, shall be applicable only to district judges appointed after the enactment of this act [Feb. 10, 1954]."

### CROSS REFERENCES

Guam district judges, tenure and residence, see section 1424b of Title 48, Territories and Insular Possessions.

Judges to hold office during good behavior, see U.S. Const., Art. 3, § 1.

Official station of district judges, see section 456 of this title.

Virgin Islands district judge, tenure, see section 1614 of Title 48, Territories and Insular Possessions.

## § 135. Salaries of district judges

Each judge of a district court of the United States shall receive a salary at an annual rate determined under section 225 of the Federal Salary Act of 1967 (2 U.S.C. 351-361), as adjusted by section 461 of this title.

(June 25, 1948, ch. 646, 62 Stat. 897; Mar. 2, 1955, ch. 9, § 1(c), 69 Stat. 10; Aug. 14, 1964, Pub. L. 88-426, title IV, § 403(c), 78 Stat. 434; Aug. 9, 1975, Pub. L. 94-82, title II, § 205(b)(3), 89 Stat. 422.)

### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 5, and District of Columbia Code, 1940 ed., § 11-302 (Mar. 3, 1911, ch. 231, § 2, 36 Stat. 1087; Feb. 25, 1919, ch. 29, § 1, 40 Stat. 1156; Dec. 13, 1926, ch. 6, 44 Stat. 919; May 17, 1932, ch. 190, 47 Stat. 158; July 31, 1946, ch. 704, § 1, 60 Stat. 716).

Section consolidates section 5 of title 28, U.S.C., 1940 ed., and section 11-302 of the District of Columbia Code, 1940 ed.

"Chief judge," in the District of Columbia, was substituted for "Chief Justice" which appeared in section 11-302 of the District of Columbia Code. (See reviser's note under section 136 of this title.)

Words "to be paid in monthly installments" were omitted, since the time of payment is a matter of administrative convenience. See 20 Comp. Gen. 834.

The provision of section 5 of title 28, U.S.C., 1940 ed., for salaries of judges of the district court of Alaska was omitted as covered by section 101 of Title 48, U.S.C., 1940 ed., Territories and Insular Possessions, as amended by a separate section in the bill to enact this revised title. The provision of said section for salary of the Virgin Islands district judge was omitted as covered by section 5a of title 28, U.S.C., 1940 ed., as amended by a separate section in the bill to enact this revised title. Such section 5a is recommended for transfer to title 48, U.S.C., 1940 ed., because of the dual nature of the Virgin Islands district court.

For salary of the district judge of Canal Zone district court, see section 1348 of title 48, U.S.C., 1940 ed., Territories and Insular Possessions.

Changes were made in phraseology.

### AMENDMENTS

1975—Pub. L. 94-82 substituted provision that each judge of a district court shall receive a salary at an annual rate determined under section 225 of the Federal Salary Act of 1967, as adjusted by section 461 of this title, for provision that each such judge receive a salary of $30,000.

1964—Pub. L. 88-426 increased the salary of the district court judges from $22,500 to $30,000, and that of the chief judge of the District Court for the District of Columbia from $23,000 to $30,500.

1955—Act Mar. 2, 1955, increased the salaries of the district court judges from $15,000 to $22,500 a year and increased the salary of the chief judge of the District Court for the District of Columbia from $15,500 to $23,000 a year.

### EFFECTIVE DATE OF 1964 AMENDMENT

Amendment by Pub. L. 88-426 effective on the first day of the first pay period which begins on or after July 1, 1964, except to the extent provided in section 501(c) of Pub. L. 88-426, see section 501 of Pub. L. 88-426.

### EFFECTIVE DATE OF 1955 AMENDMENT

Amendment by act Mar. 2, 1955, effective Mar. 1, 1955, see section 5 of act Mar. 2, 1955, set out as an Effective Date of 1955 Amendment note under section 31 of Title 2, The Congress.

### INCREASE OF SALARIES

Salaries of district judges increased to $54,500 per annum, upon recommendation of the President of the United States, see note set out under section 358 of Title 2, The Congress.

Salaries of district judges increased to $44,000 effective on the first day of the first pay period beginning on or after Oct. 1, 1976, by Ex. Ord. No. 11941, Oct. 1, 1976, 41 F.R. 43889, set out as a note under section 5332 of Title 5, Government Organization and Employees. Ex. Ord. No. 11941, further provided that pursuant to the Legislative Branch Appropriation Act, 1977, funds are not available to pay a salary at a rate which exceeds the rate in effect on Sept. 30, 1976, which was $42,000.

Salaries of district judges increased to $42,000 effective on the first day of the first pay period beginning on or after Oct. 1, 1975, by Ex. Ord. No. 11883, Oct. 6, 1975, 40 F.R. 47091, set out as a note under section 5332 of Title 5, Government Organization and Employees.

Salary of judge increased from $30,000 to $40,000 per annum, commencing February 14, 1969, upon recommendation of the President of the United States, see note set out under section 358 of Title 2, The Congress.

Prior to June 25, 1948, salaries of district judges were increased as follows:

The salary of chief judge of District Court for the District of Columbia was increased from $10,500 to $15,500 a year, and the salaries of all other district court judges were increased from $10,000 to $15,000 a year by act July 31, 1946, ch. 704, § 1, 60 Stat. 716.

The salary of the chief judge of the District Court of the District of Columbia was increased from $7,500 to $10,500 a year, and the salaries of all other district court judges were increased from $7,500 to $10,000 a year by act Dec. 13, 1926, ch. 6, § 1, 44 Stat. 919.

The salaries of district court judges were increased from $6,000 to $7,500 a year by act Feb. 25, 1919, ch. 29, § 1, 40 Stat. 1156.

Salaries of district court judges had been set at $6,000 a year by the Judicial Code of 1911, act Mar. 3, 1911, ch. 231, § 1, 36 Stat. 1087.

Salaries of the chief justice and associate justices of the Supreme Court of the District of Columbia, the forerunner of the District Court for the District of Columbia, were set at $5,000 by act Mar. 3, 1901, ch. 854, § 1, 30 Stat. 1199, and increased to $7,500 a year by act Feb. 25, 1919, ch. 29, § 1, 40 Stat. 1156.

### Cross References

Compensation not to be diminished during continuance in office, see U.S. Const. Art. 3, § 1.

Guam district judge, salary, see section 1424b of Title 48, Territories and Insular Possessions.

Payment of salaries by marshal, see section 571 of this title.

Retirement of judges, see section 371 et seq. of this title.

Virgin Islands district judge, salary, see section 1614 of Title 48, Territories and Insular Possessions.

### Section Referred to in Other Sections

This section is referred to in title 26 section 7443.

## § 136. Chief judges; precedence of district judges

(a) In each district having more than one judge the district judge in regular active service who is senior in commission and under seventy years of age shall be the chief judge of the district court. If all the district judges in regular active service are seventy years of age or older the youngest shall act as chief judge until a judge has been appointed and qualified who is under seventy years of age, but a judge may not act as chief judge until he has served as a district judge for one year.

(b) The chief judge shall have precedence and preside at any session which he attends.

Other district judges shall have precedence and preside according to the seniority of their commissions. Judges whose commissions bear the same date shall have precedence according to seniority in age.

(c) A judge whose commission extends over more than one district shall be junior to all district judges except in the district in which he resided at the time he entered upon the duties of his office.

(d) If the chief judge desires to be relieved of his duties as chief judge while retaining his active status as district judge, he may so certify to the Chief Justice of the United States, and thereafter the district judge in active service next in precedence and willing to serve shall be designated by the Chief Justice as the chief judge of the district court.

(e) If a chief judge is temporarily unable to perform his duties as such, they shall be performed by the district judge in active service, present in the district and able and qualified to act, who is next in precedence.

(June 25, 1948, ch. 646, 62 Stat. 897; Oct. 31, 1951, ch. 655, § 37, 65 Stat. 723; Aug. 6, 1958, Pub. L. 85-593, § 2, 72 Stat. 497.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 375 and District of Columbia Code, 1940 ed., § 11-301 (Mar. 3, 1901, ch. 854, §§ 60, 61, 31 Stat. 1199; Mar. 3, 1911, ch. 231, § 260, 36 Stat. 1161; Mar. 3, 1911, ch. 231, § 289, 32 Stat. 1167; Feb. 25, 1919, ch. 29, § 6, 40 Stat. 1157; Dec. 20, 1928, ch. 41, 45 Stat. 1056; Mar. 1, 1929, ch. 419, 45 Stat. 1422; June 19, 1930, ch. 537, 46 Stat. 785; May 31, 1938, ch. 290, § 5, 52 Stat. 584).

Section consolidates portions of section 375 of title 28, U.S.C., 1940 ed., and section 11-301 of the District of Columbia Code, 1940 ed. The provisions of said section 375 relating to resignation and retirement of judges, and appointment of court officers, are incorporated in sections 294, 371, and 756 of this title. Other provisions of said section 11-301 of the District of Columbia Code are incorporated in section 133 of this title.

Subsection (a), providing for a "chief judge" is new. Such term replaces the terms "senior district judge," and "Chief Justice" of the District Court in the District of Columbia. It is employed in view of the great increase of administrative duties of such judge. The use of the term "chief judge" with respect to the District of Columbia will result in uniform nomenclature for all district courts. The district judges of that court have expressed approval of such designation.

The provision in said section 11-301 of the District of Columbia Code, 1940 ed., that the "Chief Justice" shall be appointed by the President, by and with the advice and consent of the Senate, was omitted for the purpose of establishing a uniform method of creating the position of chief judge in all districts. The District of Columbia is expressly made a judicial district by section 88 of this title.

Subsection (b) is new and conforms with similar provisions respecting associate justices of the Supreme Court and circuit judges in sections 4 and 45 of this title.

Subsection (c) is from the proviso in the second paragraph of section 375 of title 28, U.S.C., 1940 ed., which applied only in cases of appointment of court officers. Here it is made applicable to all district judges.

Subsections (d) and (e) are new, and conform with section 44 of this title relating to precedence of circuit judges.

The official status of the Chief Justice of the District Court for the District of Columbia holding office at the effective date of this act is preserved by section 2 of the bill to enact revised title 28.

### Amendments

1958—Subsec. (a). Pub. L. 85-593 provided that chief judges of district courts cease to serve as such upon reaching the age of seventy, that the youngest district judge act as chief judge where all district judges in regular active service are seventy years or older until a judge under seventy has been appointed and qualified, and that district judge must have served one year before acting as chief judge.

1951—Subsec. (a). Act Oct. 31, 1951, inserted "in active service who is".

### Effective Date of 1958 Amendment

Section 3 of Pub. L. 85-593 provided in part that the amendment to this section shall take effect at the expiration of one year from Aug. 6, 1958, except that the amendment made by this section shall not be effective with respect to any district having two judges in regular active service so long as the district judge holding the position of chief judge of any such district on Aug. 6, 1958, continues to hold such position.

### Chief Justice as Chief Judge

The Chief Justice of the District Court for the District of Columbia in office on Sept. 1, 1948, shall be renamed the chief judge under the provisions of section 2(a) of act June 25, 1948.

## § 137. Division of business among district judges

The business of a court having more than one judge shall be divided among the judges as provided by the rules and orders of the court.

The chief judge of the district court shall be responsible for the observance of such rules and orders, and shall divide the business and assign the cases so far as such rules and orders do not otherwise prescribe.

If the district judges in any district are unable to agree upon the adoption of rules or orders for that purpose the judicial council of the circuit shall make the necessary orders.

(June 25, 1948, ch. 646, 62 Stat. 897.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 27 (Mar. 3, 1911, ch. 231, § 23, 36 Stat. 1090).

Section was rewritten and the practice simplified. It provided for division of business and assignment of cases by agreement of judges and, in case of inability to agree, that the senior circuit judge of the circuit should make necessary orders.

The revised section is consistent with section 332 of this title, that the last paragraph of which requires the judicial council to make all necessary orders for the effective and expeditious administration of the business of the courts within the circuit.

### Section Referred to in Other Sections

This section is referred to in title 48 section 1614.

## § 138. Terms abolished

The district court shall not hold formal terms.

(June 25, 1948, ch. 646, 62 Stat. 897; Oct. 16, 1963, Pub. L. 88-139, § 1, 77 Stat. 248.)

### Historical and Revision Notes

This section was substituted for a number of special provisions fixing stated times for holding terms of court in the several districts, in order to vest in the courts wider discretion and promote greater efficiency in the administration of the business of such courts.

### Amendments

1963—Pub. L. 88-139 substituted "The district court shall not hold formal terms" for "The times for holding regular terms of court at the places fixed by this chapter shall be determined by rule of the district court" in the text, and "Terms abolished" for "Times for holding regular terms" in the catchline.

## § 139. Times for holding regular sessions

The times for commencing regular sessions of the district court for transacting judicial business at the places fixed by this chapter shall be determined by the rules or orders of the court. Such rules or orders may provide that at one or more of such places the court shall be in continuous session for such purposes on all business days throughout the year. At other places a session of the court shall continue for such purposes until terminated by order of final adjournment or by commencement of the next regular session at the same place.

(June 25, 1948, ch. 646, 62 Stat. 897; Oct. 16, 1963, Pub. L. 88-139, § 1, 77 Stat. 248.)

### Historical and Revision Notes

The purpose of this section is to remove all doubt as to whether the mere beginning of a new term at one place ends a prior term begun at another place. As revised, it conforms to a uniform course of judicial decisions. See *U.S.* v. *Perlstein*, 39 F.Supp. 965, 968 (D.C.N.J. 1941), and cases cited.

### Amendments

1963—Pub. L. 88-139 substituted provisions requiring the times for commencing regular sessions of the district court to be determined by the rules or orders of the court, authorizing such rules or orders to provide that at one or more of the places fixed by this chapter, the court shall be in continuous session on all business days throughout the year, and that at other places, a session continues until terminated by order of final adjournment or by commencement of the next regular session at the same place, for provisions that a term continues until terminated by order of final adjournment or by commencement of the next term at the same place, in the text, and "Times for holding regular sessions" for "Term continued until terminated" in the catchline.

### Cross References

Virgin Islands district courts, times for holding sessions, see sections 1613 and 1615 of Title 48, Territories and Insular Possessions.

Courts always open, see section 452 of this title.

### Federal Rules of Civil Procedure

District courts always open, see rule 77, Appendix to this title.

## § 140. Adjournment

(a) Any district court may, by order made anywhere within its district, adjourn or, with the consent of the judicial council of the circuit, pretermit any regular session of court for insufficient business or other good cause.

(b) If the judge of a district court is unable to attend and unable to make an order of adjournment, the clerk may adjourn the court to the next regular session or to any earlier day which he may determine.

(June 25, 1948, ch. 646, 62 Stat. 897; Oct. 16, 1963, Pub. L. 88-139, § 1, 77 Stat. 248.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., §§ 16, 146, 182 (Mar. 3, 1911, ch. 231, §§ 12, 73, 101, 36 Stat. 1088, 1108, 1122; June 12, 1916, ch. 143, 39 Stat. 225; Feb. 20, 1917, ch. 102, 39 Stat. 927; June 13, 1918, ch. 98, 40 Stat. 604; Feb. 26, 1919, ch. 54, 40 Stat. 1184; May 29, 1924, ch. 209, 43 Stat. 243; June 5, 1924, ch. 259, 43 Stat. 387; Jan. 10, 1925, chs. 68, 69, 43 Stat. 730, 731; Feb. 16, 1925, ch. 233, § 1, 43 Stat. 945; May 7, 1926, ch. 255, 44 Stat. 408; Apr. 21, 1928, ch. 395, 45 Stat. 440; Mar. 2, 1929, ch. 539, 45 Stat. 1518; June 28, 1930, ch. 714, 46 Stat. 829; May 13, 1936, ch. 386, 49 Stat. 1271; Aug. 12, 1937, ch. 595, 50 Stat. 625).

Section consolidates section 16 with the third sentence of section 146, and the final proviso in the third paragraph of section 182, all of title 28, U.S.C., 1940 ed.

Said section 16 of title 28 provided for adjournment by the marshal, or clerk, on written order of the judge, in case of inability of the district judge to attend at the commencement of any regular, adjourned or special term, or any time during such term.

Said sections 146 and 182 thereof, related to the district courts of Colorado and Oklahoma, only, and contained special provisions for adjournment. Subsection (b) omits the requirement of written order where the judge is unable to make such order.

The revised section broadens these provisions, and vests discretionary power in the court, by order made anywhere within the district, to adjourn any term of court "for insufficient business or other good cause." To establish uniformity, the special provisions relating to Colorado and Oklahoma were omitted.

Other provisions of said sections 146 and 182 of title 28, U.S.C., 1940 ed., are incorporated in sections 85 and 116 of this title.

The provision of subsection (a) authorizing the district court, with the consent of the judicial council of the circuit, to pretermit any term of court for insufficient business or other good cause, is inserted to obviate the expense and inconvenience of convening and adjourning a term for which no need exists.

### Amendments

1963—Subsec. (a). Pub. L. 88-139 substituted "session" for "term".

Subsec. (b). Pub. L. 88-139 substituted "session" for "term".

## § 141. Special sessions; places; notice

Special sessions of the district court may be held at such places in the district as the nature of the business may require, and upon such notice as the court orders.

Any business may be transacted at a special session which might be transacted at a regular session.

(June 25, 1948, ch. 646, 62 Stat. 897; Oct. 16, 1963, Pub. L. 88-139, § 1, 77 Stat. 248.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 15 (Mar. 3, 1911, ch. 231, § 11, 36 Stat. 1089).

Section was rewritten to include provision that notice of special terms should conform to rules approved by the judicial council of the circuit, thus insuring a uniform practice among the courts for convening special terms.

Changes of phraseology were made.

### Amendments

1963—Pub. L. 88-139 substituted "sessions" for "terms" and "session" for "term" wherever appearing in both text and catchline, and deleted "pursuant to rules approved by the judicial council of the circuit" following "court orders" in the text.

### Cross References

Virgin Islands district courts, times for holding sessions, see sections 1613 and 1615 of Title 48, Territories and Insular Possessions.

## § 142. Accommodations at places for holding court

Court shall be held only at places where Federal quarters and accommodations are available, or suitable quarters and accommodations are furnished without cost to the United States. The foregoing restrictions shall not, however, preclude the Administrator of General Services, at the request of the Director of the Administrative Office of the United States Courts, from providing such court quarters and accommodations as the Administrator determines can appropriately be made available at places where regular terms of court are authorized by law to be held, but only if such court quarters and accommodations have been approved as necessary by the judicial council of the appropriate circuit.

(June 25, 1948, ch. 646, 62 Stat. 898; Oct. 9, 1962, Pub. L. 87-764, 76 Stat. 762.)

### Historical and Revision Notes

This section is included to permit the omission of 17 special provisions prohibiting the holding of court at certain designated places unless suitable quarters and accommodations are provided without cost to the Government. (See sections 144, 147, 149, 150, 157, 166, 167, 172, 177, 178, 178a, 179, 181, 182, 186, 188, 194 of title 28 U.S.C., 1940 ed.)

### Amendments

1962—Pub. L. 87-764 inserted sentence stating that the foregoing restrictions shall not preclude the Administrator of General Services, at the request of the Director of the Administrative Office, from providing such court quarters and accommodations as the Administrator determines can appropriately be made available at places where regular terms of court are authorized by law to be held, but only if such quarters and accommodations have been approved as necessary by the judicial council of the appropriate circuit.

### Quarters at Akron, Ohio

Pub. L. 87-833, Oct. 15, 1962, 76 Stat. 959, provided: "That the limitations and restrictions contained in section 142 of title 28, United States Code, shall be waived with respect to the holding of court at Akron, Ohio, by the United States District Court for the Northern District of Ohio, Eastern Division."

### Quarters at Richland, Washington

Pub. L. 87-699, Sept. 25, 1962, 76 Stat. 598, provided: "That the limitations and restrictions contained in section 142, title 28, United States Code, shall be waived insofar as pertains to holding court by the United States District Court for the Eastern District of Washington, southern division, at Richland, Washington."

### Quarters at Fort Myers, Saint Petersburg, Fort Pierce, and West Palm Beach, Florida

Pub. L. 87-562, § 4, July 30, 1962, 76 Stat. 248, provided that: "The limitations and restrictions contained in section 142, title 28, United States Code, shall be waived with respect to the holding of court at Fort Myers, and Saint Petersburg, Florida, by the United States District Court for the Middle District of Florida, and at Fort Pierce, and West Palm Beach, Florida, by the United States District Court for the Southern District of Florida."

### Quarters at Marshall, Texas

Pub. L. 87-560, July 27, 1962, 76 Stat. 247, provided: "That the limitations and restrictions contained in section 142 of title 28, United States Code, shall be waived with respect to the holding of court at Marshall, Texas, by the United States District Court for the Eastern District of Texas."

### Quarters at Decatur, Alabama

Pub. L. 87-559, July 27, 1962, 76 Stat. 246, provided: "That the limitations and restrictions contained in section 142 of title 28 of the United States Code, shall be waived with respect to the holding of court at Decatur, Alabama, by the United States District Court for the Northern District of Alabama."

### Quarters at Winchester, Tennessee

Pub. L. 87-553, July 27, 1962, 76 Stat. 222, provided: "That the limitations and restrictions contained in section 142, title 28, of the United States Code, shall be waived insofar as pertains to holding court by the United States District Court for the Eastern District of Tennessee at Winchester, Tennessee."

#### Quarters at Bridgeport, Connecticut

Pub. L. 87-551, July 27, 1962, 76 Stat. 221, provided: "That the limitations and restrictions contained in section 142, title 28, United States Code, shall be waived with respect to the holding of court at Bridgeport, Connecticut, by the United States District Court for the District of Connecticut."

#### Quarters at Lafayette, Louisiana

Pub. L. 87-337, Oct. 3, 1961, 75 Stat. 750, provided "That the limitations and restrictions contained in section 142 of title 28, United States Code, shall be waived with respect to the holding of court at Lafayette, Louisiana, by the United States District Court for the Western District of Louisiana."

#### Quarters at Kalamazoo, Michigan; Fayetteville, North Carolina; and Dyersburg, Tennessee

Pub. L. 87-36, § 3(g), May 19, 1961, 75 Stat. 83, provided that: "The limitations and restrictions contained in section 142 of title 28, United States Code, shall be waived with respect to the holding of court at Kalamazoo, Michigan, by the United States District Court for the Western District of Michigan, at Fayetteville, North Carolina, by the United States District Court for the Eastern District of North Carolina, and at Dyersburg, Tennessee, by the United States District Court for the Western District of Tennessee."

#### Quarters at Durant, Oklahoma

Pub. L. 86-366, Sept. 22, 1959, 73 Stat. 647, provided: "That the limitations and restrictions contained in section 142, title 28, of the United States Code, shall be waived insofar as pertains to holding court by the United States District Court for the Eastern District of Oklahoma at Durant, Oklahoma."

#### Quarters at Bryson City, North Carolina

Act July 20, 1956, ch. 657, 70 Stat. 594, provided: "That the limitations and restrictions contained in section 142, title 28, of the United States Code, shall be waived insofar as pertains to holding court by the United States District Court for the Western District of North Carolina at Bryson City, North Carolina."

#### Quarters at Klamath Falls, Oregon

Act Sept. 23, 1950, ch. 1006, 64 Stat. 982, provided: "That section 142 of title 28 of the United States Code (relating to accommodations at places for holding court) shall not apply to the holding of court at Klamath Falls, Oregon, by the United States District Court for the District of Oregon."

#### Quarters at Newnan, Georgia

Act Aug. 21, 1950, ch. 767, 64 Stat. 469, provided that: "The limitations and restrictions contained in section 142, title 28, of the United States Code, shall be waived insofar as pertains to holding court for the Newnan Division of the United States District Court at Newnan, Georgia."

#### Quarters at Rock Island, Illinois

Act Aug. 10, 1950, ch. 675, § 2, 64 Stat. 438, provided that : "Notwithstanding the provisions of section 142, title 28, United States Code, quarters and accommodations for holding court for the United States district court for the southern district, northern division of Illinois, may be furnished in Rock Island, Illinois, in any proposed Federal building construction project."

#### Quarters at Thomasville, Georgia

Act Oct. 26, 1949, ch. 744, 63 Stat. 923, provided: "That, notwithstanding the provisions of section 142 of title 28, United States Code, quarters and accommodations for holding court for the United States District Court for the Middle District of Georgia may be furnished in Thomasville, Georgia, in any proposed Federal building construction project."

#### Quarters at Brunswick, Georgia

Act Oct. 26, 1949, ch. 740, 63 Stat. 921, provided: "That the limitations and restrictions contained in section 142, title 28, of the United States Code, shall be waived insofar as pertains to holding court for the Brunswick Division of the United States District Court at Brunswick, Georgia."

### § 143. Vacant judgeship as affecting proceedings

When the office of a district judge becomes vacant, all pending process, pleadings and proceedings shall, when necessary, be continued by the clerk until a judge is appointed or designated to hold such court.

(June 25, 1948, ch. 646, 62 Stat. 898.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 26 (Mar. 3, 1911, ch. 231, § 22, 36 Stat. 1090).

The last clause of section 26 of title 28, U.S.C., 1940, ed., prescribing the powers of a designated judge was omitted as covered by section 296 of this title.

Minor changes were made in phraseology.

### § 144. Bias or prejudice of judge

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

(June 25, 1948, ch. 646, 62 Stat. 898; May 24, 1949, ch. 139, § 65, 63 Stat. 99.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 25 (Mar. 3, 1911, ch. 231, § 21, 36 Stat. 1090).

The provision that the same procedure shall be had when the presiding judge disqualifies himself was omitted as unnecessary. (See section 291 et seq. and section 455 of this title.)

Words, "at which the proceeding is to be heard," were added to clarify the meaning of words, "before the beginning of the term." (See *U.S.* v. *Costea*, D.C.Mich. 1943, 52 F.Supp. 3.)

Changes were made in phraseology and arrangement.

#### 1949 Act

This amendment clarifies the intent in section 144 of title 28, U.S.C., to conform to the law as it existed at the time of the enactment of the revision limiting the filing of affidavits of prejudice to one such affidavit in any case.

#### Amendments

1949—Act May. 24, 1949, substituted in second sentence of second par. "in any case" for "as to any judge".

### Abolition of Terms

For abolition of formal terms of the court and replacement by sessions, see sections 138 and 139 of this title.

## CHAPTER 7—COURT OF CLAIMS

Sec.
171. Appointment and number of judges; character of court.
172. Precedence of judges.
173. Tenure and salaries of judges.
174. Terms.
175. Assignment of judges; divisions; hearings; quorum; decisions.

### Amendments

1966—Pub. L. 89–425, § 3, May 11, 1966, 80 Stat. 140, substituted "Assignment of judges; divisions; hearings; quorum; decisions" for "Quorum" in item 175.

1954—Act Sept. 3, 1954, ch. 1263, § 38, 68 Stat. 1240, added "; character of court" to item 171.

### Cross References

Jurisdiction of Court of Claims, see section 1491 et seq. of this title.

### Rules of the United States Court of Claims

See Appendix to this title.

### § 171. Appointment and number of judges; character of court

The President shall appoint, by and with the advice and consent of the Senate, a chief judge and six associate judges who shall constitute a court of record known as the United States Court of Claims. Such court is hereby declared to be a court established under article III of the Constitution of the United States.

(June 25, 1948, ch. 646, 62 Stat 898; July 28, 1953, ch. 253, § 1, 67 Stat. 226; Sept. 3, 1954, ch. 1263, § 39(a), 68 Stat. 1240; May 11, 1966, Pub. L. 89–425, § 1(b), 80 Stat. 140.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed. § 241 (Mar. 3, 1911, ch. 231, § 136, 36 Stat. 1135; Feb. 25, 1919, ch. 29, § 4, 40 Stat. 1157; Dec. 13, 1926, ch. 6, § 1 44 Stat. 919).

This section contains a part of section 241 of title 28, U.S.C., 1940 ed. The remainder of such section, relating to tenure, salaries and oath, is incorporated in sections 173 and 453 of this title.

The term "chief judge" was substituted for "Chief Justice." (See reviser's note under section 136 of this title.)

Words "a court of record known as" were added. For similar provision covering other Federal courts, see sections 132, 211, and 251 of this title.

The official status of the Chief Justice of the Court of Claims holding office on the effective date of this act is preserved by section 2 of the bill to enact revised title 28.

Minor changes were made in arrangement and phraseology.

### Amendments

1966—Pub. L. 89–425 increased the number of associate judges from four to six.

1954—Act Sept. 3, 1954, added "; character or court" to the catchline.

1953—Act July 28, 1953, added second sentence.

### Additional Judgeships

Section 1(a) of Pub. L. 89–425 provided that: "The President shall appoint, by and with the advice and consent of the Senate, two additional associate judges for the Court of Claims."

### Chief Justice to Be Known as Chief Judge

Section 2(a) of act June 25, 1948, provided in part that the Chief Justice of the Court of Claims in office on Sept. 1, 1948, shall be thereafter known as the Chief Judge.

### Continuation of Organization of Court

Section 2(b) of act June 25, 1948, provided in part that the provisions of this title as set out in section 1 of act June 25, 1948, with respect to the organization of the court, shall be construed as continuations of existing law, and the tenure of the judges, officers, and employees, in office on Sept. 1, 1948, shall not be affected by its enactment, but each of them shall continue to serve in the same capacity under the appropriate provisions of this title, pursuant to his prior appointment.

### Cross References

Oath of judge, see section 453 of this title.

Official station of Court of Claims judges, see section 456 of this title.

### § 172. Precedence of judges

The chief judge of the Court of Claims shall have precedence and preside at any session of the court which he attends.

The other judges shall have precedence and preside according to the seniority of their commissions. Judges whose commissions bear the same date shall have precedence according to seniority in age.

(June 25, 1948, ch. 646, 62 Stat. 898.)

### Historical and Revision Notes

This section applies to the judges of the Court of Claims the same rule of precedence applicable to judges of other courts. (See sections 45, 136, 212, and 253 of this title.)

### Chief Justice as Chief Judge

The Chief Justice in office on Sept. 1, 1948, shall be renamed the chief judge under the provisions of section 2(a) of act June 25, 1948.

### § 173. Tenure and salaries of judges

The chief judges and associate judges of the Court of Claims shall hold office during good behavior. Each shall receive a salary at an annual rate determined under section 225 of the Federal Salary Act of 1967 (2 U.S.C. 351–361), as adjusted by section 461 of this title.

(June 25, 1948, ch. 646, 62 Stat. 898; Mar. 2, 1955, ch. 9, § 1(d), 69 Stat. 10; Aug. 14, 1964, Pub. L. 88–426, title IV, § 403(d), 78 Stat. 434; Aug. 9, 1975, Pub. L. 94–82, title II, § 205(b)(4), 89 Stat. 422.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 241 (Mar. 3, 1911, ch. 231, § 136, 36 Stat. 1135; Feb. 25, 1919, ch. 29, § 4, 40 Stat. 1157; Dec. 13, 1926, ch. 6, § 1, 44 Stat. 919; July 31, 1946, ch. 704, § 1, 60 Stat. 716).

This section is based on part of section 241 of title 28, U.S.C., 1940 ed. That portion relating to number, appointment of judges and their oaths, is incorporated in sections 171 and 453 of this title.

A provision for monthly salary payments was omitted since time of payment is a matter for administrative determination. (See 20 Comp. Gen. 834.)

The term "chief judge" was substituted for "Chief Justice." (See reviser's note under section 136 of this title.)

Minor changes were made in phraseology.

### AMENDMENTS

1975—Pub. L. 94-82 substituted provision that the chief judge and associate judges receive a salary at an annual rate determined under section 225 of the Federal Salary Act of 1967, as adjusted by section 461 of this title, for provision granting each such judge a salary of $33,000 a year.

1964—Pub. L. 88-426 increased the salary of the judges of the Court of Claims from $25,500 to $33,000.

1955—Act Mar. 2, 1955, increased the salaries of the judges of the Court of Claims from $17,500 to $25,500 a year.

### EFFECTIVE DATE OF 1964 AMENDMENT

Amendment by Pub. L. 88-426 effective on the first day of the first pay period which begins on or after July 1, 1964, except to the extent provided in section 501(c) of Pub. L. 88-426, see section 501 of Pub. L. 88-426.

### EFFECTIVE DATE OF 1955 AMENDMENT

Amendment by act Mar. 2, 1955, effective Mar. 1, 1955, see section 5 of act Mar. 2, 1955, set out as an Effective Date of 1955 Amendment note under section 31 of Title 2, The Congress.

### INCREASE OF SALARIES

Salaries of judges increased to $57,500 per annum, upon recommendation of the President of the United States, see note set out under section 358 of Title 2, The Congress.

Salaries of judges increased to $46,800 effective on the first day of the first pay period beginning on or after Oct. 1, 1976, see Ex. Ord. No. 11941, Oct. 1, 1976, 41 F.R. 43889, set out as a note under section 5332 of Title 5, Government Organization and Employees. Ex. Ord. No. 11941, further provided that pursuant to the Legislative Branch Appropriation Act, 1977, funds are not available to pay a salary at a rate which exceeds the rate in effect on Sept. 30, 1976, which was $44,600.

Salary of judge increased from $33,000 to $42,500 per annum, commencing February 14, 1969, upon recommendation of the President of the United States, see note set out under section 358 of Title 2, The Congress.

Prior to June 25, 1948, salaries of judges of the Court of Claims were increased as follows:

The salaries of the chief judge and associate judges were increased from $12,500 to $17,500 a year by act July 31, 1946, ch. 704, § 1, 60 Stat. 716.

The salary of the Chief Justice, now the chief judge, was increased from $8,000 to $12,500 a year, and the salaries of the associate justices, now judges, were increased from $7,500 to $12,500 a year by act Dec. 13, 1926, ch. 6, § 1, 44 Stat. 919.

The salary of the Chief Justice was increased from $6,500 to $8,000 a year, and the salaries of the associate justices were increased from $6,000 to $7,500 a year by act Feb. 25, 1919, ch. 29, § 1, 40 Stat. 1156.

The salary of the chief justice was set at $6,500, and the salaries of the associate justices were set at $6,000 by the Judicial Code of 1911, act Mar. 3, 1911, ch. 231, § 1, 36 Stat. 1135.

### CROSS REFERENCES

Retirement of judges, see section 371 et seq. of this title.

## § 174. Terms

The Court of Claims shall hold at the seat of government an annual term at a time to be fixed by rule of court.

(June 25, 1948, ch. 646, 62 Stat. 898.)

### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 243 (Mar. 3, 1911, ch. 231, § 138, 36 Stat. 1136).

This section is based on the first sentence of section 243 of title 28, U.S.C., 1940 ed. The remainder of said section is incorporated in section 175 of this title.

Words "the seat of government" were substituted for "the city of Washington" to conform to similar language respecting the Supreme Court. (See section 2 of this title.)

Words "to be fixed by rule of court" were added to provide greater flexibility in administering the business of the court. For similar provisions covering the district courts, see section 138 of this title.

Word "term" was substituted for "session" for uniformity.

Minor changes were made in phraseology.

### CROSS REFERENCES

Courts always open, see section 452 of this title.

Official station of Court of Claims judges, see section 456 of this title.

### RULES OF THE UNITED STATES COURT OF CLAIMS

Court always open; term, see rules 3 and 6, Appendix to this title.

## § 175. Assignment of judges; divisions; hearings; quorum; decisions

(a) Judges of the Court of Claims shall sit on the courts and its divisions in such order and at such times as the court directs.

(b) The Court of Claims may authorize the hearing and determination of cases and controversies by separate divisions, each consisting of three judges. Such divisions shall sit at the times and places and hear the cases and controversies assigned as the court directs.

(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing en banc is ordered by the court or by the chief judge. The court en banc for an initial hearing shall consist of the judges of the Court of Claims in regular active service. In case of a vacancy in the court or of the inability of a judge thereof in regular active service to sit, a justice or judge assigned to the court pursuant to chapter 13 of this title shall be competent to sit in the court en banc when designated by the court to do so.

(d) A rehearing en banc may be ordered by a majority of the judges of the Court of Claims in regular active service. The court en banc for a rehearing shall consist of the judges of the Court of Claims in regular active service. A judge of the Court of Claims who has retired from regular active service shall also be competent to sit as a judge of the court en banc in the rehearing of a case or controversy if he sat on the court or division at the original hearing thereof.

(e) Two judges shall constitute a quorum of a division of the Court of Claims, four judges shall constitute a quorum of a court en banc.

(f) A majority of the judges or justices who actually sit on the court or division or court in banc must concur in any decision.

(Added Pub. L. 89-425, § 2, May 11, 1966, 80 Stat. 140.)

### PRIOR PROVISIONS

A prior section 175, act June 25, 1948, ch. 646, 62 Stat. 898, which required three judges of the Court of Claims to constitute a quorum and the concurrence of three judges for any decision, was stricken by section 2 of Pub. L. 89-425.

## CHAPTER 9—COURT OF CUSTOMS AND PATENT APPEALS

Sec.
211. Appointment and number of judges.
212. Precedence of judges.
213. Tenure and salaries of judges.
214. Sessions.
215. Quorum.
216. Opinions.

#### CROSS REFERENCES

Jurisdiction of Court of Customs and Patent Appeals, see section 1541 et seq. of this title.

#### RULES OF THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

See Title 35, Appendix, Patents.

#### RULES OF THE UNITED STATES CUSTOMS COURT

Procedure in cases appealed to Court of Customs and Patent Appeals, see Rule 13.1, Appendix to this title.

### § 211. Appointment and number of judges

The President shall appoint, by and with the advice and consent of the Senate, a chief judge and four associate judges who shall constitute a court of record known as the United States Court of Customs and Patent Appeals. Such court is hereby declared to be a court established under article III of the Constitution of the United States.

(June 25, 1948, ch. 646, 62 Stat. 899; Aug. 25, 1958, Pub. L. 85-755, § 1, 72 Stat. 848.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§ 301, 307 (Mar. 3, 1911, ch. 231, §§ 188, 194, 36 Stat. 1143, 1145; Feb. 25, 1919, ch. 29, §§ 2, 5, 40 Stat. 1156, 1157; Dec. 13, 1926, ch. 6, § 1, 44 Stat. 919; Mar. 2, 1929, ch. 488, § 1, 45 Stat. 1475).

Term "chief judge" was substituted for "presiding judge." (See Reviser's Note under section 45 of this title.)

The provision of said section 301 of title 28, U.S.C., 1940 ed., requiring designation of the "presiding" judge in the presidential commission, was omitted as unnecessary in view of the language of the revised section.

Other provisions of section 301 of title 28, U.S.C., 1940 ed., are incorporated in sections 212, 213, 215, 293, and 296 of this title.

The provision of said section 307 of title 28, U.S.C., 1940 ed., that the court shall prescribe the form and style of its seal, was omitted. The court may more appropriately provide for these by rule.

The provision of said section 307 that the court shall "exercise such powers conferred by law as may be conformable and necessary to the exercise of its jurisdiction," was omitted as surplusage.

The final sentence of said section 307 providing that the court "shall have power to review any decision or matter within its jurisdiction, and may affirm, modify, or reverse the same and remand the case with such orders as may seem to it proper in the premises, which shall be executed accordingly" was omitted as unnecessary.

The provisions of said section 307 that the court shall prescribe the form of its writs and other process and procedure, and shall have power to establish all rules and regulations for the conduct of the business of the court, and as may be needful for the uniformity of decisions within its jurisdiction as conferred by law, are incorporated in section 2071 of this title.

The official status of the presiding judge of the Court of Customs and Patent Appeals holding office on the effective date of this act is preserved by section 2 of the bill to enact revised title 28.

Minor changes were made in phraseology.

#### AMENDMENTS

1958—Pub. L. 85-755 amended section to declare the United States Court of Customs and Patent Appeals to be a court established under article III of the Constitution of the United States.

#### JURISDICTION OF UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Section 7 of Pub. L. 85-755 provided that: "Nothing contained in this Act [amending sections 211 and 291 to 295 of this title] shall be construed in any way to limit or alter the jurisdiction heretofore conferred upon the United States Court of Customs and Patent Appeals by any provision of law."

#### CHIEF JUSTICE TO BE KNOWN AS CHIEF JUDGE

Section 2(a) of act June 25, 1948, provided in part that the Chief Justice of the Court of Customs and Patent Appeals in office on Sept. 1, 1948, shall be thereafter known as the Chief Judge.

#### CONTINUATION OF ORGANIZATION OF COURT

Section 2(b) of act June 25, 1948, provided in part that the provisions of this title as set out in section 1 of act June 25, 1948, with respect to the organization of the court, shall be construed as continuations of existing law, and the tenure of the judges, officers, and employees in office on Sept. 1, 1948, shall not be affected by its enactment, but each of them shall continue to serve in the same capacity under the appropriate provisions of this title pursuant to his prior appointment.

#### CROSS REFERENCES

Oath of judge, see section 453 of this title.

Official station of judges of the Court of Customs and Patent Appeals, see section 456 of this title.

### § 212. Precedence of judges

The chief judge of the Court of Customs and Patent Appeals shall have precedence and preside at any session of the court which he attends.

The associate judges shall have precedence and preside according to the seniority of their commissions. Judges whose commissions bear the same date shall have precedence according to seniority in age.

(June 25, 1948, ch. 646, 62 Stat. 899.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 301 (Mar. 3, 1911, ch. 231, § 188, 36 Stat. 1143; Mar. 2, 1929, ch. 488, § 1, 45 Stat. 1475).

The first and third sentences were added to conform to the language of similar sections of this title relating to precedence. (See sections 45, 136, 172, 253, and 273 of this title.)

Other provisions of said section 301 of title 28, U.S.C., 1940 ed., are incorporated in sections 211, 213, 215, 293, and 296 of this title.

#### PRESIDING JUDGE AS CHIEF JUDGE

The presiding judge in office on Sept. 1, 1948, shall be renamed the chief judge under the provisions of section 2(a) of act June 25, 1948.

### § 213. Tenure and salaries of judges

Judges of the Court of Customs and Patent Appeals shall hold office during good behavior. Each shall receive a salary at an annual rate determined under section 225 of the Federal

Salary Act of 1967 (2 U.S.C. 351-361), as adjusted by section 461 of this title.

(June 25, 1948, ch. 646, 62 Stat. 899; Mar. 2, 1955, ch. 9. § 1(e), 69 Stat. 10; Aug. 14, 1964, Pub. L. 88-426, title IV, § 403(e), 78 Stat. 434; Aug. 9, 1975, Pub. L. 94-82, title II, § 205(b)(5), 89 Stat. 422.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., §§ 301, 301a (Mar. 3, 1911, ch. 231, § 188, 36 Stat. 1143; Feb. 25, 1919, ch. 29, §§ 2, 5, 40 Stat. 1156, 1157; Dec. 13, 1926, ch. 6, § 1, 44 Stat. 919; Mar. 2, 1929, ch. 488, § 1, 45 Stat. 1475; June 17, 1930, ch. 497, title IV, § 646, 46 Stat. 762; July 31, 1946, ch. 704, § 1, 60 Stat. 716).

This section consolidates those parts of sections 301 and 301a of title 28, U.S.C., 1940 ed., that relate to the tenure and salaries of the judges of the Court of Customs and Patent Appeals.

A provision for payment of salaries in monthly installments was omitted, since time of payment is a matter of administrative convenience. (See 20 Comp. Gen. 834.)

Other provisions of said section 301 of title 28, U.S.C., 1940 ed., are incorporated in sections 211, 212, 215, 293, and 296 of this title.

The remainder of said section 301a was omitted as unnecessary in view of sections 371 and 372 of this title providing for the resignation and retirement of judges. It related to the inclusion of service of judges rendered before March 2, 1929, for purposes of retirement.

Changes were made in phraseology.

#### Amendments

1975—Pub. L. 94-82 substituted provision that the judges receive a salary at an annual rate determined under section 225 of the Federal Salary Act of 1967, as adjusted by section 461 of this title, for provision that each such judge receive a salary of $33,000.

1964—Pub. L. 88-426 increased the salary of the judges of the Court of Customs and Patent Appeals from $25,500 to $33,000.

1955—Act Mar. 2, 1955, increased the salaries of the judges of the Court of Customs and Patent Appeals from $17,500 to $25,500 a year.

#### Effective Date of 1964 Amendment

Amendment by Pub. L. 88-426 effective on the first day of the first pay period which begins on or after July 1, 1964, except to the extent provided in section 501(c) of Pub. L. 88-426, see section 501 of Pub. L. 88-426.

#### Effective Date of 1955 Amendment

Amendment by Act Mar. 2, 1955, effective Mar. 1, 1955, see section 5 of act Mar. 2, 1955, set out as an Effective Date of 1955 Amendment note under section 31 of Title 2, The Congress.

#### Increase of Salaries

Salaries of judges increased to $57,500 per annum, upon the recommendation of the President of the United States, see note set out under section 358 of Title 2, The Congress.

Salaries of judges increased to $46,800 effective on the first day of the first pay period beginning on or after Oct. 1, 1976, see Ex. Ord. No. 11941, Oct. 1, 1976, 41 F.R. 43889, set out as a note under section 5332 of Title 5, Government Organization and Employees. Ex. Ord. No. 11941, further provided that pursuant to the Legislative Branch Appropriation Act, 1977, funds are not available to pay a salary at a rate which exceeds the rate in effect on Sept. 30, 1976, which was $44,600.

Salary of judge increased from $33,000 to $42,500 per annum, commencing Feb. 14, 1969, upon recommendation of the President of the United States, see note set out under section 358 of Title 2, The Congress.

Prior to June 25, 1948, salaries of judges of Court of Customs and Patent Appeals were increased as follows:

The salaries of judges of the Court of Customs and Patent Appeals were increased from $12,500 to $17,500 a year by act July 13, 1946, ch. 704, § 1, 60 Stat. 716.

The salaries of the presiding judge and other judges of the Court of Customs Appeals, changed to the Court of Customs and Patent Appeals by act Mar. 2, 1929, ch. 488, § 1, 45 Stat. 1475, were increased from $8,500 to $12,500 a year by act Dec. 13, 1926, ch. 6, 44 Stat. 919.

The salaries of the presiding judge and other judges were increased from $7,000 to $8,500 a year by act Feb. 25, 1919, ch. 29, § 1, 40 Stat. 1157.

Salaries of these judges were set at $7,000 a year by the Judicial Code of 1911, act Mar. 3, 1911, ch. 231, § 1, 36 Stat. 1143.

#### Cross References

Retirement of judges, see section 371 et seq. of this title.

### § 214. Sessions

The Court of Customs and Patent Appeals may hold court at such times and places as it may fix by rule.

(June 25, 1948, ch. 646, 62 Stat. 899.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 302 (Mar. 3, 1911, ch. 231, § 189, 36 Stat. 1143; Mar. 2, 1929, ch. 488, § 1, 45 Stat. 1475).

This section constitutes only a part of section 302 of title 28, U.S.C., 1940 ed.

Words "times and" were added to make explicit a power which the court exercises in the absence of statutory authority.

The part of said section 302 providing that the court shall always be open is incorporated in section 452 of this title.

The part of said section 302 providing for traveling expenses and the expenses of stenographic clerks is incorporated in sections 456 and 604 of this title.

Changes were made in phraseology.

#### Cross References

Courts always open, see section 452 of this title.

#### Rules of the United States Court of Customs and Patent Appeals

Sessions, see rule 1.3, Title 35, Appendix, Patents.

### § 215. Quorum

Three judges of the Court of Customs and Patent Appeals constitute a quorum. The concurrence of three judges is necessary to any decision.

(June 25, 1948, ch. 646, 62 Stat. 899.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., §§ 301, 302 (Mar. 3, 1911, ch. 231, §§ 188, 189, 36 Stat. 1143; Mar. 2, 1929, ch. 488, § 1, 45 Stat. 1475).

Other provisions of said section 301 of title 28, U.S.C., 1940 ed., are incorporated in sections 211-213, 293, and 296 of this title.

Changes were made in phraseology.

### § 216. Opinions

The Court of Customs and Patent Appeals, on each appeal from a Patent Office decision, shall file a written opinion as part of the record and send a certified copy to the Commissioner of Patents who shall record it in the Patent Office.

(June 25, 1948, ch. 646, 62 Stat. 899.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 312 (Mar. 2, 1929, ch. 488, § 3, 45 Stat. 1476).

Changes were made in phraseology.

### Change of Name

"Patent Office" and "Commissioner of Patents" redesignated "Patent and Trademark Office" and "Commissioner of Patents and Trademarks", respectively, by section 3 of Pub. L. 93-596, Jan. 2, 1975, 88 Stat. 1949, set out as a note under section 1 of Title 35, Patents.

### Transfer of Functions

The functions of all other officers of the Department of Commerce and all functions of all agencies and employees of the Department, were, with a few exceptions, transferred to the Secretary of Commerce, with power vested in him to authorize their performance or the performance of any of his functions by any of the officers, agencies, and employees, by Reorg. Plan No. 5 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3174, 64 Stat. 1263, set out in the Appendix to Title 5, Government Organization and Employees. The Patent Office, referred to in this section, an agency of the Department of Commerce, and the Commissioner of Patents, referred to in this section, is an officer of the Department.

### Cross References

Distribution of reports, see section 411 et seq. of this title.

## CHAPTER 11—CUSTOMS COURT

Sec.
251. Appointment and number of judges; offices.
252. Tenure and salaries of judges.
253. Duties of chief judge; precedence of judges.
254. Single-judge trial.
255. Three-judge trials.
256. Trials at ports other than New York.
257. Publication of decisions.

### Historical and Revision Notes

The "Board of General Appraisers" was designated "United States Customs Court" by act May 28, 1926, ch. 411, § 1, 44 Stat. 669. General provisions concerning such court were incorporated in section 1518 of title 19, U.S.C., 1940 ed., Customs Duties, until amended by act October 10, 1940, ch. 843, § 1, 54 Stat. 1101, adding a new section to the Judicial Code of 1911, when they were transferred to section 296 of title 28, U.S.C., 1940 ed. They are retained in title 28 by this revision.

In this connection former Congressman Walter Chandler said, "Among the major subjects needing study and revision are special courts, such as the Customs Court, which should be fitted into the judicial system." (See U.S. Law Weekly, Nov. 7, 1939.)

### History of Court

The United States Customs Court as "constituted on June 17, 1930", consisted of nine members as provided by act Sept. 21, 1922, ch. 356, title IV, § 518, 42 Stat. 972, which established the Board of General Appraisers, designated the "United States Customs Court" by act May 28, 1926, ch. 411, § 1, 44 Stat. 669.

Provisions similar to these were contained in act Sept. 21, 1922, ch. 356, title IV, § 518, 42 Stat. 972. That section was superseded by section 518 of the Tariff Act of 1930, and was repealed by section 651 (a)(1) of said 1930 act.

The sentence in the former first paragraph as to sitting in a case previously participated in, is from act Aug. 5, 1909, ch. 6, § 28, 36 Stat. 98, which combined and amended Customs Administrative Act June 10, 1890, ch. 407, § 12, 26 Stat. 136, and section 31, as added by act May 27, 1908, ch. 205, 35 Stat. 406. Section 12 of the act of 1890 was expressly saved from repeal by act Sept. 21, 1922, ch. 356, title IV, § 643, 42 Stat. 989, and prior acts, but its provisions, other than the sentence above mentioned, were omitted from the Code.

Provisions for the review of decisions of Boards of General Appraisers by the Circuit Courts, made by section 15 of the Customs Administrative Act of June 10, 1890, ch. 407, were superseded by provisions for such review by the Court of Customs Appeals created by section 29 added to that act by the Payne-Aldrich Tariff Act of Aug. 5, 1909, ch. 6. The provisions of said new section 29 were incorporated in and superseded by chapter 8 of the Judicial Code of March 3, 1911, incorporated into the Code as former chapter 8 of Title 28, Judicial Code and Judiciary.

R.S. § 2608 provided for the appointment of four appraisers of merchandise, to be employed in visiting ports of entry under the direction of the Secretary of the Treasury, and to assist in the appraisement of merchandise as might be deemed necessary by the Secretary to protect and insure uniformity in the collection of the revenue from customs. It was repealed by act June 10, 1890, ch. 407, § 29, 26 Stat. 141.

R.S. § 2609 provided for the appointment of merchant appraisers. R.S. § 2610 made every merchant refusing to serve as such appraiser liable to a penalty. Both sections were superseded by the provisions relating to appraisers and appraisements of the Customs Administrative Act of June 10, 1890, ch. 407, 26 Stat. 131, and subsequent acts, and were repealed by act Sept. 21, 1922, ch. 356, title IV, § 642, 42 Stat. 989.

R.S. § 2945, which contained a provision similar to that of R.S. § 2610, was repealed, without mention of section 2610, by said Customs Administrative Act of June 10, 1890, ch. 407, § 29, 26 Stat. 141, and was again repealed by section 642 of act Sept. 21, 1922.

R.S. § 2725, which prescribed the compensation of merchant appraisers, and section 2726, which prescribed the salary of the general appraiser at New York, were superseded by the provisions relating to general appraisers and appraisers made by the Customs Administrative Act of June 10, 1890, ch. 407, §§ 12, 13, 26 Stat. 136, as amended by the Payne-Aldrich Act of Aug. 5, 1909, ch. 6, § 28.

R.S. § 2727 fixed the salary of the four general appraisers at the sum of $2,500 a year each, and their actual traveling expenses. It was repealed by act Feb. 27, 1877, ch. 69, 19 Stat. 246.

### Amendments

1970—Pub. L. 91-271, title I, § 123(a), June 2, 1970, 84 Stat. 282, substituted "Single-judge trial" for "Divisions; powers and assignments" in item 254, and "Three-judge trials" for "Publication of decisions" in item 255, and added items 256 and 257.

### Cross References

Jurisdiction of Customs Court, see section 1581 et seq. of this title.

### Rules of the United States Customs Court

See Appendix to this title.

### § 251. Appointment and number of judges; offices

The President shall appoint, by and with the advice and consent of the Senate, nine judges who shall constitute a court of record known as the United States Customs Court. Such court is hereby declared to be a court established under article III of the Constitution of the United States. Not more than five of such judges shall be appointed from the same political party.

The President shall designate from time to time one of the judges to act as chief judge.

The offices of the court shall be located at the port of New York.

(June 25, 1948, ch. 646, 62 Stat. 899; July 14, 1956, ch. 589, § 1, 70 Stat. 532.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 296 (Mar. 3, 1911, ch. 231, § 187(a), as added Oct. 10, 1940, ch. 843, § 1, 54 Stat. 1101).

This section contains only a part of section 296 of title 28, U.S.C., 1940 ed. Other provisions of such section are incorporated in sections 252, 253, 254, 455, 1581, 2071, 2639, and 2640 of this title.

The provision that vacancies should be filled by appointment of the President and confirmed by the Senate was omitted as unnecessary in view of the language of the revised section.

Words "a court of record known as" were added. (See Reviser's Note under section 171 of this title.)

The term "chief judge" was substituted for "presiding judge." (See reviser's note under section 136 of this title.)

The provisions of such section 296 of title 28, U.S.C., 1940 ed., relating to assignment and powers of retired judges were omitted as covered by sections 294 and 296 of this title.

Changes in phraseology were made.

### Amendments

1956—Act July 14, 1956, declared the Customs Court to be a court established under article III of the Constitution of the United States.

### Limitation or Alteration of Jurisdiction

Section 4 of act July 14, 1956, provided that: "Nothing contained in this Act [amending sections 251, 292(f), 293, and 295 of this title] shall be construed in any way to limit or alter the jurisdiction heretofore conferred upon the United States Customs Court by any provision of law."

### Continuation of Organization of Court

Section 2(b) of act June 25, 1948, provided in part that the provisions of this title as set out in section 1 of act June 25, 1948, with respect to the organization of the court, shall be construed as continuations of existing law, and the tenure of the judges, officers, and employees, in office on Sept. 1, 1948, shall not be affected by its enactment, but each of them shall continue to serve in the same capacity under the appropriate provisions of this title, pursuant to his prior appointment.

### Cross References

Oath of judge, see sections 453 of this title.

Official station of Customs Court judges, see section 456 of this title.

## § 252. Tenure and salaries of judges

Judge[1] of the Customs Court shall hold office during good behavior. Each shall receive a salary at an annual rate determined under section 225 of the Federal Salary Act of 1967 (2 U.S.C. 351-361), as adjusted by section 461 of this title.

(June 25, 1948, ch. 646, 62 Stat. 899; Mar. 2, 1955, ch. 9, § 1(f), 69 Stat. 10; Aug. 14, 1964, Pub. L. 88-426, title IV, § 403(f), 78 Stat. 434; Aug. 9, 1975, Pub. L. 94-82, title II, § 205(b)(6), 89 Stat. 423.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 296 (Mar. 3, 1911, ch. 231, § 187(a), as added Oct. 10, 1940, ch. 843, § 1, 54 Stat. 1101; July 31, 1946, ch. 704, § 1, 60 Stat. 716).

This section contains a part of section 296 of title 28, U.S.C., 1940 ed., Other provisions of such section are incorporated in sections 251, 253, 254, 456, 1581, 2071, 2639, and 2640 of this title.

A provision exempting judge's salaries from section 1790 of the Revised Statutes was omitted, as such section was repealed by act Aug. 26, 1935, ch. 689, § 1, 49 Stat. 864.

A provision for monthly salary payments was omitted since time of payment is a matter for administrative determination.

Changes were made in phraseology.

### Amendments

1975—Pub. L. 94-82 substituted provision that each judge shall receive a salary at an annual rate determined under section 225 of the Federal Salary Act of 1967, as adjusted by section 461 of this title, for provision that each judge shall receive a salary of $30,000 a year.

1964—Pub. L. 88-426 increased the salary of the judges of the Customs Court from $22,500 to $30,000.

1955—Act Mar. 2, 1955, increased the salaries of the judges of the Customs Court from $15,000 to $22,500 a year.

### Effective Date of 1964 Amendment

Amendment by Pub. L. 88-426 effective on the first day of the first pay period which begins on or after July 1, 1964, except to the extent provided in section 501(c) of Pub. L. 88-426, see section 501 of Pub. L. 88-426.

### Effective Date of 1955 Amendment

Amendment by act Mar. 2, 1955, effective Mar. 1, 1955, see section 5 of act Mar. 2, 1955, set out as an Effective Date of 1955 Amendment note under section 31 of Title 2, The Congress.

### Increase of Salaries

Salaries of judges increased to $54,500 per annum, upon recommendation of the President of the United States, see note set out under section 358 of Title 2, The Congress.

Salaries of judges increased to $44,000 effective on the first day of the first pay period beginning on or after Oct. 1, 1976, see Ex. Ord. No. 11941, Oct. 1, 1976, 41 F.R. 43889, set out as a note under section 5332 of Title 5, Government Organization and Employees. Ex. Ord. No. 11941, further provided that pursuant to the Legislative Branch Appropriation Act, 1977, funds are not available to pay a salary at a rate which exceeds the rate in effect on Sept. 30, 1976, which was $42,000.

Salary of judge increased from $30,000 to $40,000 per annum, commencing Feb. 14, 1969, upon recommendation of the President of the United States, see note set out under section 358 of Title 2, The Congress.

Prior to June 25, 1948, salaries of judges of the Customs Court were increased as follows:

The salaries of the presiding judge and associate judges were increased from $10,000 to $15,000 a year by act July 31, 1946, ch. 704, § 1, 60 Stat. 716.

The salaries of the presiding judge and associate judges were increased from $9,000 to $10,000 a year by the Tariff Act of 1930, act June 17, 1930, ch. 497, title IV, § 518, 46 Stat. 737.

### Cross References

Payment of salaries by United States marshal, see section 571 of this title.

Retirement of judges, see section 371 et seq. of this title.

## § 253. Duties of chief judge; precedence of judges

(a) The chief judge of the Customs Court, with the approval of the court, shall supervise the fiscal affairs and clerical force of the court;

(b) The chief judge shall promulgate dockets.

(c) The chief judge, under rules of the court, may designate any judge or judges of the court to try any case and, when the circumstances so warrant, reassign the case to another judge or judges.

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[1] So in original.

(d) Whenever the chief judge is unable to perform the duties of his office or the office is vacant, his powers and duties shall devolve upon the judge next in precedence who is able to act, until such disability is removed or another chief judge is appointed and duly qualified.

(e) The chief judge shall have precedence and shall preside at any session which he attends. Other judges shall have precedence and shall preside according to the seniority of their commissions. Judges whose commissions bear the same date shall have precedence according to seniority in age.

(June 25, 1948, ch. 646, 62 Stat. 900; Sept. 9, 1959, Pub. L. 86-243, § 3, 73 Stat. 474; June 2, 1970, Pub. L. 91-271, title I, § 105, 84 Stat. 276.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 296 (Mar. 3, 1911, ch. 231, § 187(a), as added Oct. 10, 1940, ch. 843, § 1, 54 Stat. 1101).

This section contains a part of section 296 of title 28, U.S.C., 1940 ed. Other provisions of such section are incorporated in sections 251, 252, 254, 456, 1581, 2071, 2639, and 2640 of this title.

Provision respecting recommendations for appointment, promotions, or otherwise affecting such clerical force, was omitted as unnecessary in view of section 871 of this title.

The second paragraph is partly new and conforms with similar provisions of section 136(e) of this title, relating to the chief judges of district courts.

The term "chief judge" was substituted for "presiding judge." (See Reviser's Note under section 136 of this title.)

Changes were made in phraseology and arrangement.

### Amendments

1970—Pub. L. 91-271 reorganized existing provisions into lettered subsecs. (a) to (e) and made minor changes in phrasoeology.

1959—Pub. L. 86-243 required the chief judge to supervise the fiscal affairs and clerical force of the court, with the approval of the court.

### Effective Date of 1970 Amendment

Amendment by Pub. L. 91-271 effective on Oct. 1, 1970, see section 122 of Pub. L. 91-271, set out as an Effective Date of 1970 Amendment note under section 1541 of this title.

### Savings Provisions

Amendment by Pub. L. 86-243 not to deprive Customs Court officers or employees of any rights, privileges, or civil service status, see section 4 of Pub. L. 86-243, set out as a Savings Provisions note under section 871 of this title.

## § 254. Single-judge trials

Except as otherwise provided in section 255 of this title, the judicial power of the Customs Court with respect to any action, suit or proceeding shall be exercised by a single judge, who may preside alone and hold a regular or special session of court at the same time other sessions are held by other judges.

(June 25, 1948, ch. 646, 62 Stat. 900; May 24, 1949, ch. 139, § 66, 63 Stat. 99; June 2, 1970, Pub. L. 91-271, title I, § 106, 84 Stat. 277.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 296 (Mar. 3, 1911, ch. 231, 187(a), as added Oct. 10, 1940, ch. 843, § 1, 54 Stat. 1101).

This section contains a part of section 296 of title 28, U.S.C., 1940 ed. Other provisions of such section are incorporated in sections 251, 252, 253, 456, 1581, 2071, 2639, and 2640 of this title.

Words "when in the opinion of such division or judge the ends of justice so require," which followed the phrase "grant a rehearing or retrial," were omitted as surplusage.

The term "chief judge" was substituted for "presiding judge." (See reviser's note under section 136 of this title.)

The phrase "petitions for remission of additional duties" was added to the first paragraph at the suggestion of the court to conform to existing practice.

Reappraisement appeals are heard by a single judge and reviewed by a division. (See sections 2631 and 2636 of this title.)

The provision of section 296 of title 28, U.S.C., 1940 ed., that the presiding judge shall designate one of the three judges of a division to preside over such division was omitted as in conflict with section 253 of this title (also taken from section 296 of title 28 U.S.C., 1940 ed.), which provides that judges shall preside according to the seniority of their commissions. The latter provision is in acccord with present practice.

Changes were made in arrangement and phraseology.

### 1949 Act

This amendment clarifies section 254 of title 28, U.S.C., by restoring language of the original law.

### Prior Provisions

Provisions similar to those relating to the assignment of judges to hear and determine cases, and provisions similar to those authorizing the chief judge to designate judges to hear and determine cases within the jurisdiction of the United States, formerly contained in this section, are now covered by sections 255 and 256 of this title, respectively.

### Amendments

1970—Pub. L. 91-271 substituted in the section catchline "Single-judge trials" for "Divisions; powers and assignments" and substituted provisions requiring the judicial power of the Customs Court with respect to any action, suit, or proceeding to be exercised by a single judge, for provisions setting forth the powers of the chief judge of the Customs Court with respect to the organization of such Court into divisions, and the assignment of judges to hear and determine pending cases.

1949—Act May 24, 1949, inserted in the third par. "to hear or" preceding "to hear and determine".

### Effective Date of 1970 Amendment

Amendment by Pub. L. 91-271 effective on Oct. 1, 1970, see section 122 of Pub. L. 91-271, set out as an Effective Date of 1970 Amendment note under section 1541 of this title.

## § 255. Three-judge trials

(a) Upon application of any party to a civil action, or upon his own initiative, the chief judge of the Customs Court shall designate any three judges of the court to hear and determine any civil action which the chief judge finds: (1) raises an issue of the constitutionality of an Act of Congress, a proclamation of the President or an Executive order; or (2) has broad or significant implications in the administration or interpretation of the customs laws.

(b) A majority of the three judges designated may hear and determine the civil action and all questions pending therein.

(Added Pub. L. 91-271, title I, § 108, June 2, 1970, 84 Stat. 277.)

### PRIOR PROVISIONS

A prior section 255, was renumbered section 257 of this title.

### EFFECTIVE DATE

Section effective on Oct. 1, 1970, see section 122 of Pub. L. 91-271, set out as an Effective Date of 1970 Amendment note under section 1541 of this title.

### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 254 of this title.

## § 256. Trials at ports other than New York

(a) The chief judge may designate any judge or judges of the court to proceed, together with necessary assistants, to any port or to any place within the jurisdiction of the United States to preside at a trial or hearing at the port or place.

(b) Upon application of a party or upon his own initiative, and upon a showing that the interests of economy, efficiency, and justice will be served, the chief judge may issue an order authorizing a judge of the court to preside in an evidentiary hearing in a foreign country whose laws do not prohibit such a hearing: *Provided, however,* That an interlocutory appeal may be taken from such an order pursuant to the provisions of section 1541(b) of this title, subject to the discretion of the Court of Customs and Patent Appeals as set forth in that section.

(Added Pub. L. 91-271, title I, § 109, June 2, 1970, 84 Stat. 277.)

### EFFECTIVE DATE

Section effective on Oct. 1, 1970, see section 122 of Pub. L. 91-271, set out as an Effective Date of 1970 Amendment note under section 1541 of this title.

### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1541 of this title.

## § 257. Publication of decisions

All decisions of the Customs Court shall be preserved and open to inspection. The court shall forward copies of each decision to the Secretary of the Treasury or his designee and to the appropriate customs officer for the district in which the case arose. The Secretary shall publish weekly such decisions as he or the court may designate and abstracts of all other decisions.

(June 25, 1948, ch. 646, 62 Stat. 900, § 255, renumbered and amended June 2, 1970, Pub. L. 91-271, title I, § 107, 84 Stat. 277.)

### HISTORICAL AND REVISION NOTES

Based on section 1519 of title 19, U.S.C., 1940 ed., Customs Duties (June 17, 1930, ch. 497, title IV, § 519, 46 Stat. 739).

Changes in phraseology were made.

### AMENDMENTS

1970—Pub. L. 91-271 added "or his designee" following "Secretary of the Treasury," and substituted "to the appropriate customs officer" for "the collector".

### EFFECTIVE DATE OF 1970 AMENDMENT

Amendment by Pub. L. 91-271 effective on Oct. 1, 1970, see section 122 of Pub. L. 91-271, set out as an Effective Date of 1970 Amendment note under section 1541 of this title.

### RULES OF THE UNITED STATES CUSTOMS COURT

Opinions and judgments, see rule 11.5, Appendix to this title.

# CHAPTER 13—ASSIGNMENT OF JUDGES TO OTHER COURTS

Sec.
291. Circuit judges.
292. District judges.
293. Judges of other courts.
294. Assignment of retired justices or judges to active duty.[1]
295. Conditions upon designation and assignment.
296. Powers upon designation and assignment.

### AMENDMENTS

1958—Pub. L. 85-755, § 8, Aug. 25, 1958, 72 Stat. 850, substituted "Judges of other courts." for "Circuit or district judges to Court of Customs and Patent Appeals in item 293".

### COURT OF CLAIMS EN BANC

Competency of justice or judge assigned pursuant to this chapter to sit in Court of Claims En Banc in case of vacancy in Court of Claims or inability of judge of such Court in regular active service to sit, see section 175 of this title.

### CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in sections 175, 1407 of this title.

## § 291. Circuit judges

(a) The Chief Justice of the United States may designate and assign temporarily any circuit judge to act as circuit judge in another circuit upon presentation of a certificate of necessity by the chief judge or circuit justice of the circuit where the need arises.

(b) The Chief Justice of the United States may designate and assign temporarily any circuit judge to serve as a judge of the Court of Claims or the Court of Customs and Patent Appeals upon presentation to him of a certificate of necessity by the chief judge of the court in which the need arises.

(c) The chief judge of a circuit or the circuit justice may, in the public interest, designate and assign temporarily any circuit judge within the circuit, including a judge designated and assigned to temporary duty therein, to hold a district court in any district within the circuit.

(June 25, 1948, ch. 646, 62 Stat. 900; July 28, 1953, ch. 253, § 2, 67 Stat. 226; Sept. 3, 1954, ch. 1263, § 39(b), 68 Stat. 1240; July 9, 1956, ch. 517, § 1(a), 70 Stat. 497; Aug. 25, 1958, Pub. L. 85-755, § 2, 72 Stat. 848.)

### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§ 17, 22 (Mar. 3, 1911, ch. 231, §§ 13, 18, 36 Stat. 1089; Oct. 3, 1913, ch.

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[1] So in original. Does not conform to section catchline.

18, 38 Stat. 203; Sept. 14, 1922, ch. 306, §§ 3, 5, 42 Stat. 839; Mar. 2, 1929, ch. 488, § 1, 45 Stat. 1475; June 7, 1934, ch. 426, 48 Stat. 926; June 25, 1936, ch. 804, 49 Stat. 1921; Aug. 24, 1937, ch. 754, § 4, 50 Stat. 753; Dec. 29, 1942, ch. 835, § 1, 56 Stat. 1094).

Section consolidates all provisions of sections 17 and 22 of title 28, U.S.C., 1940 ed., relating to designation and assignment of circuit judges.

The revised section omits a reference to the Chief Justice contained in said section 22, since in exercising the powers under subsection (b), he acts as a circuit justice.

Paragraph (d) of said section 17, making the section applicable to the United States Court of Appeals for the District of Columbia, is omitted since such court is included in this revision because the District of Columbia is made a separate circuit. (See section 41 of this title.)

Provisions of said sections 17 and 22 authorizing the senior Associate Justice to act in the absence of the Chief Justice of the United States were omitted as surplusage in view of specific authority to so act in section 3 of this title.

The words in said section 17 "for such time as the business of such district court may require," were omitted as inconsistent with the language of said section 22 of title 28, U.S.C., 1940 ed., which employed the words "the public interest requires" and "from time to time and until he shall otherwise direct." The revised section and sections 294 and 296 of this title make clear the power to make designation and assignment without any limitation of time, to revoke such designation and assignment and to make, from time to time, new designations and assignments.

The term "chief judge" of the circuit was substituted for "senior circuit judge." (See reviser's note under section 136 of this title.)

References in said sections 17 and 22 to retired judges were omitted as covered by section 294 of this title.

Other provisions of said section 17 of title 28, U.S.C., 1940 ed., are incorporated in sections 292, 295 and 296 of this title.

Other provisions of said section 22 of title 28, U.S.C., 1940 ed., are incorporated in section 296 of this title.

Changes were made in phraseology and arrangement.

#### AMENDMENTS

1958—Subsec. (a). Pub. L. 85-755 deleted provision for assignment of any judge of the Court of Claims to serve as circuit judge in any circuit. Subject matter is now covered by section 293(a) of this title.

Subsec. (b). Pub. L. 85-755 redesignated former subsec. (c) as subsec. (b) and incorporated in it provision for assignment of circuit judges to Court of Customs and Patent Appeals formerly contained in section 293 of this title. Provisions of former subsec. (b) for assignment of judges of the Court of Customs and Patent Appeals to serve as judges of the Court of Appeals or the District Court for the District of Columbia are now covered by section 293(a) of this title.

Subsec. (c). Pub. L. 85-755 redesignated former subsec. (d) as subsec. (c). Former subsec. (c) redesignated (b).

1956—Subsec. (a). Act July 9, 1956, inserted the language, "or any judge of the Court of Claims to serve as a circuit judge in any circuit".

1954—Subsec. (c). Act Sept. 3, 1954, eliminated "United States" from name of Court of Claims.

1953—Subsec. (c). Act July 28, 1953, inserted subsec. (c).

Subsec. (d). Act July 28, 1953, redesignated former subsec. (c) as subsec. (d).

#### JURISDICTION OF UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Amendment by Pub. L. 85-755 as not limiting or altering the jurisdiction of the United States Court of Customs and Patent Appeals, see note under section 211 of this title.

#### CROSS REFERENCES

Assignment of circuit judge to serve as judge in District Court of Guam by Chief Justice of the United States, see section 1424b of Title 48, Territories and Insular Possessions.

Assignment of judge to serve temporarily as a judge of the District Court of the Virgin Islands, see section 1614 of Title 48.

### § 292. District judges

(a) The chief judge of a circuit may designate and assign one or more district judges within the circuit to sit upon the court of appeals or a division thereof whenever the business of that court so requires. Such designations or assignments shall be in conformity with the rules or orders of the court of appeals of the circuit.

(b) The chief judge of a circuit may, in the public interest, designate and assign temporarily any district judge of the circuit to hold a district court in any district within the circuit.

(c) The chief judge of the United States Court of Appeals for the District of Columbia Circuit may, upon presentation of a certificate of necessity by the chief judge of the Superior Court of the District of Columbia pursuant to section 11-908(c) of the District of Columbia Code, designate and assign temporarily any district judge of the circuit to serve as a judge of such Superior Court, if such assignment (1) is approved by the Attorney General of the United States following a determination by him to the effect that such assignment is necessary to meet the ends of justice, and (2) is approved by the chief judge of the United States District Court for the District of Columbia.

(d) The Chief Justice of the United States may designate and assign temporarily a district judge of one circuit for service in another circuit, either in a district court or court of appeals, upon presentation of a certificate of necessity by the chief judge or circuit justice of the circuit wherein the need arises.

(e) The Chief Justice of the United States may designate and assign temporarily any district judge to serve as a judge of the Court of Claims, the Court of Customs and Patent Appeals or the Customs Court upon presentation to him of a certificate of necessity by the chief judge of the court in which the need arises.

(June 25, 1948, ch. 646, 62 Stat. 901; July 28, 1953, ch. 253, § 3, 67 Stat. 226; Sept. 3, 1954, ch. 1263, § 39(c), 68 Stat. 1240; July 9, 1956, ch. 517, § 1(b), 70 Stat. 497; July 14, 1956, ch. 589, § 2, 70 Stat. 532; Aug. 25, 1958, Pub. L. 85-755, § 3, 72 Stat. 848; July 29, 1970, Pub. L. 91-358, title I, § 172(e), 84 Stat. 591.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§ 17, 21 and 216 (Mar. 3, 1911, ch. 231, §§ 13, 17, 120, 36 Stat. 1089, 1132; Sept. 14, 1922, ch. 306, § 3, 42 Stat. 839; Aug. 24, 1937, ch. 754, § 4, 50 Stat. 753; Dec. 29, 1942, ch. 835, § 1, 56 Stat. 1094).

Section consolidates and simplifies all provisions of sections 17, 21 and 216 of title 28, U.S.C., 1940 ed., relating to designation and assignment of district judges.

Term "chief judge" was substituted for "senior circuit judge." (See Reviser's Note under section 136 of this title.)

Sections 17 and 21 of title 28, U.S.C., 1940 ed., were inconsistent insofar as the words "or in his absence, the circuit judges thereof," appearing in said section 17 were not in section 21, and the words "senior circuit judge then present in the circuit," appearing in section 21 were not in section 17. The revised section omits all such words and leaves designation of assignment to the chief judge of the circuit. If the chief judge is unable to perform his duties they devolve, under section 45 of this title, upon the circuit judge next in seniority of commission.

The provision of said section 17, that designation of a district judge to another circuit should be from an adjacent circuit if practicable, was omitted as an unnecessary restriction on the discretion of the Chief Justice.

Section 19 of title 28, U.S.C., 1940 ed., is omitted as unnecessary. It authorized the Chief Justice of the United States to designate and assign any district judge to a district upon receiving a certificate from the clerk of the district that all circuit judges and the circuit justice were absent from the circuit, or were unable to appoint a substitute judge for the district,or where the district judge actually designated was disabled or neglected to hold court.

For omission of reference in said section 17 to senior Associate Justice, see reviser's note under section 291 of this title.

Reference in said section 17 to retired judges were omitted as covered by section 294 of this title.

Other provisions of said section 17 of title 28, U.S.C., 1940 ed., are incorporated in sections 291, 295, and 296 of this title. Other provisions of said section 216 of such title are incorporated in sections 45 and 47 of this title.

Words "either in a district court or court of appeals" were inserted in subsection (c) as suggested by Hon. Learned Hand, Senior Circuit Judge of the Second Circuit. The revised section permits a district judge to be assigned directly to the circuit court of appeals of another circuit. Under existing law it has been assumed that he must be assigned to serve as a district judge on the other circuit and then designated to serve on the circuit court of appeals by that court in which his services are required.

Many changes were made in phraseology.

### Amendments

1970—Subsec. (c). Pub. L. 91-358, § 172(e)(1), (2), added subsec. (c). Former subsec. (c) was redesignated as (d).

Subsec. (d). Pub. L. 91-358, § 172(e)(1), redesignated former subsec. (c) as (d). Former subsec. (d) was redesignated as (e).

Subsec. (e). Pub. L. 91-358, § 172(e)(1), redesignated former subsec. (d) as (e).

1958—Subsecs. (a) to (c). Pub. L. 85-755 reenacted subsecs. (a) to (c) without change.

Subsec. (d). Pub. L. 85-755 incorporated provisions for assignment of district judges to the Court of Customs and Patent Appeals and the Customs Court, formerly containedin section 293 of this title and former subsec. (f) of this section.

Subsec. (e). Pub. L. 85-755 eliminated subsec. (e) which provided for assignment of judges of the Court of Claims to district courts. Subject matter is now covered by section 293(a) of this title.

Subsec. (f). Pub. L. 85-755 eliminated subsec. (f) which provided for assignment of district judges to the Customs Court. Subject matter is now covered by subsec. (d) of this section.

1956—Subsec. (e). Act July 9, 1956, added subsec. (e).

Subsec. (f). Act July 14, 1956, added subsec. (f).

1954—Subsec. (d), Act Sept. 3, 1954, eliminated "United States" from name of Court of Claims.

1953—Subsec. (d). Act July 28, 1953, added subsec. (d).

### Effective Date of 1970 Amendment

Amendment by Pub. L. 91-358 effective the first day of the seventh calendar month which begins after July 29, 1970, see section 199(a) of Pub. L. 91-358, set out as an Effective Date of 1970 Amendment note under section 1257 of this title.

### Jurisdiction of United States Court of Customs and Patent Appeals

Amendment by Pub. L. 85-755 not limiting or altering the jurisdiction of the United States Court of Customs and Patent Appeals, see note under section 211 of this title.

### Limitation or Alteration of Jurisdiction

Amendment by act July 14, 1956, not to be construed as limiting or altering the jurisdiction heretofore conferred upon the Customs Court, see section 4 of act July 14, 1956, set out as a note under section 251 of this title.

### Cross References

Assignment of district judge to serve as judge in District Court of Guam by Chief Justice of the United States, see section 1424b of Title 48, Territories and Insular Possessions.

Assignment of judge to serve temporarily as a judge of the District Court of the Virgin Islands, see section 1614 of Title 48.

### Section Referred to in D.C. Code

This section is referred to in section 11-908 of the District of Columbia Code.

## § 293. Judges of other courts

(a) The Chief Justice of the United States may designate and assign temporarily any judge of the Court of Claims or the Court of Customs and Patent Appeals to serve, respectively, as a judge of the Court of Customs and Patent Appeals or the Court of Claims upon presentation of a certificate of necessity by the chief judge of the court wherein the need arises, or to perform judicial duties in any circuit, either in a court of appeals or district court, upon presentation of a certificate of necessity by the chief judge or circuit justice of the circuit wherein the need arises.

(b) The Chief Justice of the United States may designate and assign temporarily any judge of the Customs Court to perform judicial duties in a district court in any circuit upon presentation of a certificate of necessity by the chief judge or circuit justice of the circuit wherein the need arises.

(c) The chief judge of the Court of Customs and Patent Appeals may, upon presentation to him by the chief judge of the Customs Court of a certificate of necessity, designate and assign temporarily any judge of the Court of Customs and Patent Appeals to serve as a judge of the Customs Court.

(d) The chief judge of the Customs Court may, upon presentation to him by the chief judge of the Court of Customs and Patent Appeals of a certificate of necessity, designate and assign temporarily any judge of the Customs Court to serve as a judge of the Court of Customs and Patent Appeals.

(June 25, 1948, ch. 646, 62 Stat. 901; July 14, 1956, ch. 589, § 3(a), 70 Stat. 532; Aug. 25, 1958, Pub. L. 85-755, § 4, 72 Stat. 848.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 301 (Mar. 3, 1911, ch. 231, § 188, 36 Stat. 1143; Mar. 2, 1929, ch. 488, § 1, 45 Stat. 1475).

Section simplifies last sentence of section 301 of title 28, U.S.C., 1940 ed., and is in conformity with other designation and assignment provisions of this chapter.

Other provisions of said section 301 of title 28, U.S.C., 1940 ed., are incorporated in sections 211-213, 215, and 296 of this title.

This section transfers from the President to the Chief Justice of the United States the authority to designate and assign which is in conformity with sections 201 and 292 of this title.

The words "he is willing to undertake" were added to make clear that such service is voluntary.

The term "chief judge" was substituted for "presiding judge." (See reviser's note under section 136 of this title.)

Changes were made in phraseology.

### Amendments

1958—Pub. L. 85-755 substituted "Judges of other courts" for "Circuit or district judges to court of customs and patent appeals" in the catchline.

Subsec. (a). Pub. L. 85-755 added subsec. (a). It incorporates provisions of former sections 291(a), (b) and 292(e) of this title respecting assignment of any judge of the Court of Claims to serve as circuit judge in any circuit, assignment of judges of the Court of Customs and Patent Appeals to serve as judges of the Court of Appeals or the District Court of Appeals or the District Court for the District of Columbia, and assignment of judges of the Court of Claims to district courts, respectively.

Subsec. (b). Pub. L. 85-755 designated as subsc. (b) the former second paragraph.

Subsecs. (c) and (d). Pub. L. 85-755 added subsecs. (c) and (d).

1956—Act July 14, 1956, authorized the Chief Justice of the United States to designate and assign temporarily a judge of the Customs Court to perform judicial duties in a district court in any circuit.

### Jurisdiction of United States Court of Customs and Patent Appeals

Amendment by Pub. L. 85-755 not limiting or altering the jurisdiction of the United States Court of Customs and Patent Appeals, see note under section 211 of this title.

### Limitation or Alteration of Jurisdiction

Amendment by act July 14, 1956, not to be construed as limiting or altering the jurisdiction heretofore conferred upon the Customs Court, see section 4 of act July 14, 1956, set out as a note under section 251 of this title.

## § 294. Assignment of retired Justices or judges to active duty

(a) Any retired Chief Justice of the United States or Associate Justice of the Supreme Court may be designated and assigned by the Chief Justice of the United States to perform such judicial duties in any circuit, including those of a circuit justice, as he is willing to undertake.

(b) Any judge of the United States who has retired from regular active service under section 371(b) or 372(a) of this title shall be known and designated as a senior judge and may continue to perform such judicial duties as he is willing and able to undertake, when designated and assigned as provided in subsections (c) and (d).

(c) Any retired circuit or district judge may be designated and assigned by the chief judge or judicial council of his circuit to perform such judicial duties within the circuit as he is willing and able to undertake. Any other retired judge of the United States may be designated and assigned by the chief judge of his court to perform such judicial duties in such court as he is willing and able to undertake.

(d) The Chief Justice of the United States shall maintain a roster of retired judges of the United States who are willing and able to undertake special judicial duties from time to time outside their own circuit, in the case of a retired circuit or district judge, or in a court other than their own, in the case of other retired judges, which roster shall be known as the roster or senior judges. Any such retired judge of the United States may be designated and assigned by the Chief Justice to perform such judicial duties as he is willing and able to undertake in a court outside his own circuit, in the case of a retired circuit or district judge, or in a court other than his own, in the case of any other retired judge of the United States. Such designation and assignment to a court of appeals or district court shall be made upon the presentation of a certificate of necessity by the chief judge or circuit justice of the circuit wherein the need arises and to any other court of the United States upon the presentation of a certificate of necessity by the chief judge of such court. No such designation or assignment shall be made to the Supreme Court.

(e) No retired justice or judge shall perform judicial duties except when designated and assigned.

(June 25, 1948, ch. 646, 62 Stat. 901; July 9, 1956, ch. 517, § 1(c), 70 Stat. 497; Aug. 29, 1957, Pub. L. 85-219, 71 Stat. 495; Aug. 25, 1958, Pub. L. 85-755, § 5, 72 Stat. 849.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., §§ 375, 375a, and 375f (Mar. 3, 1911, ch. 231, § 260, 36 Stat. 1161; Feb. 25, 1919, ch. 29, § 6, 40 Stat. 1157; Mar. 1, 1929, ch. 419, 45 Stat. 1422; Mar. 1, 1937, ch. 21, 50 Stat. 24; Feb. 11, 1938, ch. 25, 52 Stat. 28; Aug. 5, 1939, ch. 433, § 5, as added May 11, 1944, ch. 192, §§ 1-3, 58 Stat. 218, 219).

Section consolidates those parts of sections 375, 375a, and 375f of title 28, U.S.C., 1940 ed., relating to designation and assignment of retired justices and judges. Other provisions of said sections 375 and 375a, appear in sections 136, 371, and 756 of this title.

The term "chief judge" was substituted for "presiding judge or senior judge." (See Reviser's Note under section 136 of this title.)

Changes were made in phraseology.

### Amendments

1958—Subsec. (a). Pub. L. 85-755 reenacted subsec. (a) without change.

Subsecs. (b) to (d). Pub. L. 85-755 revised and rearranged subject matter to apply the phrase "senior judge" to all judges who retire from regular active service under sections 371(b) and 372(a) of this title, while retaining their commissions, rather than merely to those who ask to be placed on the Chief Justice's roster, to lodge solely in the chief judge and judicial council of the circuit concerned the intracircuit assignment power, and in the Chief Justice the power to assign retired judges beyond their circuits or special courts.

Subsec. (e). Pub. L. 85-755 reenacted subsec. (e) without change.

1957—Subsec. (d). Pub. L. 85-219 added subsec. (d).

1956—Subsec. (b). Act July 9, 1956, added provisions relating to assignment of retired judges of the Court of Claims.

### Jurisdiction of United States Court of Customs and Patent Appeals

Amendment by Pub. L. 85-755 not limiting or altering the jurisdiction of the United States Court of Customs and Patent Appeals, see note under section 211 of this title.

## § 295. Conditions upon designation and assignment

No designation and assignment of a circuit or district judge in active service shall be made without the consent of the chief judge or judicial council of the circuit from which the judge is to be designated and assigned. No designation and assignment of a judge of any other court of the United States in active service shall be made without the consent of the chief judge of such court.

All designations and assignments of justices and judges shall be filed with the clerks and entered on the minutes of the courts from and to which made.

The Chief Justice of the United States, a circuit justice or a chief judge of a circuit may make new designation and assignments in accordance with the provisions of this chapter and may revoke those previously made by him.

(June 25, 1948, ch. 646, 62 Stat. 901; Sept. 3, 1954, ch. 1263, § 39(d), 68 Stat. 1240; July 14, 1956, ch. 589, § 3(b), 70 Stat. 532; Aug. 25, 1958, Pub. L. 85-755, § 6, 72 Stat. 850.)

### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§ 17, 20 (Mar. 3, 1911, ch. 231, §§ 13, 16, 36 Stat. 1089; Sept. 14, 1922, ch. 306, § 3, 42 Stat. 839; Aug. 24, 1937, ch. 754, § 4, 50 Stat. 753; Dec. 29, 1942, ch. 835, §§ 1, 4, 56 Stat. 1094, 1095).

This section consolidates and simplifies provisions of sections 17 and 20 of title 28, U.S.C., 1940 ed., relating to conditions upon designation and assignment as well as those applicable to filing, revoking and making new designations.

Other provisions of section 17 of title 28, U.S.C., 1940 ed., are incorporated in section 291, 292, and 296 of this title.

The reference in said section 20 to senior Associate Judge was omitted. (See Reviser's Note under section 291 of this title.)

The terms "chief judge" and "chief judge of a circuit" were substituted for "senior circuit judge". (See Reviser's Note under section 136 of this title.)

The alternative provision for approval by the judicial council of the circuit was inserted to conform with section 332 of this title.

Changes were made in phraseology.

### AMENDMENTS

1958—Pub. L. 85-755 substituted "of any other court of the United States" for "of the Customs Court" in first par.

1956—Act July 14, 1956, provided that no designation and assignment of a judge of the Customs Court in active service shall be made without the consent of the chief judge of the court.

1954—Act Sept. 3, 1954, made it clear that the section applies only to the assignment of circuit and district judges in active service.

### JURISDICTION OF UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Amendment by Pub. L. 85-755 not limiting or altering the jurisdiction of the United States Court of Customs and Patent Appeals, see note under section 211 of this title.

### LIMITATION OR ALTERATION OF JURISDICTION

Amendment by act July 14, 1956, not to be construed as limiting or altering the jurisdiction heretofore conferred upon the Customs Court, see section 4 of act July 14, 1956, set out as a note under section 251 of this title.

## § 296. Powers upon designation and assignment

A justice or judge shall discharge, during the period of his designation and assignment, all judicial duties for which he is designated and assigned. He may be required to perform any duty which might be required of a judge of the court or district or circuit to which he is designated and assigned.

Such justice or judge shall have all the powers of a judge of the court, circuit or district to which he is designated and assigned, except the power to appoint any person to a statutory position or to designate permanently a depository of funds or a newspaper for publication of legal notices.

A justice or judge who has sat by designation and assignment in another district or circuit may, notwithstanding his absence from such district or circuit or the expiration of the period of his designation and assignment, decide or join in the decision and final disposition of all matters submitted to him during such period and in the consideration and disposition of applications for rehearing or further proceedings in such matters.

(June 25, 1948, ch. 646, 62 Stat. 901.)

### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§ 17, 18, 22, 23, 301 (Mar. 3, 1911, ch. 231, §§ 13, 14, 18, 19, 188, 36 Stat. 1089, 1143; Oct. 3, 1913, ch. 18, 38 Stat. 203; Feb. 25, 1919, ch. 29, §§ 2, 5, 40 Stat. 1156, 1157; Sept. 14, 1922, ch. 306, §§ 3, 4, 5, 42 Stat. 839; Dec. 13, 1926, ch. 6, § 1, 44 Stat. 919; Mar. 2, 1929, ch. 488, § 1, 45 Stat. 1475; June 7, 1934, ch. 426, 48 Stat. 926; June 25, 1936, ch. 804, 49 Stat. 1921; Aug. 24, 1937, ch. 754, § 4, 50 Stat. 753; Dec. 29, 1942, ch. 835, §§ 1, 2, 5, 6, 56 Stat. 1094, 1095).

Section simplifies provisions of sections 17, 18, paragraphs (b) and (c) of section 22, and sections 23 and 301 of title 28, U.S.C., 1940 ed., relating to powers and duties of designated judges.

Other provisions of said sections 17 and 22 of title 28, U.S.C., 1940 ed., are incorporated in sections 291, 292, and 295 of this title.

Other provisions of said section 301 of title 28, U.S.C., 1940 ed., are incorporated in sections 211-213, 215, and 293 of this title.

Section is made applicable to retired justices of the Supreme Court by inclusion of reference to "justice," on the theory that a justice should have the same powers and duties and be subject to the same limitations as designated and assigned circuit and district judges.

The second sentence of the revised section was substituted for the provision of section 18 of title 28, U.S.C., 1940 ed., which subjected circuit judges to the same assignments of duty as the circuit judges of the circuit to which they are designated and assigned. The revised section extends this requirement and makes it applicable to all designated and assigned judges.

The provision in the last paragraph of said section 22 that the action of the assigned judge in writing filed with the clerk of court where the trial or hearing was held shall be valid as if such action had been taken by him within the district and within the period of his designation, was omitted as surplusage. See section 295 of this title.

# CHAPTER 15—CONFERENCES AND COUNCILS OF JUDGES

Sec.
331. Judicial Conference of the United States.
332. Judicial councils.
333. Judicial conferences of circuits.
334. Institutes and joint councils on sentencing.

AMENDMENTS

1958—Pub. L. 85-752, § 2, Aug. 25, 1958, 72 Stat. 845, added item 334.

CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in section 2109 of this title.

### § 331. Judicial Conference of the United States

The Chief Justice of the United States shall summon annually the chief judge of each judicial circuit, the chief judge of the Court of Claims, the chief judge of the Court of Customs and Patent Appeals, and a district judge from each judicial circuit to a conference at such time and place in the United States as he may designate. He shall preside at such conference which shall be known as the Judicial Conference of the United States. Special sessions of the conference may be called by the Chief Justice at such times and places as he may designate.

The district judge to be summoned from each judicial circuit shall be chosen by the circuit and district judges of the circuit at the annual judicial conference of the circuit held pursuant to section 333 of this title and shall serve as a member of the conference for three successive years, except that in the year following the enactment of this amended section the judges in the first, fourth, seventh, and tenth circuits shall choose a district judge to serve for one year, the judges in the second, fifth, and eighth circuits shall choose a district judge to serve for two years and the judges in the third, sixth, ninth, and District of Columbia circuits shall choose a district judge to serve for three years.

If the chief judge of any circuit or the district judge chosen by the judges of the circuit is unable to attend, the Chief Justice may summon any other circuit or district judge from such circuit. If the chief judge of the Court of Claims, or the chief judge of the Court of Customs and Patent Appeals is unable to attend, the Chief Justice may summon an associate judge of such court. Every judge summoned shall attend and, unless excused by the Chief Justice, shall remain throughout the sessions of the conference and advise as to the needs of his circuit or court and as to any matters in respect of which the administration of justice in the courts of the United States may be improved.

The conference shall make a comprehensive survey of the condition of business in the courts of the United States and prepare plans for assignment of judges to or from circuits or districts where necessary, and shall submit suggestions to the various courts, in the interest of uniformity and expedition of business.

The Conference shall also carry on a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use as prescribed by the Supreme Court for the other courts of the United States pursuant to law. Such changes in and additions to those rules as the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay shall be recommended by the Conference from time to time to the Supreme Court for its consideration and adoption, modification or rejection, in accordance with law.

The Attorney General shall, upon request of the Chief Justice, report to such conference on matters relating to the business of the several courts of the United States, with particular reference to cases to which the United States is a party.

The Chief Justice shall submit to Congress an annual report of the proceedings of the Judicial Conference and its recommendations for legislation.

(June 25, 1948, ch. 646, 62 Stat. 902; July 9, 1956, ch. 517, § 1(d), 70 Stat. 497; Aug. 28, 1957, Pub. L. 85-202, 71 Stat. 476; July 11, 1958, Pub. L. 85-513, 72 Stat. 356; Sept. 19, 1961, Pub. L. 87-253, §§ 1, 2, 75 Stat. 521.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 218 (Sept. 14, 1922, ch. 306, § 2, 42 Stat. 838; July 5, 1937, ch. 427, 50 Stat. 473).

Provisions as to associate justice acting when Chief Justice is disabled are omitted as unnecessary in view of section 3 of this title giving senior associate justice power to act upon the disability of the Chief Justice.

The provision of section 218 of title 28, U.S.C., 1940 ed., as to traveling expenses is incorporated in section 456 of this title.

Provision as to time and place for holding conference was omitted as unnecessary since the Chief Justice is vested with discretionary power to designate the time and place under the language retained.

The references to "chief judge" are in harmony with other sections of this title. (See Reviser's Note under section 136 of this title.)

Provision for stated annual reports by the chief judge of the district was omitted as obsolete and unnecessary in view of sections 332 and 333 of this title.

The last paragraph is new and is inserted to authorize the communication to Congress of information which now reaches that body only because incorporated in the annual report of the Attorney General.

Numerous changes were made in phraseology and arrangement.

AMENDMENTS

1961—Pub. L. 87-253 provided for the summoning to the judicial conference of the chief judge of the Court of Customs and Patent Appeals, and if he is unable to attend, for the summoning of an associate judge of such court.

1958—Pub. L. 85-513 inserted paragraph requiring a continuous study of the operation and effect of the general rules of practice and procedure.

1957—Pub. L. 85-202 provided generally in first three paragraphs for the representation of district judges on the Judicial Conference.

1956—Act July 9, 1956, inserted provisions relating to participation of Court of Claims judges.

CROSS REFERENCES

Annuities to widows and surviving dependent children of judges, review by Judicial Conference of the United States of questions of dependency and disability, see section 376 of this title.

Pretermission of regular term or session of court of appeals with consent of Judicial Conference of the United States, see section 48 of this title.

### § 332. Judicial councils

(a) The chief judge of each circuit shall call, at least twice in each year and at such places as he may designate, a council of the circuit judges for the circuit, in regular active service, at which he shall preside. Each circuit judge, unless excused by the chief judge, shall attend all sessions of the council.

(b) The council shall be known as the Judicial Council of the circuit.

(c) The chief judge shall submit to the council the quarterly reports of the Director of the Administrative Office of the United States Courts. The council shall take such action thereon as may be necessary.

(d) Each judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit. The district judges shall promptly carry into effect all orders of the judicial council.

(e) The judicial council of each circuit may appoint a circuit executive from among persons who shall be certified by the Board of Certification. The circuit executive shall exercise such administrative powers and perform such duties as may be delegated to him by the circuit council. The duties delegated to the circuit executive of each circuit may include but need not be limited to:

(1) Exercising administrative control of all nonjudicial activities of the court of appeals of the circuit in which he is appointed.

(2) Administering the personnel system of the court of appeals of the circuit.

(3) Administering the budget of the court of appeals of the circuit.

(4) Maintaining a modern accounting system.

(5) Establishing and maintaining property control records and undertaking a space management program.

(6) Conducting studies relating to the business and administration of the courts within the circuit and preparing appropriate recommendations and reports to the chief judge, the circuit council, and the Judicial Conference.

(7) Collecting, compiling, and analyzing statistical data with a view to the preparation and presentation of reports based on such data as may be directed by the chief judge, the circuit council, and the Administrative Office of the United States Courts.

(8) Representing the circuit as its liaison to the courts of the various States in which the circuit is located, the marshall's office, State and local bar associations, civic groups, news media, and other private and public groups having a reasonable interest in the administration of the circuit.

(9) Arranging and attending meetings of the judges of the circuit and of the circuit council, including preparing the agenda and serving as secretary in all such meetings.

(10) Preparing an annual report to the circuit and to the Administrative Office of the United States Courts for the preceding calendar year, including recommendations for more expeditious disposition of the business of the circuit.

All duties delegated to the circuit executive shall be subject to the general supervision of the chief judge of the circuit.

(f) The standards for certification as qualified to be a circuit executive shall be set by a Board of Certification. These standards shall take into account experience in administrative and executive positions, familiarity with court procedures, and special training. The Board of Certification shall consist of five members, three of whom shall be elected by the Judicial Conference of the United States, and at least one of these three shall be selected from among persons experienced in executive recruitment and selection. The additional two members shall be the Director of the Administrative Office of the United States Courts and the Director of the Federal Judicial Center. The members of the Board elected by the Judicial Conference shall each serve for three years except that upon appointment of the first members, one member shall serve for one year, one for two years, and one for three years. The Board shall consider all applicants who apply for certification, shall certify qualified applicants, shall maintain a roster of all persons certified, and shall publish the standards for certification. A person's name shall be removed from the roster after three years unless he is recertified. Three members of the Board shall constitute a quorum for purposes of fixing standards and for certifying applicants, but no action of the Board shall be taken unless three of the members are in agreement. The Director of the Administrative Office of the United States Courts shall provide staff assistance in support of the operation of the Board. Expenses of the Board of Certification shall be borne by the travel and miscellaneous expense funds appropriated to the Federal judiciary. Any member of the Board who is an officer or employee of the United States shall serve without compensation. Other members shall receive the daily equivalent of the rate provided for GS-18 of the General Schedule contained in section 5332 of title 5, United States Code, when actually engaged in service for the Board.

Each circuit executive shall be paid at a salary to be established by the Judicial Conference of the United States not to exceed the annual rate of level V of the Executive Schedule pay rates (5 U.S.C. 5316).

The circuit executive shall serve at the pleasure of the judicial council of the circuit.

The circuit executive may appoint, with the approval of the council, necessary employees in such number as may be approved by the Director of the Administrative Office of the United States Courts.

The circuit executive and his staff shall be deemed to be officers and employees of the judicial branch of the United States Government within the meaning of subchapter III of chapter 83 (relating to civil service retirement), chapter 87 (relating to Federal employees' life insurance program), and chapter 89 (relating to Federal employees' health benefits program) of title 5, United States Code.

(June 25, 1948, ch. 646, 62 Stat. 902; Nov. 13, 1963, Pub. L. 88-176, § 3, 77 Stat. 331; Jan. 5, 1971, Pub. L. 91-647, 84 Stat. 1907).

### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 448 (Mar. 3, 1911, ch. 231, § 306, as added Aug. 7, 1939, ch. 501, § 1, 53 Stat. 1223).

The final sentence of section 448 of title 28, U.S.C., 1940 ed., excepting from the operation of said section the provisions of existing law as to assignment of district judges outside their districts, was omitted as surplusage, since there is nothing in this section in conflict with section 292 of this title providing for such assignments.

The requirement for attendance of circuit judges, unless excused by the chief judge, was included in conformity with a similar provision of section 331 of this title.

Changes in phraseology were made.

#### AMENDMENTS

1971—Pub. L. 91-647 designated existing four paragraphs as subsecs. (a), (b), (c) and (d) and added subsecs. (e) and (f).

1963—Pub. L. 88-176 inserted "regular" preceding "active service" in subsec. (a).

### § 333. Judicial conferences of circuits

The chief judge of each circuit shall summon annually the circuit and district judges of the circuit, in active service, to a conference at a time and place that he designates, for the purpose of considering the business of the courts and advising means of improving the administration of justice within such circuit. He shall preside at such conference, which shall be known as the Judicial Conference of the circuit. The judges of the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands shall also be summoned annually to the conferences of their respective circuits.

Every judge summoned shall attend, and unless excused by the chief judge, shall remain throughout the conference.

The court of appeals for each circuit shall provide by its rules for representation and active participation at such conference by members of the bar of such circuit.

(June 25, 1948, ch. 646, 62 Stat. 903; Dec. 29, 1950, ch. 1185, 64 Stat. 1128; Oct. 31, 1951, ch. 655, § 38, 65 Stat. 723; July 7, 1958, Pub. L. 85-508, § 12(e), 72 Stat. 348.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§ 449, 450 (Mar. 3, 1911, ch. 231, §§ 307, 308, as added Aug. 7, 1939, ch. 501, § 1, 53 Stat. 1223).

Section consolidates parts of sections 449 and 450 of title 28, U.S.C., 1940 ed.,

Said section 450 contained definitions of "courts" and "continental United States," and directions that sections 444-450 of title 28, U.S.C., 1940 ed., relating to the administration of United States courts, should apply to the courts of appeals, the United States Court of Appeals for the District of Columbia and to the several enumerated district courts of the United States, including those in the Territories and Possessions as well as the Court of Claims, Court of Customs and Patent Appeals, and Customs Court. It also provided that the Chief Justice and associate justices of the Court of Appeals for the District of Columbia should have the powers of the senior judge and circuit judges, respectively, of a circuit court of appeals.

The revised section omits, as surplusage, the definition of "continental United States." Other provisions of section 450 of title 28, U.S.C., 1940 ed., referred to were omitted as unnecessary in view of section 604 of this title which provides for the powers and duties of the Director of the Administrative Office of the United States Courts. Remaining provisions of said section 450 are incorporated in said section 604 and section 610 of this title.

The provision as to travel and subsistence which was contained in said section 449 of title 28, U.S.C., 1940 ed., is incorporated in section 456 of this title.

#### AMENDMENTS

1958—Pub. L. 85-508 eliminated provisions which required the judge of the District Court for the Territory of Alaska to be summoned annually to the conference of his circuit. See section 81A of this title which establishes a United States District Court for the State of Alaska.

1951—Act Oct. 31, 1951, inserted reference to the judge of the District Court of Guam in first par.

1950—Act Dec., 29, 1950, provided for the presence of the judges of the District Courts of Alaska, Canal Zone, and the Virgin Islands at annual conferences within their respective circuits.

#### EFFECTIVE DATE OF 1958 AMENDMENT

Amendment by Pub. L. 85-508 effective Jan. 3, 1959, upon admission of Alaska into the Union pursuant to Proc. No. 3269, Jan. 3, 1959, 24 F.R. 81, 73 Stat. c16, as required by sections 1 and 8(c) of Pub. L. 85-508, see notes set out under section 81A of this title and preceding section 21 of Title 48, Territories and Insular Possessions.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 331 of this title.

### § 334. Institutes and joint councils on sentencing

(a) In the interest of uniformity in sentencing procedures, there is hereby authorized to be established under the auspices of the Judicial Conference of the United States, institutes and joint councils on sentencing. The Attorney General and/or the chief judge of each circuit may at any time request, through the Director of the Administrative Office of the United States Courts, the Judicial Conference to convene such institutes and joint councils for the purpose of studying, discussing, and formulating the objectives, policies, standards, and criteria for sentencing those convicted of crimes and offenses in the courts of the United States. The agenda of the institutes and joint councils may include but shall not be limited to: (1) The development of standards for the content and utilization of presentence reports; (2) the establishment of factors to be used in selecting cases for special study and observation in prescribed diagnostic clinics; (3) the determination of the importance of psychiatric, emotional, sociological and physiological factors involved in crime and their bearing upon sentences; (4) the discussion of special sentencing problems in unusual cases such as treason, violation of public trust, subversion, or involving abnormal sex behavior, addiction to drugs or alcohol, and mental or physical handicaps; (5) the formulation of sentencing principles and criteria which will assist in promoting the equitable administration of the criminal laws of the United States.

(b) After the Judicial Conference has approved the time, place, participants, agenda, and other arrangements for such institutes and joint councils, the chief judge of each circuit is authorized to invite the attendance of district judges under conditions which he thinks proper and which will not unduly delay the work of the courts.

(c) The Attorney General is authorized to select and direct the attendance at such institutes and meetings of United States attorneys and other officials of the Department of Justice and may invite the participation of other interested Federal officers. He may also invite specialists in sentencing methods, criminologists, psychiatrists, penologists, and others to participate in the proceedings.

(d) The expenses of attendance of judges shall be paid from applicable appropriations for the judiciary of the United States. The expenses connected with the preparation of the plans and agenda for the conference and for the travel and other expenses incident to the attendance of officials and other participants invited by the Attorney General shall be paid from applicable appropriations of the Department of Justice.

(Added Pub. L. 85-752, § 1, Aug. 25, 1958, 72 Stat. 845.)

### SENTENCING PROCEDURES

Section 7 of Pub. L. 85-752 provided that: "This Act [which enacted this section, sections 4208 and 4209 of Title 18, Crimes and Criminal Procedure, and provisions set out as a note under section 4208 of title 18] does not apply to any offense for which there is provided a mandatory penalty."

## CHAPTER 17—RESIGNATION AND RETIREMENT OF JUSTICES AND JUDGES

Sec.

371. Resignation or retirement for age.
372. Retirement for disability; substitute judge on failure to retire.
373. Judges in Territories and Possessions.
374. Residence of retired judges; official station.
375. Annuities to widows of justices.
376. Annuities to widows and surviving dependent children of justices and judges of the United States. [1]

### AMENDMENTS

1972—Pub. L. 92-397, § 3(a), (b), Aug. 22, 1972, 86 Stat. 579, substituted "Justices and Judges" for "Judges" in the chapter heading, and in item 376 substituted "justices and judges of the United States" for "judges".

1959—Pub. L. 86-312, § 2, Sept. 21, 1959, 73 Stat. 587, inserted "; official station" in item 374.

1956—Act Aug. 3, 1956, ch. 944, § 1(a), 70 Stat. 1021, substituted "Annuities to widows of justices" for "Annuities to widows on the Chief Justice and Associate Justices of the Supreme Court of the United States" in item 375, and added item 376.

1954—Act Aug. 28, 1954, ch. 1053, § 2, 68 Stat. 918, added item 375.

Act Feb. 10, 1954, ch. 6, § 4(b), 68 Stat. 13, transferred "; substitute judge on failure to retire" from item 371 to item 372.

### CROSS REFERENCES

Tax Court Judges, retirement, see section 7447 of Title 26, Internal Revenue Code.

### § 371. Resignation or retirement for age

(a) Any justice or judge of the United States appointed to hold office during good behavior who resigns after attaining the age of seventy years and after serving at least ten years continuously or otherwise shall, during the remainder of his lifetime, continue to receive the salary which he was receiving when he resigned.

(b) Any justice or judge of the United States appointed to hold office during good behavior may retain his office but retire from regular active service after attaining the age of seventy years and after serving at least ten years continuously or otherwise, or after attaining the age of sixty-five years and after serving at least fifteen years continuously or otherwise. He shall, during the remainder of his lifetime, continue to receive the salary of the office. The President shall appoint, by and with the advice and consent of the Senate, a successor to a justice or judge who retires.

(June 25, 1948, ch. 646, 62 Stat. 903; Oct. 31, 1951, ch. 655, § 39, 65 Stat. 724; Feb. 10, 1954, ch. 6, § 4(a), 68 Stat. 12.)

### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§ 375 and 375a (Mar. 3, 1911, ch. 231, § 260, 36 Stat. 1161; Feb. 25, 1919, ch. 29, § 6, 40 Stat. 1157; Mar. 1, 1929, ch. 419, 45 Stat. 1422; Mar. 1, 1937, ch. 21, §§ 1, 2, 50 Stat. 24; Feb. 11, 1938, ch. 25, § 1, 52 Stat. 28; May 11, 1944, ch. 192, § 1, 58 Stat. 218).

This section consolidates provisions of sections 375 and 375a of title 28, U.S.C., 1940 ed., relating to resignation and retirement. Remaining provisions of said section 375 now appear in sections 136, 294, and 756 of this title, and remaining provisions of said section 375a now appear in section 294 of this title.

Words "may resign, or may retain his office but retire from regular active service" were used to clarify the difference between resignation and retirement. Resignation results in loss of the judge's office, while retirement does not. (*Booth* v. *U.S.*, 1933, 54 S. Ct. 379, 291 U.S. 339, 78 L. Ed. 836; *U.S.* v. *Moore*, 1939, 101 F. 2d 56, certiorari denied 59 S. Ct. 788, 306 U.S. 664, 83 L. Ed. 1060.)

Terms "judge of the United States" and "justice of the United States" are defined in section 451 of this title.

The revised section continues the provision respecting the salary of a resigned judge but changes such provision for retired judges and makes them eligible to receive any increases provided by Congress for the office from which they retired. This change is in harmony with the clear line of distinction drawn by Congress between retirement and resignation.

### AMENDMENTS

1954—Act Feb. 10, 1954, struck out "; substitute judge on failure to retire" in catchline.

Subsec. (a). Act Feb. 10, 1954, reenacted subsec. (a) without change.

Subsec. (b). Act Feb. 10, 1954, in first sentence, inserted the provision for retirement after attaining the age of 65 years and after serving 15 years continuously or otherwise.

Subsec. (c). Act Feb. 10, 1954, in the general amendment of this section, omitted subsec. (c) which related to appointment of substitute judges for disabled judges eligible to resign or retire where the latter fail to resign or retire, and to precedence of such disabled judges who remain on the active list after the appointment of substitutes.

1951—Act Oct. 31, 1951, subdivided the section into subsections, and limited second par. of subsec. (c) (as so designated) to judges who remain on the active list but whose disabilities cause the appointment of additional judges as authorized by first par. of such subsec.

### COMPUTATION OF JUDICIAL SERVICE, DISTRICT OF ALASKA

Pub. L. 89-70, July 8, 1965, 79 Stat. 213, provided: "That, notwithstanding any other provision of law, any service as a judge of the District Court for the Territory of Alaska shall be included in computing under sections 371 and 372 of Title 28, United States Code, the aggregate years of judicial service of a United States district judge for the district of Alaska."

### JUDICIAL SERVICE IN HAWAII INCLUDED WITHIN COMPUTATION OF AGGREGATE YEARS OF JUDICIAL SERVICE

Pub. L. 86-3, § 14(d), Mar. 18, 1959, 73 Stat. 10, provided in part: "That service as a judge of the District

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[1] So in original. Does not conform to section catchline.

Court for the Territory of Hawaii or as a judge of the United States District Court for the District of Hawaii or as a justice of the Supreme Court of the Territory of Hawaii or as a judge of the circuit courts of the Territory of Hawaii shall be included in computing under section 371, 372, or 373 of title 28, United States Code, the aggregate years of judicial service of any person who is in office as a district judge for the District of Hawaii on the date of enactment of this Act [Mar. 18, 1959]."

### Cross References

Assignment of retired justices or judges to active duty, see section 294 of this title.

Justices and judges appointed to hold office during good behavior—

- Court of Claims, see section 173 of this title.
- Court of Customs and Patent Appeals, see section 213 of this title.
- Courts of Appeals, see U.S. Const., Art. 3, § 1.
- Customs Court, see section 252 of this title.
- District Courts, see U.S. Const., Art. 3, § 1.
- Supreme Court, see U.S. Const., Art. 3, § 1.

Tax court judges, retirement, see section 7447 of Title 26, Internal Revenue Code.

### Section Referred to in Other Sections

This section is referred to in sections 294, 376 of this title.

## § 372. Retirement for disability; substitute judge on failure to retire

(a) Any justice or judge of the United States appointed to hold office during good behavior who becomes permanently disabled from performing his duties may retire from regular active service, and the President shall, by and with the advice and consent of the Senate, appoint a successor.

Any justice or judge of the United States desiring to retire under this section shall certify to the President his disability in writing.

Whenever an associate justice of the Supreme Court, a chief judge of a circuit or the chief judge of the Court of Claims, Court of Customs and Patent Appeals, or Customs Court, desires to retire under this section, he shall furnish to the President a certificate of disability signed by the Chief Justice of the United States.

A circuit or district judge, desiring to retire under this section, shall furnish to the President a certificate of disability signed by the chief judge of his circuit.

A judge of the Court of Claims, Court of Customs and Patent Appeals, or Customs Court desiring to retire under this section, shall furnish to the President a certificate of disability signed by the chief judge of his court.

Each justice or judge retiring under this section after serving ten years continuously or otherwise shall, during the remainder of his lifetime, receive the salary of the office. A justice or judge retiring under this section who has served less than ten years in all shall, during the remainder of his lifetime, receive one-half the salary of the office.

(b) Whenever any judge of the United States appointed to hold office during good behavior who is eligible to retire under this section does not do so and a certificate of his disability signed by a majority of the members of the Judicial Council of his circuit in the case of a circuit or district judge, or by the Chief Justice of the United States in the case of the Chief Judge of the Court of Claims, Court of Customs and Patent Appeals, or Customs Court, or by the chief judge of his court in the case of a judge of the Court of Claims, Court of Customs and Patent Appeals, or Customs Court, is presented to the President and the President finds that such judge is unable to discharge efficiently all the duties of his office by reason of permanent mental or physical disability and that the appointment of an additional judge is necessary for the efficient dispatch of business, the President may make such appointment by and with the advice and consent of the Senate. Whenever any such additional judge is appointed, the vacancy subsequently caused by the death, resignation, or retirement of the disabled judge shall not be filled. Any judge whose disability causes the appointment of an additional judge shall, for purpose of precedence, service as chief judge, or temporary performance of the duties of that office, be treated as junior in commission to the other judges of the circuit, district, or court.

(June 25, 1948, ch. 646, 62 Stat. 903; May 24, 1949, ch. 139, § 67, 63 Stat. 99; Feb. 10, 1954, ch. 6, § 4(a), 68 Stat. 13; Sept. 2, 1957, Pub. L. 85-261, 71 Stat. 586.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., §§ 375b, 375c, and 375d (Aug. 5, 1939, ch. 433, §§ 1-3, 53 Stat. 1204, 1205).

This section consolidates sections 375b, 375c, and 375d of title 28, U.S.C., 1940 ed.

Section 375e of title 28, U.S.C., 1940 ed. providing that term "senior circuit judge" includes the Chief Justice of the United States Court of Appeals for the District of Columbia, and the term "judicial circuit" includes the District of Columbia, was omitted from this revision as unnecessary. Such district is included as a judicial circuit by section 41 of this title.

Words "justice or judge of the United States" were used to describe members of all courts who hold office during good behavior. (See reviser's note under section 371 of this title.)

Term "chief judge" was substituted for "Chief Justice" of the Court of Claims, "presiding judge" of the Court of Customs and Patent Appeals and "senior circuit judge." (See Reviser's Note under section 136 of this title.)

For clarity and convenience the requirement that certificates of disability be submitted "to the President," was made explicit.

The revised section requires a judge of the Customs Court to furnish a certificate of disability signed by the chief judge of his court, instead of by the chief judge of the Court of Customs and Patent Appeals as in said section 375c of title 28, U.S.C., 1940 ed. This change insures signing of the certificate of disability by the chief judge possessing knowledge of the facts.

Changes were made in phraseology and arrangement.

### 1949 Act

Subsection (a) of this section amends section 372 of title 28, U.S.C., to express the requirement that appointment of successors to justices or judges must be made with confirmation by the Senate. Subsection (b) of this section clarifies the intent of section 372 of title 28, U.S.C., and conforms with the language of section 371 of such title.

### Amendments

1957—Subsec. (b). Pub. L. 85-261 added subsec. (b).

1954—Act Feb. 10, 1954, added "; substitute judge on failure to retire" to catchline (but without adding any provisions on such subject to the text of the section, see 1957 amendment), and added, after "retire" in third, fourth, and fifth pars., the words "under this section".

1949—Act May 24, 1949, amended section to include the provision that appointment of successors to justices or judges must be made with the consent of the Senate, and inserted "continuously or otherwise" following "Each justice or judge" in the last par.

### JUDICIAL SERVICE IN HAWAII

Certain judicial service in Hawaii included within computation of aggregate years of judicial service, see section 14(d) of Pub. L. 86-3, Mar. 18, 1959, 73 Stat. 10, set out as a note under section 371 of this title.

### COMPUTATION OF JUDICIAL SERVICE, DISTRICT OF ALASKA

Inclusion of service as judge of the District Court for the Territory of Alaska in the computation of years of judicial service for judges of the United States District Court for the District of Alaska, see Pub. L. 89-70, July 8, 1965, 79 Stat. 213, set out as a note under section 371 of this title.

### CROSS REFERENCES

Assignment of retired justices or judges to active duty, see section 294 of this title.

Justices and judges appointed to hold office during good behavior—

- Court of Claims, see section 173 of this title.
- Court of Customs and Patent Appeals, see section 213 of this title.
- Courts of Appeals, see U.S. Const., Art. 3, § 1.
- Customs Court, see section 252 of this title.
- District Courts, see U.S. Const., Art. 3, § 1.
- Supreme Court, see U.S. Const., Art. 3, § 1.

### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 294, 376 of this title.

## § 373. Judges in Territories and Possessions

Any judge of the United States District Court for the District of the Canal Zone, the District Court of Guam, or the District Court of the Virgin Islands, who resigns after attaining the age of seventy years and after serving at least ten years, continuously or otherwise, or after attaining the age of sixty-five years and after serving at least fifteen years, continuously or otherwise, shall continue during the remainder of his life to receive the salary he received when he relinquished office.

Any judge of any such courts who is removed by the President of the United States upon the sole ground of mental or physical disability, or who fails of reappointment, shall be entitled, upon attaining the age of sixty-five years or upon relinquishing office if he is then beyond the age of sixty-five years, (a) if his judicial service aggregated sixteen years or more, to receive during the remainder of his life the salary he received when he relinquished office, or (b) if his judicial service aggregated less than sixteen years but not less than ten years, to receive during the remainder of his life that proportion of such salary which the aggregate number of years of his judicial service bears to sixteen.

Service at any time in any of the courts referred to in the first paragraph, or in any other court under appointment by the President, shall be included in the computation of aggregate years of judicial service for the purposes of this section.

Any judge who has retired by resigning under the provisions of this section, or who is otherwise entitled to payments under this section, shall be entitled after the effective date of this Act to a cost-of-living adjustment in the amount payable to him computed as specified in section 8340(b) of title 5, United States Code: *Provided, however,* That in no case shall the salary or amount payable to such judge as increased under this paragraph exceed 95 per centum of the salary of a United States district court judge in regular active service.

(June 25, 1948, ch. 646, 62 Stat. 904; Oct. 31, 1951, ch. 655, § 40, 65 Stat. 724; Feb. 10, 1954, ch. 6, § 5, 68 Stat. 13; July 7, 1958, Pub. L. 85-508, § 12(d), 72 Stat. 348; Mar. 18, 1959, Pub. L. 86-3, § 14(d), 73 Stat. 10; Sept. 12, 1966, Pub. L. 89-571, § 2, 80 Stat. 764; Oct. 11, 1976, Pub. L. 94-470, 90 Stat. 2052.)

### HISTORICAL AND REVISION NOTES

Based on section 634b and 634c of title 48, U.S.C., 1940 ed., Territories and Insular Possessions. [title 28, U.S.C., 1940 ed., §§ 375g, 375g note, 375h] (May 31, 1938, ch. 301, §§ 1, 2, 52 Stat. 591; Apr. 16, 1946, ch. 139, §§ 1, 2, 3, 60 Stat. 90, 91).

Section consolidates sections 634b and 634c of title 48, U.S.C., 1940 ed., as amended and transferred to title 28, U.S.C., 1940 ed., as sections 375g and 375h thereof, with changes of phraseology necessary to effect consolidation.

### REFERENCES IN TEXT

The effective date of this Act, referred to in text, probably means Oct. 11, 1976, the date of approval of Pub. L. 94-470.

### AMENDMENTS

1976—Pub. L. 94-470 added cost-of-living adjustment provision, including limitation of payment to amount no greater than 95 per centum of the salary of a United States district court judge in regular active service.

1966—Pub. L. 89-571 removed the United States District Court for the District of Puerto Rico from the list of courts to which the provisions of the section are applicable.

1959—Pub. L. 86-3 eliminated references to judges of the United States District Court for the District of Hawaii and to justices of the Supreme Court of the Territory of Hawaii. See section 91 of this title and notes thereunder.

1958—Pub. L. 85-508 eliminated provisions which related to the District Court for the Territory of Alaska. See section 81A of this title which establishes a United States District Court for the State of Alaska.

1954—Act Feb. 10, 1954, among other changes, added the provisions for retirement after attaining the age of 65 years and after serving at least fifteen years continuously or otherwise, changed the period of service in connection with retirement at age 70, and reduced from 70 to 65 years the age requirement in connection with payment of salary after removal for mental or physical disability or failure of reappointment.

1951—Act Oct. 31, 1951, inserted reference to the judge of the District Court of Guam in first paragraph.

### EFFECTIVE DATE OF 1959 AMENDMENT

Amendment by Pub. L. 86-3 effective upon the admission of the State of Hawaii into the Union, see note set out under section 1252 of this title. Admission of Hawaii into the Union was accomplished Aug. 21, 1959, upon issuance of Proc. No. 3309, Aug. 21, 1959, 25 F.R. 6868, 73 Stat. c74, as required by sections 1 and 7(c) of Pub. L. 86-3, Mar. 18, 1959, 73 Stat. 4, set out as notes preceding section 491 of Title 48, Territories and Insular Possessions.

EFFECTIVE DATE OF 1958 AMENDMENT

Amendment by Pub. L. 85-508 effective Jan. 3, 1959, upon admission of Alaska into the Union pursuant to Proc. No. 3269, Jan. 3, 1959, 24 F.R. 81, 73 Stat. c16, as required by sections 1 and 3(c) of Pub. L. 85-508, see notes set out under section 81A of this title and preceding section 21 of Title 48, Territories and Insular Possessions.

TENURE AND SALARY RIGHTS OF JUDGES IN PUERTO RICO IN OFFICE ON SEPTEMBER 12, 1966

Amendment by Pub. L. 89-571 not to affect tenure of office or right to continue to receive salary after resignation, retirement, or failure of reappointment of any district judge for the District of Puerto Rico in office on September 12, 1966, see section 4 of Pub. L. 89-571, set out as a note under section 134 of this title.

PRESERVATION OF RIGHTS OF RETIRED JUDGES OF THE DISTRICT COURT FOR THE TERRITORY OF ALASKA

Section 12(d) of Pub. L. 85-508 provided in part that the amendment by Pub. L. 85-508 shall not affect the rights of any judge who may have retired before it takes effect. See Effective Date of 1958 Amendment note above.

PRESERVATION OF RIGHTS OF RETIRED JUDGES OF THE DISTRICT COURT FOR THE DISTRICT OF HAWAII AND JUSTICES OF THE SUPREME COURT OF THE TERRITORY OF HAWAII

Section 14(d) of Pub. L. 86-3 provided in part that the amendments by Pub. L. 86-3 shall not affect the rights of any judge or justice who may have retired before the effective date of section 14(d) of Pub. L. 86-3.

JUDICIAL SERVICE IN HAWAII

Certain judicial service in Hawaii included within computation of aggregate years of judicial service, see section 14(d) of Pub. L. 86-3, set out as a note under section 371 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 376 of this title.

### § 374. Residence of retired judges; official station

Retired judges of the United States are not subject to restrictions as to residence. The place where a retired judge maintains the actual abode in which he customarily lives shall be deemed to be his official station for the purposes of section 456 of this title.

(June 25, 1948, ch. 646, 62 Stat. 904; Sept. 21, 1959, Pub. L. 86-312, § 1, 73 Stat. 587.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 402 (Feb. 11, 1938, ch. 23, 52 Stat. 28).

Sections 44 and 133 of this title require that active circuit and district judges shall reside in the circuit or district to which appointed.

Changes were made in phraseology.

AMENDMENTS

1959—Pub. L. 86-312 added sentence to provide that place where retired judge maintains actual abode shall be deemed to be his official station and inserted "; official station" in the catchline.

### § 375. Annuities to widows of justices

(a) The Director of the Administrative Office of the United States Courts shall pay to the surviving widow of a justice of the United States who died on or before the date of enactment of this section, while in regular active service or after having retired or resigned under the provisions of this chapter, an annuity of $10,000.

(b) The surviving widow of a justice of the United States who is in regular active service or is retired or resigned under the provisions of this chapter on the date of enactment of this section, shall, if the justice gives written notice to the Director of the Administrative Office of the United States Courts within six months of the date of enactment of this section of his election to become subject to the provisions of section 376 of this chapter, be paid an annuity of $5,000 or an annuity in accordance with the provisions of section 376, whichever is the greater.

(c) The surviving widow of a justice of the United States who is in regular active service or is retired or resigned under the provisions of this chapter on the date of enactment of this section, shall, if the justice fails to give timely written notice of his election to become subject to the provisions of section 376 of this chapter, be paid an annuity of $5,000.

(d) The widow of a justice of the United States who is appointed after the date of enactment of this section shall be ineligible for an annuity under this section.

(e) An annuity payable under this section shall accrue monthly and shall be due and payable in monthly installments on the first business day of the month following the month for which the annuity shall have accrued. Such annuity shall commence on the first day of the month in which a justice dies, and shall terminate upon the death or remarriage of the annuitant.

(Added Aug. 28, 1954, ch. 1053, § 1, 68 Stat. 918, and amended Aug. 3, 1956, ch. 944, § 1(b), 70 Stat. 1021; Aug. 22, 1972, Pub. L. 92-397, § 1, 86 Stat. 579.)

REFERENCES IN TEXT

Date of enactment of this section, referred to in subsecs. (a) to (d), probably refers to the date of amendment of this section by Pub. L. 92-397, which was approved on Aug. 22, 1972.

AMENDMENTS

1972—Subsec. (a). Pub. L. 92-397 struck out reference to annuity in the amount payable to the beneficiary under the Act of January 14, 1937 (50 Stat. 923, chapter 3), and specified annuity of $10,000.

Subsecs. (b) to (d). Pub. L. 92-397 added subsecs. (b) to (d). Former subsec. (b) redesignated (e).

Subsec. (e). Pub. L. 92-397 redesignated former subsec. (b) as (e), and in subsec. (e) as redesignated, substituted "a justice dies" for "any such justice dies, or on the first day of the month in which this section is enacted, whichever is later".

1956—Act Aug. 3, 1956, substituted "Annuities to widows of justices" for "Annuities to widows of the Chief Justice and Associate Justices of the Supreme Court of the United States" in the catchline.

### § 376. Annuities for survivors of certain judicial officials of the United States

(a) For the purposes of this section—

(1) "judicial official" means:

(A) a Justice or judge of the United States, as defined by section 451 of this title;

(B) a judge of the United States District Court for the District of the Canal Zone, the District Court of Guam, or the District Court of the Virgin Islands;

(C) a Director of the Administrative Office of the United States Courts, after he or she has filed a waiver under subsection (a) of section 611 of this title;

(D) a Director of the Federal Judicial Center, after he or she has filed a waiver under subsection (b) of section 627 of this title; or

(E) an administrative assistant to the Chief Justice of the United States, after he or she has filed a waiver in accordance with both subsection (a) of section 677 and subsection (a) of section 611 of this title;

who notifies the Director of the Administrative Office of the United States Courts in writing of his or her intention to come within the purview of this section within six months after (i) the date upon which he or she takes office, (ii) the date upon which he or she marries, or (iii) the date upon which the Judicial Survivors' Annuities Reform Act becomes effective;

(2) "retirement salary" means:

(A) in the case of a Justice or judge of the United States, as defined by section 451 of this title, salary paid (i) after retirement from regular active service under subsection (b) of section 371 or subsection (a) of section 372 of this title, or (ii) after retirement from office by resignation on salary under subsection (a) of section 371 of this title;

(B) in the case of a judge of the United States District Court for the District of the Canal Zone, the District Court of Guam, or the District Court of the Virgin Islands, salary paid after retirement from office (i) by resignation on salary under section 373 of this title or (ii) by removal or failure of reappointment after not less than ten years' judicial service;

(C) in the case of a Director of the Administrative Office of the United States Courts, an annuity paid under subsection (b) or (c) of section 611 of this title;

(D) in the case of a Director of the Federal Judicial Center, an annuity paid under subsection (c) or (d) of section 627 of this title; and

(E) in the case of an administrative assistant to the Chief Justice of the United States, an annuity paid in accordance with both subsection (a) of section 677 and subsection (a) of section 611 of this title;

(3) "widow" means the surviving wife of a "judicial official", who:

(A) has been married to him for at least one year on the day of his death; or

(B) is the mother of issue by that marriage;

(4) "widower" means the surviving husband of a "judicial official", who:

(A) has been married to her for at least one year on the day of her death; or

(B) is the father of issue by that marriage;

(5) "child" means:

(A) an unmarried child under eighteen years of age, including (i) an adopted child and (ii) a stepchild or recognized natural child who lived with the judicial official in a regular parent-child relationship;

(B) such unmarried child between eighteen and twenty-two years of age who is a student regularly pursuing a full-time course of study or training in residence in a high school, trade school, technical or vocational institute, junior college, college, university, or comparable educational institution. A child whose twenty-second birthday occurs before July 1, or after August 31, of a calendar year, and while he or she is regularly pursuing such a course of study or training, is deemed to have become twenty-two years of age on the first day of July immediately following that birthday. A child who is a student is deemed not to have ceased being a student during an interim period between school years, if that interim period lasts no longer than five consecutive months and if that child shows, to the satisfaction of the Director of the Administrative Office of the United States Courts, that he or she has a bona fide intention of continuing to pursue a course of study or training in the same or a different school during the school semester, or other period into which the school year is divided, immediately following that interim period; or

(C) such unmarried child, regardless of age, who is incapable of self-support because of a mental or physical disability incurred either (i) before age eighteen, or (ii) in the case of a child who is receiving an annuity as a full-time student under subparagraph (5)(B) of this subsection, before the termination of that annuity.

(b) Every judicial official who files a written notification of his or her intention to come within the purview of this section, in accordance with paragraph (1) of subsection (a) of this section, shall be deemed thereby to consent and agree to having deducted and withheld from his or her salary, including any "retirement salary", a sum equal to 4.5 percent of that salary. The amounts so deducted and withheld from the salary of each such judicial official shall, in accordance with such procedures as may be prescribed by the Comptroller General of the United States, be covered into the Treasury of the United States and credited to the "Judicial Survivors' Annuities Fund" established by section 3 of the Judicial Survivors' Annuities Reform Act. Such fund shall be used for the payment of annuities, refunds, and allowances as provided by this section. Payment of such salary less such deductions shall be a full and complete discharge and acquittance of all claims and demands whatsoever for all services rendered by such judicial official during the period covered by such payment, except the rights to those benefits to which such judicial official, or his or her survivors, shall be entitled under the provisions of this section.

(c) There shall also be deposited to the credit of the "Judicial Survivors' Annuities Fund", in accordance with such procedures as may be prescribed by the Comptroller General of the United States, amounts matching those deducted and withheld in accordance with subsection (b) of this section. Such deposits shall be taken from the fund used to pay the compensation of the judicial official, and shall immediately become an integrated part of the "Judicial Survivors' Annuities Fund" for any use required under this section.

(d) Each judicial official shall deposit, with interest at 4 percent per annum to December 31, 1947, and at 3 percent per annum thereafter, compounded on December 31 of each year, to the credit of the "Judicial Survivors' Annuities Fund":

(1) a sum equal to 4.5 percent of that salary, including "retirement salary", which he or she has received for serving in any of the offices designated in paragraph (1) of subsection (a) of this section prior to the date upon which he or she filed notice of an intention to come within the purview of this section with the Director of the Administrative Office of the United States Courts; and

(2) a sum equal to 4.5 percent of the basic salary, pay, or compensation which he or she has received for serving as a Senator, Representative, Delegate, or Resident Commissioner in Congress, or for serving as an "employee", as that term is defined in subsection (1) of section 8331 of title 5, prior to assuming the responsibilities of any of the offices designated in paragraph (1) of subsection (a) of this section.

The interest otherwise required by this subsection shall not be required for any period during which a judicial official was separated from all such service and was not receiving any retirement salary.

Each such judicial official may elect to make such deposits in installments, during the continuance of his or her service in those offices designated in paragraph (1) of subsection (a) of this section, in such amounts and under such conditions as may be determined in each instance by the Director of the Administrative Office of the United States Courts: *Provided*, That, in each instance in which a judicial official does elect to make such deposits in installments, the Director shall require (i) that the first installment payment made shall be in an amount no smaller than that amount necessary to cover at least the last eighteen months of prior creditable civilian service, and (ii) that at least one additional installment payment shall be made every eighteen months thereafter until the total of all such deposits have been made.

Notwithstanding the failure of any such judicial official to make all such deposits or installment payments, credit shall be allowed for the service rendered, but the annuity of that judicial official's widow or widower shall be reduced by an amount equal to 10 percent of the amount of such deposits, computed as of the date of the death of such judicial official, unless such widow or widower shall elect to eliminate such service entirely from credit under subsection (k) of this section: *Provided*, That no deposit shall be required from any such judicial official for any honorable active duty service in the Army, Navy, Air Force, Marine Corps, or Coast Guard of the United States, or for any other creditable service rendered prior to August 1, 1920.

(e) The amounts deducted and withheld in accordance with subsection (b) of this section, and the amounts deposited in accordance with subsection (d) of this section, shall be credited to individual accounts in the name of each judicial official from whom such amounts are received, for credit to the "Judicial Survivors' Annuities Fund".

(f) The Secretary of the Treasury shall invest, from time to time, in interest bearing securities of the United States or Federal farm loan bonds, those portions of the "Judicial Survivors' Annuities Fund" which in his judgment may not be immediately required for the payment of annuities, refunds, and allowances as provided in this section. The income derived from such investments shall constitute a part of such fund for the purposes of paying annuities and carrying out the provisions of subsections (g), (h), (m), (*o* ), (p), and (q) of this section.

(g) If any judicial official resigns from office without receiving any "retirement salary," all amounts credited to his or her individual account, together with interest at 4 percent per annum to December 31, 1947; and at 3 percent per annum thereafter, compounded on December 31 of each year, to the date of his or her relinquishment of office, shall be returned to that judicial official in a lump-sum payment within a reasonable period of time following the date of his or her relinquishment of office. For the purposes of this subsection a "reasonable period of time" shall be presumed to be no longer than one year following the date upon which such judicial official relinquished his or her office.

(h) Annuities payable under this section shall be paid only in accordance with the following provisions:

(1) In any case in which a judicial official dies while in office, or while receiving "retirement salary," after having completed at least eighteen months of creditable civilian service, as computed in accordance with subsection (k) of this section, for the last eighteen months of which the salary deductions provided by subsection (b) of this section or, in lieu thereof, the deposits required by subsection (d) of this section have actually been made—

(A) if such judicial official is survived by a widow or widower, but not by a child, there shall be paid to such widow or widower an annuity, beginning on the day on which such judicial official died, in an amount computed as provided in subsection (l) of this section; or

(B) if such judicial official is survived by a widow or widower and a child or children, there shall be paid to such widow or widower an annuity, beginning on the day on which such judicial official died, in an amount computed as provided in subsection (*l* ) of this section, and there shall also be paid to or on behalf of each such child an immediate annuity equal to:

(i) $1,548; or

(ii) $4,644, divided by the number of children;

whichever is smallest; or

(C) if such judicial official leaves no surviving widow or widower, but does leave a surviving child or children, there shall be paid to or on behalf of each such child an immediate annuity equal to:

(i) the amount of the annuity to which the judicial official's widow or widower would have been entitled under subparagraph (1)(A) of this subsection, had such widow or widower survived the judicial official, divided by the number of children; or

(ii) $1,860; or

(iii) $5,580, divided by the number of children;

whichever is smallest.

(2) An annuity payable to a widow or widower under subparagraphs (1)(A) or (1)(B) of this subsection shall be terminated upon his or her death or remarriage.

(3) An annuity payable to a child under this subsection shall terminate:

(A) if such child is receiving an annuity based upon his or her status under subparagraph (5)(A) of subsection (a) of this section, on the last day of the month during which he or she becomes eighteen years of age;

(B) if such child is receiving an annuity based upon his or her status under subparagraph (5)(B) of subsection (a) of this section, either (i) on the first day of July immediately following his or her twenty-second birthday or (ii) on the last day of the month during which he or she ceases to be a full-time student in accordance with subparagraph (5)(B) of subsection (a) of this section, whichever occurs first: *Provided*, That if such child is rendered incapable of self-support because of a mental or physical disability incurred while receiving that annuity, that annuity shall not terminate, but shall continue without interruption and shall be deemed to have become, as of the date of disability, an annuity based upon his or her status under clause (ii) of subparagraph (5)(C) of subsection (a) of this section;

(C) if such child is receiving an annuity based upon his or her status under subparagraph (5)(C) of subsection (a) of this section, on the last day of the month during which he or she ceases to be incapable of self-support because of mental or physical disability; or

(D) on the last day of the month during which such child dies or marries.

(4) An annuity payable to a child or children under subparagraph (1)(B) of this subsection shall be recomputed and paid as provided in subparagraph (1)(C) of this subsection upon the death, but not upon the remarriage, of the widow or widower who is receiving an annuity under subparagraph (1)(B) of this subsection.

(5) In any case in which the annuity of a child is terminated, the annuity of each remaining child which is based upon the service of the same judicial official shall be recomputed and paid as though the child whose annuity has been terminated had not survived that judicial official.

(i) All questions of dependency and disability arising under this section shall be determined by the Director of the Administrative Office of the United States Courts, subject to review only by the Judicial Conference of the United States, and the decision of the Judicial Conference of the United States shall be final and conclusive. The Director may order or direct at any time such medical or other examinations as he deems necessary to determine the facts relative to the nature and degree of disability of any child who is an annuitant, or an applicant for an annuity, under this section, and may suspend or deny any such annuity for failure to submit to any such examination.

(j) In any case in which a payment under this section is to be made to a minor, or to a person mentally incompetent or under other legal disability, as determined by a court of competent jurisdiction, such payment may be made to the person who is constituted guardian or other fiduciary of such claimant by the laws of the State of residence of such claimant, or to any other person who is otherwise legally vested with the care of the claimant or of the claimant's estate, and need not be made directly to such claimant. The Director of the Administrative Office of the United States Courts may, at his or her discretion, determine whether such payment is made directly to such claimant or to such guardian, fiduciary, or other person legally vested with the care of such claimant or the claimant's estate. Where no guardian or other fiduciary of such minor or such person under legal disability has been appointed under the laws of the State of residence of such claimant, the Director of the Administrative Office of the United States Courts shall determine the person who is otherwise legally vested with the care of the claimant or of the claimant's estate.

(k) The years of service rendered by a judicial official which may be creditable in calculating the amount of an annuity for such judicial official's widow or widower under subsection (l) of this section shall include—

(1) those years during which such judicial official served in any of the offices designated in paragraph (1) of subsection (a) of this section, including in the case of a Justice or judge of the United States those years during which he or she continued to hold office following retirement from regular active service under subsection (b) of section 371 or subsection (a) of section 372 of this title;

(2) those years during which such judicial official served as a Senator, Representative, Delegate, or Resident Commissioner in Congress, prior to assuming the responsibilities of any of the offices designated in paragraph (1) of subsection (a) of this section;

(3) those years during which such judicial official honorably served on active duty in the Army, Navy, Air Force, Marine Corps, or Coast Guard of the United States, prior to assuming the responsibilities of any of the offices designated in paragraph (1) of subsection (a) of this section: *Provided*, That those years of such military service for which credit has been allowed for the purposes of retirement or retired pay under any other provision of law shall not be included as allowable years of such service under this section; and

(4) those years during which such judicial official served as an "employee", as that term

is defined in subsection (1) of section 8331 of title 5, prior to assuming the responsibilities of any of the offices designated in paragraph (1) of subsection (a) of this section.

For the purposes of this subsection the term "years" shall mean full years and twelfth parts thereof, excluding from the aggregate any fractional part of a month which numbers less than fifteen full days and including, as one full month, any fractional part of a month which numbers fifteen full days or more. Nothing in this subsection shall be interpreted as waiving or canceling that reduction in the annuity of a widow or widower which is required by subsection (d) of this section due to the failure of a judicial official to make those deposits required by subsection (d) of this section.

(*l*) The annuity of a widow or widower of a judicial official shall be an amount equal to the sum of—

(1) 1¼ percent of the average annual salary, including retirement salary, which such judicial official received for serving in any of the offices designated in paragraph (1) of subsection (a) of this section (i) during those three years of such service in which his or her annual salary was greatest, or (ii) if such judicial official has so served less than three years, but more than eighteen months, then during the total period of such service prior to his or her death, multiplied by the total of:

(A) the number of years of creditable service tabulated in accordance with paragraph (1) of subsection (k) of this section; plus

(B) the number of years of creditable service tabulated in accordance with paragraph (2) of subsection (k) of this section; plus

(C) the number of years of creditable service tabulated in accordance with paragraph (3) of subsection (k) of this section; plus

(D) the number of years up to, but not exceeding, fifteen of creditable service tabulated in accordance with paragraph (4) of subsection (k) of this section,

plus:

(2) three-fourths of 1 percent of such average annual salary, multiplied by the number of years of any prior creditable service, as tabulated in accordance with subsection (k) of this section, not applied under paragraph (1) of this subsection:

*Provided*, That such annuity shall not exceed 40 percent of such average annual salary and shall be further reduced in accordance with subsection (d) of this section, if applicable.

(m) Whenever the salary paid for service in one of the offices designated in paragraph (1) of subsection (a) of this section is increased, each annuity payable from the "Judicial Survivors' Annuities Fund", which is based, in whole or in part, upon a deceased judicial official having rendered some portion of his or her final eighteen months of service in that same office, shall also be increased. The actual amount of the increase in such an annuity shall be determined by multiplying the amount of the annuity, on the date on which the increase in salary becomes effective, by 3 percent for each 5 percent by which such salary has been increased. In the event that such salary is increased by less than 5 percent, there shall be no increase in such annuity.

(n) Each annuity authorized under this section shall accrue monthly and shall be due and payable in monthly installments on the first business day of the month following the month or other period for which the annuity shall have accrued. No annuity authorized under this section shall be assignable, either in law or in equity, or subject to execution, levy, attachment, garnishment, or other legal process.

(*o*) In any case in which a judicial official dies while in office, or while receiving "retirement salary", and;

(1) before having completed eighteen months of civilian service, computed in accordance with subsection (k) of this section, during which the salary deductions provided by subsection (b) of this section or the deposit required by subsection (d) of this section have actually been made; or

(2) after having completed eighteen months of civilian service, computed in accordance with subsection (k) of this section, during which all such deductions or deposits have been made, but without a survivor or survivors who are entitled to receive the annuity benefits provided by subsection (h) of this section; or

(3) the rights of all persons entitled to receive the annuity benefits provided by subsection (h) of this section terminate before a valid claim therefor has been established;

the total amount credited to the individual account of that judicial official, established under subsection (e) of this section, with interest at 4 percent per annum to December 31, 1947, and at 3 percent per annum thereafter, compounded on December 31, of each year, to the date of that judicial official's death, shall be paid, upon the establishment of a valid claim therefor, to the person or persons surviving at the date title to the payment arises, in the following order of precedence:

First, to the beneficiary or beneficiaries whom that judicial official may have designated in a writing received by the Administrative Office of the United States Courts prior to his or her death;

Second, if there be no such beneficiary, to the widow or widower of such judicial official;

Third, if none of the above, to the child or children of such judicial official and the descendants of any deceased children by representation;

Fourth, if none of the above, to the parents of such judicial official or the survivor of them;

Fifth, if none of the above, to the duly appointed executor, executrix, administrator, or administratrix of the estate of such judicial official;

Sixth, if none of the above, to such other next of kin of such judicial official, as may be determined by the Director of the Administrative Office of the United States Courts to be entitled to such payment, under the laws of the domicile of such judicial official, at the time of his or her death.

Such payment shall be a bar to recovery by any other person. For the purposes of this subsection only, a determination that an individual is a widow, widower, or child of a judicial official may be made by the Director of the Administrative Office of the United States Courts without regard to the definitions of those terms contained in paragraphs (3), (4), and (5) of subsection (a) of this section.

(p) In any case in which all the annuities which are authorized by this section and based upon the service of a given official terminate before the aggregate amount of annuity payments received by the annuitant or annuitants equals the total amount credited to the individual account of such judicial official, established under subsection (e) of this section with interest at 4 percent per annum to December 31, 1947, and at 3 percent per annum thereafter, compounded on December 31, of each year, to the date of that judicial official's death, the difference between such total amount, with such interest, and such aggregate amount shall be paid, upon establishment of a valid claim therefor, in the order of precedence prescribed in subsection (*o*) of this section.

(q) Any accrued annuity benefits remaining unpaid upon the termination of an annuity, other than by the death of an annuitant, shall be paid to that annuitant. Any accrued annuity benefits remaining unpaid upon the death of an annuitant shall be paid, upon the establishment of a valid claim therefor, in the following order of precedence:

First, to the duly appointed executor, executrix, administrator, or administratrix of the estate of such annuitant;

Second, if there is no such executor, executrix, administrator, or administratrix, payments shall be made, after the expiration of sixty days from the date of death of such annuitant, to such individual or individuals as may appear, in the judgment of the Director of the Administrative Office of the United States Courts, to be legally entitled thereto, and such payment shall be a bar to recovery by any other individual.

(r) Nothing contained in this section shall be interpreted to prevent a widow or widower eligible for an annuity under this section from simultaneously receiving such an annuity while also receiving any other annuity to which such widow or widower may also be entitled under any other law without regard to this section: *Provided*, That service used in the computation of the annuity conferred by this section shall not also be credited in computing any such other annuity.

(Added Aug. 3, 1956, ch. 944, § 2, 70 Stat. 1021, and amended July 7, 1958, Pub. L. 85-508, § 12(n), 72 Stat. 348; Dec. 20, 1967, Pub. L. 90-219, title II, § 202, 81 Stat. 668; Aug. 8, 1968, Pub. L. 90-466, § 1(a), 82 Stat. 662; Aug. 22, 1972, Pub. L. 92-397, §§ 2, 3(c), 86 Stat. 579, 580; Oct. 19, 1976, Pub. L. 94-554, § 2, 90 Stat. 2603.)

### References in Text

The date upon which the Judicial Survivors' Annuities Reform Act becomes effective, referred to in subsec. (a)(1), means the effective date of Pub. L. 94-554, which is Jan. 1, 1977. See section 8 of Pub. L. 94-554, set out as an Effective Date of 1976 Amendment note below.

Section 3 of the Judicial Survivors' Annuities Reform Act, referred to in subsec. (b), is section 3 of Pub. L. 94-554, which is set out as a note below.

### Amendments

1976—Pub. L. 94-554 completely rewrote the section so as to reform and update the existing judicial survivors' annuity program providing benefits for surviving spouses and children of all Federal Justices and judges who elect to join the program by placing the program in an actuarially sound fiscal condition, providing more liberal eligibility standards and reasonable increases in existing annuity amounts made necessary by increases in the cost of living since existing annuities were commenced, and by establishing a method for providing future periodic increases in annuity amounts by keying them into increases in judicial salaries.

1972—Subsecs. (a) to (c), (e) to (g), (i) to (k), (n), (o). Pub. L. 92-397 substituted "of justices and judges of the United States" for "of judges" in the section catchline and substituted "justice or judge" for "judge" and "justice's or judge's" for "judge's" wherever appearing.

1968—Subsec. (a). Pub. L. 90-466 deleted "(or within six months after the enactment of this section)" following "takes office" and authorized Federal judges to elect within six months of marriage to participate in the judicial survivors annuity system.

1967—Subsecs. (r), (s). Pub. L. 90-219 added subsecs. (r) and (s).

1958—Subsec. (q). Pub. L. 85-508 eliminated provisions which related to the judge of the District Court for the Territory of Alaska. See section 81A of this title which establishes a United States District Court for the State of Alaska.

### Effective Date of 1976 Amendment

Section 8 of Pub. L. 94-554 provided: "That this Act [amending this section and enacting provisions set out as notes under this section] shall become effective on the first day of the third month following the month in which it is enacted [Jan. 1, 1977], or on October 1, 1976, whichever occurs last."

### Effective Date of 1958 Amendment

Amendment by Pub. L. 85-508 effective Jan. 3, 1959, upon admission of Alaska into the Union pursuant to Proc. No. 3269, Jan. 5, 1959, 24 F.R. 81, 73 Stat. c16, as required by sections 1 and 8(c) of Pub. L. 85-508, see notes set out under section 81A of this title and preceding section 21 of Title 48, Territories and Insular Possessions.

### Retroactive Effect of 1967 Amendment

The provisions of section 611(a) of this title, the first paragraph of section 611(b) of this title, and subsec. (s) of this section, as added by Pub. L. 90-219, applicable to a Director or former Director of the Administrative Office of the United States Courts who was first appointed prior to Dec. 20, 1967 if at the time such Director or former Director left or leaves such office he had, or shall have, attained the age of sixty-five years and completed fifteen years of service as Director of the Administrative Office of the United States Courts and if, on or before the expiration of six months following Dec. 20, 1967, he makes the election referred to in section 611(a) of this title or subsec. (s) of this section, or both, as the case may be, see section 205(b) of Pub. L. 90-219, set out as a Retroactive Effect note under section 611 of this title.

### Judicial Survivors' Annuities Fund

Section 3 of Pub. L. 94-554 provided: "That on the date upon which this Act becomes effective [Jan. 1, 1977] there shall be established on the books of the Treasury a fund which shall be known as 'The Judicial Survivors' Annuities Fund, and all money credited to the judicial survivors annuity fund established by section 2 of the Act of August 3, 1956 (70 Stat. 1021) [which enacted this section], as amended, shall be transferred to the credit of the Judicial Survivors' Annuities Fund established by this section."

### COMPENSATION FOR ACTUARIAL DEFICIENCY IN THE ANNUITIES FUND

Section 4 of Pub. L. 94-554 provided: "That on the date upon which this Act becomes effective [Jan. 1, 1977] the Secretary of the Treasury shall ascertain from the Director of the Administrative Office of the United States Courts the amount of the actuarial deficiency in the fund transferred by section 3 of this Act [see Judicial Survivors' Annuities Fund note above] on the date of that fund's transfer and, at the earliest time thereafter at which appropriated funds in that amount shall become available, the Secretary shall deposit such funds, in a single payment, into the Judicial Survivors' Annuities Fund established by section 3 of this Act. Such funds as are necessary to carry out this section are hereby authorized to be appropriated."

### INCREASES IN WIDOWS' ANNUITIES PAID UNDER SECTION 2 OF ACT AUG. 3, 1956

Section 5 of Pub. L. 94-554 provided: "That on the date upon which this Act becomes effective [Jan. 1, 1977] each annuity then being paid to a widow from the judicial survivors annuity fund established by section 2 of the Act of August 3, 1956 (70 Stat. 1021) [which enacted this section], as amended, shall be increased by an amount equal to one-fifth of 1 percent of the amount of such annuity multiplied by the number of months which have passed since the commencement of that annuity. For the purposes of this section, any fractional part of a month which numbers less than fifteen full days shall be excluded from the Computation of the number of months and any fractional part of a month which numbers fifteen full days or more shall be included in the computation as one full month. Such funds as are necessary to carry out this section are authorized to be appropriated and, upon appropriation, shall be deposited by the Secretary of the Treasury, in a single payment, to credit of the Judicial Survivors' Annuities Fund established by section 3 of this Act [see Judicial Survivors' Annuities Fund note above]."

### SAVINGS PROVISIONS

Section 6 of Pub. L. 94-554 provided: "That the benefits conferred by this Act shall, on the date upon which this Act becomes effective [Jan. 1, 1977], immediately become available to any individual then receiving an annuity under section 2 of the Act of August 3, 1956 (70 Stat. 1021) [which enacted this section], as amended: *Provided*, That although the rights of any judicial official electing to come within the purview of section 376 of title 28, United States Code [this section], on or after the date upon which this Act becomes effective, shall be determined exclusively under the provisions of that section as amended by this Act, nothing in this Act shall be interpreted to cancel, abrogate, or diminish any rights to which an individual or his or her survivors may be entitled by virtue of that individuals having contributed to the judicial survivors annuity fund established by section 2 of the Act of August 3, 1956 (70 Stat. 1021) [which enacted this section], as amended, before the date upon which this Act becomes effective."

### REVOCATION OF ELECTION TO PARTICIPATE IN ANNUITIES PROGRAM

Section 7 of Pub. L. 94-554 provided: "That, at any time within one hundred and eighty days after the date upon which this Act becomes effective [Jan. 1, 1977], any judicial official who has, prior to that date, already participated in the judicial survivors annuity program created by the Act of August 3, 1956 (70 Stat. 1021) [which enacted this section] as amended, shall be entitled to revoke his or her earlier election to participate in that program and thereby completely withdraw from participation in the judicial survivors' annuities program created by this Act: *Provided*, That (a) any such revocation may be effected only by means of a writing filed with the Director of the Administrative Office of the United States Courts, (b) any such writing shall be deemed to have become effective no sooner than the date upon which that writing is received by the Director, (c) upon receipt of such a writing by the Director, any and all rights to survivorship benefits for such judicial official's survivors shall terminate, and all amounts credited to such judicial official's individual account, together with interest at 3 percent per annum, compounded on December 31 of each year to that date of revocation, shall thereafter be returned to that judicial official in a lump-sum refund payment, and (d) any judicial official who effects such a revocation and who subsequently again becomes eligible and elects to join the judicial survivors annuities program created by this Act under the provisions of section 376 of title 28, United States Code [this section] as amended by this Act, shall be permitted to do so only upon the redeposit of the full amount of the refund obtained under this section plus interest at 3 percent per annum, compounded on December 31 of each year from the date of the revocation until the date upon which that amount is redeposited. Any judicial official who fails to effect a revocation in accordance with the right conferred by this section within one hundred and eighty days after the date upon which this Act becomes effective shall be deemed to have irrevocably waived the right to that revocation."

### JUDGE TAKING OFFICE ON AUGUST 8, 1968

Section 1(b) of Pub. L. 90-466 provided that: "For the purpose of the amendment made by subsection (a) [to subsec. (a) of this section], a judge who is in office on the date of enactment of this Act [Aug. 8, 1968] shall be deemed to have taken office on that date."

### PRESERVATION OF RIGHTS OF JUDGES OF THE DISTRICT COURT FOR THE TERRITORY OF ALASKA

Section 12(n) of Pub. L. 85-508 provided in part that the amendment of subsec. (q) of this section by Pub. L. 85-508 shall not affect the rights under this section of any present or former judge of the District Court for the Territory of Alaska or his survivors.

### APPROPRIATIONS

Section 5 of act Aug. 3, 1956, provided that: "Funds necessary to carry out the provisions of this Act [enacting this section and provisions set out as notes below, and amending sections 375, 604(a)(7), and 605 of this title] may be appropriated out of any money in the Treasury not otherwise appropriated."

### RESIGNED, REMOVED, AND RETIRED JUDGES

Section 6 of act Aug. 3, 1956, provided that: "A judge who resigned prior to the date of enactment of this Act [Aug. 3, 1956] and who on that date is receiving salary under section 371(a) of title 28, United States Code, or who resigned, was removed or failed of reappointment prior to the date of enactment of this Act [Aug. 3, 1956] and who on that date is receiving salary under section 373 of title 28, United States Code, shall be considered a judge within the meaning of section 376 of title 28, United States Code, as added by section 2 of this Act [this section], and as such shall be entitled within six months after the date of enactment of this Act [Aug. 3, 1956] to make the election authorized by and to receive the benefits of that section. A judge who retired from regular active service under section 260 of the Judicial Code of 1911 or the Act of August 5, 1939, chapter 433, and who is living on the date of enactment of this Act [Aug. 3, 1956] shall be deemed for the purposes of this Act to have retired from regular active service under section 371(b) or 372(a), as the case may be, of title 28, United States Code."

### PRIOR DEATH OF JUDGE

Section 7 of the act Aug. 3, 1956, provided that: "In the case of a living widow of a judge of the United States as defined in section 451 of title 28, United States Code, who died prior to the date of enactment of this Act [Aug. 3, 1956], an annuity shall be paid as provided in section 376 of title 28, United States Code, as added by section 2 of this Act [this section], as if such judge had died on such date and had elected to bring himself within the purview of such section 376 [this section], but had not made the deposit provided for by subsection (c) of the said section: *Provided*, (a) That such widow has not remarried; and (b) that the amount of such annuity and the reduction therein because of such deposit not having been made shall be computed on the basis of the actual length of judicial and other allowable service of such judge: *And provided further*, That notwithstanding the provisions of subsection (g) of such section 376 [this section] such annuity shall be payable even though such judge had not rendered five years of civilian service prior to his death. In the case of a judge of the United States as defined in section 451 of title 28, United States Code, who dies within 6 months after the date of enactment of this Act [Aug. 3, 1956] after having rendered at least 5 years of civilian service computed as prescribed in subsection (*o*) of section 376 of title 28, United States Code, as added by section 2 of this Act [this section], but without having made an election as provided in such section 376 [this section] to bring himself within the purview of that section, an annuity shall be paid to his widow and surviving dependent children as provided in such section 376 as if such judge had elected on the day of his death to bring himself within the purview of such section 376 [this section] but had not made the deposit provided for by subsection (c) of the said section. An annuity shall be payable under this section computed on the basis of the actual length of judicial and other allowable service of the judge and subject to the reduction required by subsection (c) of such section 376 [this section] even though no deposit has been made, as required by subsection (g) of such section 376 [this section], with respect to any of such service."

### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 375 of this title.

## CHAPTER 19—DISTRIBUTION OF REPORTS AND DIGESTS

Sec.

411. Supreme Court reports; printing, binding, and distribution.
412. Sale of Supreme Court reports.
413. Publications; distribution to courts.
414. Transmittal of books to successors.
415. Court of Claims decisions.

### AMENDMENTS

1952—Act July 10, 1952, ch. 632, § 3, 66 Stat. 540, amended analysis to conform it to amendments of sections 411 to 413 of this title.

### § 411. Supreme Court reports; printing, binding, and distribution

(a) The decisions of the Supreme Court of the United States shall be printed, bound, and distributed in the preliminary prints and bound volumes of the United States Reports as soon as practicable after rendition, to be charged to the proper appropriation for the judiciary. The number and distribution of the copies shall be under the control of the Joint Committee on Printing.

(b) Reports printed prior to June 12, 1926, shall not be furnished the Secretary of the Army, the Secretary of the Navy, or the Secretary of the Air Force.

(c) The Public Printer, or other printer designated by the Supreme Court of the United States, upon request, shall furnish to the Superintendent of Documents the reports required to be distributed under the provisions of this section.

(June 25, 1948, ch. 646, 62 Stat. 904; May 24, 1949, ch. 139, § 68, 63 Stat. 99; Oct. 31, 1951, ch. 655, § 41, 65 Stat. 724; July 10, 1952, ch. 632, § 4, 66 Stat. 540.)

### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 334 (Mar. 3, 1911, ch. 231, § 227, 36 Stat. 1154; Mar. 4, 1911, ch. 285, § 1, 36 Stat. 1419; July 1, 1922, ch. 267, § 3, 42 Stat. 816; June 12, 1926, ch. 568, 44 Stat. 736; Jan. 29, 1929, ch. 113, 45 Stat. 1143; Mar. 2, 1929, ch. 488, § 1, 45 Stat. 1475; July 3, 1930, ch. 863, § 1, 46 Stat. 1016; Feb. 23, 1931, ch. 276, § 30, 46 Stat. 1214; May 17, 1932, ch. 190, 47 Stat. 158; June 30, 1932, ch. 314, § 501, 47 Stat. 415; May 10, 1934, ch. 277, § 512, 48 Stat. 758; Ex. Ord. No. 6166, §§ 12, 14, June 10, 1933; June 7, 1934, ch. 426, 48 Stat. 926; May 27, 1936, ch. 463, § 1, 49 Stat. 1380; June 20, 1936, ch. 630, § 5, 49 Stat. 1549; June 25, 1936, ch. 804, 49 Stat. 1921).

Requirements for printing, binding, and issuing Supreme Court decisions "within eight months after said decisions have been rendered by the Supreme Court" and provision for distribution "within said period" were omitted. The phrase "as soon as practicable after rendition" was made the time for publishing such decisions as more flexible and practicable.

The words "the United States Court for China" were omitted inasmuch as that court is no longer functioning. The Secretary of State by an arrangement with China has relinquished the extraterritorial jurisdiction previously exercised by the United States in China. The 1944 Legislative and Judiciary Appropriation Act approved June 28, 1943, made no appropriation for the United States Court for China. Appropriations for other courts were made in title II of chapter 173 (57 Stat. 241). The last appropriation for the United States Court for China was in the act of July 2, 1942 (ch. 472, title IV, 56 Stat. 502).

The words "to the Secretary of War for the use of the proper courts and officers of the Philippine Islands, seven copies" were omitted in view of the independence of the Philippines, effective July 4, 1946.

The phrase "justice or judge of the United States" obviated repetition of names of courts. (See definitive section 451 of this title.)

Last sentence, fourth paragraph, of section 334 of title 28, U.S.C., 1940 ed., requiring that books should remain the property of the United States and should be preserved and turned over to successors in office, was omitted as covered by section 414 of this title.

A reference to the United States attorney for the District of Columbia was omitted as covered by "each United States attorney."

Provision authorizing distribution of volumes under this section to each place where a court of appeals is held was added for purposes of uniformity. See similar provision in section 413 of this title.

The revised section substitutes the Director of the Administrative Office of the United States Courts in lieu of the Attorney General insofar as distribution of volumes to the judiciary is concerned. This change is consistant with the duties of the former under section 601 et seq. of this title.

Provision of section 334 of title 28, U.S.C., 1940 ed., as to the custody, use and delivery to successors was omitted as obsolete on advice of the Administrative Office of the United States Courts.

The limitation of 10 copies to the library of the Supreme Court and 6 copies to the marshal of the Supreme Court for use of the justices, was omitted and the provision for distribution in such number "specified by the Chief Justice of the United States" was substituted therefor.

Authority for making an appropriation to carry into effect the provisions of this section is contained in section 336 of title 28, U.S.C., 1940 ed., Acts July 1, 1922, ch. 267, § 5, 42 Stat. 818; May 29, 1926, ch. 425, § 3, 44 Stat. 678 which is omitted, but not repealed, as unnecessary in this revision.

Changes were made in phraseology and arrangement.

### 1949 Act

Subsection (a) of this section substitutes, in section 411(a) of title 28, U.S.C., "Secretary of the Army" and "Department of the Army" for "Secretary of War" and "War Department," in view of such redesignation by act of July 26, 1947 (ch. 343, title II, § 205(a), 61 Stat. 501). It substitutes, in section 411(a), "Commissioner of Customs; Commandant of the Coast Guard" for "Chief of the Bureau of Marine Inspection and Navigation," in view of the abolishment of the Bureau of Marine Inspection and Navigation, and the transfer of its functions to, and the division thereof between, the Commissioner of Customs and the Commandant of the Coast Guard, by 1946 Reorganization Plan No. 3, §§ 101-104, effective July 16, 1946 (11 F.R. 7875, 60 Stat. 1097).

It substitutes, in such section 411(a), "Director of the Bureau of Land Management" for "Commissioner of the General Land Office," in view of section 403 of such plan which abolished the General Land Office and created the Bureau of Land Management, headed by a Director. It inserts as new, in such section 411(a), references to the Secretary of Defense, Secretary of the Air Force, and Judge Advocate General of the Air Force, in view of the creation of the National Military Establishment, headed by the Secretary of Defense, and the establishment of the Department of the Air Force in 1947.

Subsection (b) of this section redesignates, in section 411(b) of title 28, U.S.C., the Secretary of War as "Secretary of the Army," for the reasons stated above, and corrects a typographical error in the word "court-martial".

### Amendments

1952—Act July 10, 1952, provided for flexibility in the printing and distribution of these reports under congressional control.

1951—Subsec. (c). Act Oct. 31, 1951, in second par., substituted "Secretary of the Army" for "Secretary of War".

1949—Subsec. (a). Act May 24, 1949, § 68(a), inserted "Secretary of Defense", "Secretary of the Air Force", and "Judge Advocate General of the Air Force" where appearing, and substituted "Secretary of the Army" for "Secretary of War", "Department of the Army" for "War Department", "Director of the Bureau of Land Management" for "Commissioner of the General Land Office", "Commissioner of Customs, Commandant of the Coast Guard" for "Chief of the Bureau of Marine Inspection", and "Chief of Forest Service, Department of Agriculture" for "Chief Forester, National Park Service, Department of the Interior".

Subsec. (b). Act May 24, 1949, § 68(b), substituted "Secretary of the Army" for "Secretary of War" and "Court-martial" for "courtmartial".

### Cross References

Printing and binding for Supreme Court, see section 676 of this title.

### Section Referred to in Other Sections

This section is referred to in section 676 of this title.

## § 412. Sale of Supreme Court reports

The Public Printer, or other printer designated by the Supreme Court of the United States shall print such additional bound volumes and preliminary prints of such reports as may be required for sale to the public. Such additional copies shall be sold by the Superintendent of Documents, as provided by law.

(June 25, 1948, ch. 646, 62 Stat. 906; July 10, 1952, ch. 632, § 5, 66 Stat. 541.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 335 (Mar. 3, 1911, ch. 231, § 228, 36 Stat. 1155; July 1, 1922, ch. 267, § 4, 42 Stat. 818; May 29, 1926, ch. 425, § 2, 44 Stat. 677).

Authority for making an appropriation to carry into effect the provisions of this section is contained in section 336 of title 28, U.S.C., 1940 ed., acts July 1, 1922, ch. 267, § 5, 42 Stat. 818; May 29, 1926, ch. 425, § 3, 44 Stat. 678, which is omitted, but not repealed, as unnecessary in this revision.

Reference to digests was omitted to conform to administrative practice. (See section 604(a)(9) of this title.)

Changes were made in phraseology.

### Amendments

1952—Act July 10, 1952, permitted the Superintendent of Documents to sell these reports under the same terms as other Government publications.

### Cross References

Prices for bound volumes of its decisions, printed by a private printer, to be fixed by Supreme Court or Chief Justice, see section 676 of this title.

### Section Referred to in Other Sections

This section is referred to in section 676 of this title.

## § 413. Publications; distribution to courts

Distribution of publications to Federal courts in accordance with the provisions of this chapter shall not be made to any place where such court is held in a building not owned or controlled by the United States unless such publications are committed to the custody of an officer of the United States at such building.

The Attorney General and the Director in the procurement of law books, books of reference or periodicals may exchange or sell similar items and apply the allowance or proceeds to payment in whole or in part of the cost of the items procured.

(June 25, 1948, ch. 646, 62 Stat. 906; May 24, 1949, ch. 139, § 69, 63 Stat. 100; July 10, 1952, ch. 632, § 6, 66 Stat. 541.)

### Historical and Revision Notes

Based on section 1131 of title 26, U.S.C., 1940 ed., Internal Revenue Code, title 28, U.S.C., 1940 ed., §§ 337, 530 (Mar. 3, 1911, ch. 231, § 229, 36 Stat. 1155; Mar. 2, 1929, ch. 488, § 1, 45 Stat. 1475; May 10, 1934, ch. 277, § 512, 48 Stat. 758; June 7, 1934, ch. 426, 48 Stat. 926; June 25, 1936, ch. 804, 49 Stat. 1921; Feb. 10, 1939, ch. 2, § 1131, 53 Stat. 163; May 14, 1940, ch. 189, title IV, 54 Stat. 210; July 2, 1942, ch. 472, title IV, 56 Stat. 504; June 28, 1943, ch. 173, title II, § 201, 57 Stat. 243; June 26, 1944, ch. 277, § 203, 58 Stat. 358; May 21, 1945, ch. 129, title IV, 59 Stat. 200; July 5, 1946, ch. 541, title IV, 60 Stat. 480.)

Section consolidates provisions of section 1131 of title 26, U.S.C., 1940 ed., relating to expenditures for "lawbooks" for the Tax Court of the United States, with sections 337 and 530 of title 28, U.S.C., 1940 ed., relating to purchase and distribution of reporter and digest volumes.

Other provisions of section 1131 of title 26, U.S.C., 1940 ed., are incorporated in section 604 of this title.

Provisions of section 530 of title 28, U.S.C., 1940 ed., limiting the price to be paid for volumes of the Federal Reporter and other similar reports were omitted after consultation with the Administrative Office of United States Courts as more properly covered by current appropriation acts. Similar provisions relating to the Federal Digest and the United States Code Annotated were omitted as covered in current appropriation acts. (See Act June 29, 1944, ch. 286, title II, § 212, 58 Stat. 361, 387.)

Provisions of said section 337 of title 28, U.S.C., 1940 ed., that books are to remain United States property, so marked, and transmitted to successors in office of persons receiving them, were omitted as covered by section 414 of this title.

Similar provisions in said section 530 of title 28, U.S.C., 1940 ed., are incorporated in section 414 of this title.

Provision in section 337 of title 28, U.S.C., 1940 ed., for distribution to the Court of Appeals and District Court for the District of Columbia was omitted as covered by the phrase "Each place where a circuit court of appeals or district court is regularly held."

The revised section is extended to include the Customs Court as well as the Court of Claims and Court of Customs and Patent Appeals. All judges receive the Supreme Court reports and digests under section 411 of this title. Presumably the Congress did not intend to deny distribution of the Federal Reporter and digests to the Customs Court while providing for all other courts under said section 337.

The revised section provides for distribution of volumes to the judiciary by the Director of the Administrative Office of the United States Courts. (See reviser's note under section 411 of this title.)

Similar publications are purchased by the Marshal of Supreme Court for the use of the Court. (See section 672(5) of this title.)

The provisions of section 337 of title 28, U.S.C., 1940 ed., requiring annual estimates and disbursement of moneys for the volumes under this section were omitted. Such provisions are covered by appropriate sections of title 31, U.S.C., 1940 ed., Money and Finance.

Provision of section 337 of title 28, U.S.C., 1940 ed., as to custody, use, and delivery to successors was omitted as obsolete on advice of the Administrative Office of the United States Courts.

Numerous changes were made in phraseology and superfluous language was omitted.

### SENATE REVISION AMENDMENT

As finally enacted, part of act July 9, 1947, ch. 211, title IV, 61 Stat. 306, which was classified to Title 28, U.S.C., 1946 ed., § 530, became one of the sources of this section and was accordingly included in the schedule of repeals by Senate amendment. See 80th Congress Senate Report No. 1559.

Although section 1131 of Title 26, U.S.C. (Internal Revenue Code) is one of the sources of this section, it was struck out of the schedule of repeals by Senate amendment and accordingly remains in Title 26. See 80th Congress Senate Report No. 1559.

### 1949 ACT

Subsection (a) of this section eliminates from section 413 of title 28, U.S.C., the provision for furnishing books to the Tax Court, which procures books under section 1131 of the Internal Revenue Code (26 U.S.C., 1946 ed., § 1131).

Subsection (b) of this section incorporates in section 413 of title 28, U.S.C., with changes in phraseology, the provisions of act of June 3, 1948 (ch. 400, title II, § 204, 62 Stat. 321), which was not incorporated in title 18 when the revision was enacted. As amended, section 413 is expanded to give like authority with respect to procurement of books to the Director of the Administrative Office of the United States Courts, as well as to the Attorney General, to prevent an obvious inconsistency.

### AMENDMENTS

1952—Act July 10, 1952, amended section generally, and permitted delivery of publication to buildings controlled by the Government as well as to buildings owned by it.

1949—Act May 24, 1949, struck out a reference to the Tax Court in former provisions enumerating judges and courts to receive certain publications, and added the provisions now set out as the second par.

## § 414. Transmittal of books to successors

All government publications and law books furnished to justices, judges, clerks of courts, and United States attorneys of the United States and its territories and possessions, and other officers of the United States or an agency thereof shall be transmitted to their successors in office. All permanent or bound books and publications furnished under this chapter except those books furnished to the Library of Congress for international exchange shall remain the property of the United States and shall be marked plainly, "The Property of the United States".

(June 25, 1948, ch. 646, 62 Stat. 906; Oct. 18, 1962, Pub. L. 87-845, § 7, 76A Stat. 699.)

### HISTORICAL AND REVISION NOTES

Based on section 90 of title 5, U.S.C., 1940 ed., Executive Departments and Government Officers and Employees, section 530 of title 28, U.S.C., 1940 ed., and section 92 of title 44, U.S.C., 1940 ed., Public Printing and Documents (Aug. 7, 1882, ch. 433, § 1, 22 Stat. 336; Jan. 12, 1895, ch. 23, § 74, 28 Stat. 620; June 20, 1936, ch. 630, §§ 11, 12, 49 Stat. 1552, 1553; May 14, 1940, ch. 189, title IV, 54 Stat. 210; June 28, 1941, ch. 258, title IV, 55 Stat. 301; July 2, 1942, ch. 472, title IV, 56 Stat. 504; June 28, 1943, ch. 173, title II, § 201, 57 Stat. 243; June 26, 1944, ch. 277, § 203, 58 Stat. 358; May 21, 1945, ch. 129, title IV, 59 Stat. 200; July 5, 1946, ch. 541, title IV, 60 Stat. 480).

Section consolidates section 90 of title 5, U.S.C., 1940 ed., providing that "statutes" shall be delivered to successors of United States attorneys and clerks and provisions of section 530 of title 28, U.S.C., 1940 ed., requiring that all lawbooks for judges and others shall be marked as property of the United States and shall be transmitted to their successors, with section 92 of title 44, U.S.C., 1940 ed., relating to transmittal of "Government publications."

Words "All Government publications and lawbooks" and "furnished under this chapter" were used to cover "all statutes" and "The Federal Reporter and continuations thereto."

Words "justices and judges of the United States" were substituted for "United States judges" in conformity with uniform use of the phrase to describe all members of the Federal judiciary. Similar provisions in sections 334 and 377 of title 28, U.S.C., 1940 ed., were therefore omitted as covered by this revised section.

Other provisions of said section 530 of title 28, U.S.C., 1940 ed., were omitted. (See reviser's note under section 413 of this title.)

The words "permanent or bound" were inserted in the last sentence of the revised section to obviate the wasteful practice under existing law of marking temporary pamphlets.

Changes were made in phraseology.

### SENATE REVISION AMENDMENT

As finally enacted, part of act July 9, 1947, ch. 211, title IV, 61 Stat. 306, which was classified to Title 28, U.S.C., 1946 ed., § 530, became one of the sources of this section and was accordingly included in the schedule of repeals by Senate amendment. See 80th Congress Senate Report No. 1559.

#### AMENDMENTS

1962—Pub. L. 87-845 substituted "furnished to justices, judges, clerks of courts, and United States attorneys of the United States and its territories and possessions, and other officers of the United States or an agency thereof" for "furnished to justices and judges of the United States and of the Territorial Courts, United States attorneys, clerks of courts, and other officers of the United States".

#### EFFECTIVE DATE OF 1962 AMENDMENT

Amendment by Pub. L. 87-845 effective Jan. 2, 1963, see section 25 of Pub. L. 87-845, set out as an Effective Date of 1962 Amendment note set out under section 14 of Title 18, Crimes and Criminal Procedure.

### § 415. Court of Claims decisions

At the end of every term of the Court of Claims the clerk thereof shall distribute one copy of each decision of such court to: (1) The heads of departments, (2) General Counsel for Treasury Department, (3) Comptroller General of the United States, (4) Director of the Bureau of Land Management, (5) Commissioner of Indian Affairs, (6) Chiefs of bureaus, and (7) Officers charged with adjustment of claims against the United States.

(June 25, 1948, ch. 646, 62 Stat. 906; May 24, 1949, ch. 139, § 70, 63 Stat. 100.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 248 (Mar. 3, 1911, ch. 231, § 143, 36 Stat. 1136; June 10, 1921, ch. 18, §§ 301, 302, 310, 42 Stat. 23, 25; May 10, 1934, ch. 277, § 512(b), 48 Stat. 759).

The remaining provisions of section 248 of title 28, U.S.C., 1940 ed., are incorporated in section 791 of this title.

Changes were made in phraseology.

#### 1949 ACT

This section substitutes, in section 415 of title 28, U.S.C., "Director of the Bureau of Land Management" for "Commissioner of the General Land Office". Reorganization Plan No. 3, § 403, effective July 16, 1946 (11 F.R. 7876), abolished the General Land Office and the office of Commissioner thereof, and consolidated the functions of the General Land Office and of the Grazing Service in the Department of the Interior, to form the Bureau of Land Management within such Department, headed by a Director.

#### AMENDMENTS

1949—Act May 24, 1949, amended section, substituting "(4) Director of the Bureau of Land Management" for "(4) Commissioner of the General Land Office".

## CHAPTER 21—GENERAL PROVISIONS APPLICABLE TO COURTS AND JUDGES

Sec.
451. Definitions.
452. Courts always open; power unrestricted by expiration of sessions.[1]
453. Oath of justices and judges.[1]
454. Practice of law by justices and judges.
455. Disqualification of justice, judge, magistrate, or referee in bankruptcy.
456. Traveling expenses of justices and judges.
457. Records; obsolete papers.
458. Relative of justice or judge ineligible to appointment.
459. Administration of oaths and acknowledgments.
460. Application to Alaska, Canal Zone, Guam and Virgin Islands.
461. Adjustments in certain salaries.

#### AMENDMENTS

1975—Pub. L. 94-82, title II, § 205(a)(2), Aug. 9, 1975, 89 Stat. 422, added item 461.

1974—Pub. L. 93-512, § 2, Dec. 5, 1974, 88 Stat. 1610, substituted "Disqualification of justice, judge, magistrate, or referee in bankruptcy" for "Interest of justice or judge" in item 455.

1963—Pub. L. 88-139, § 3(b), Oct. 16, 1963, 77 Stat. 248, substituted "power unrestricted by expiration of sessions" for "powers unrestricted by terms" in item 452.

1951—Act Oct. 31, 1951, ch. 655, § 42, 65 Stat. 725, inserted ", Guam" in item 460.

### § 451. Definitions

As used in this title:

The term "court of the United States" includes the Supreme Court of the United States, courts of appeals, district courts constituted by chapter 5 of this title, including the Court of Claims, the Court of Customs and Patent Appeals, the Customs Court and any court created by Act of Congress the judges of which are entitled to hold office during good behavior.

The terms "district court" and "district court of the United States" mean the courts constituted by chapter 5 of this title.

The term "judge of the United States" includes judges of the courts of appeals, district courts, Court of Claims, Court of Customs and Patent Appeals, Customs Court and any court created by Act of Congress, the judges of which are entitled to hold office during good behavior.

The term "justice of the United States" includes the Chief Justice of the United States and the associate justices of the Supreme Court.

The terms "district" and "judicial district" means the districts enumerated in Chapter 5 of this title.

The term "department" means one of the executive departments enumerated in section 1 of Title 5, unless the context shows that such term was intended to describe the executive, legislative, or judicial branches of the government.

The term "agency" includes any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense.

(June 25, 1948, ch. 646, 62 Stat. 907; Mar. 18, 1959, Pub. L. 86-3, § 10, 73 Stat. 9; Sept. 12, 1966, Pub. L. 89-571, § 3, 80 Stat. 764.)

#### HISTORICAL AND REVISIONS NOTES

This section was inserted to make possible a greater simplification in consolidation of the provisions incorporated in this title.

The definitions of agency and department conform with such definitions in section 6 of revised title 18, U.S.C. (H.R. 3190, 80th Cong.).

#### SENATE REVISION AMENDMENT

Those provisions of this section which related to the Tax Court were eliminated by Senate amendment. See 80th Congress Senate Report No. 1559.

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[1] So in original. Does not conform to section catchline.

### REFERENCES IN TEXT

Section 1 of Title 5, referred to in text, is section 1 of former Title 5, Executive Departments and Government Officers and Employees, the provisions of which are now covered by section 101 of Title 5, Government Organization and Employees.

### AMENDMENTS

1966—Pub. L. 89-571 removed the United States District Court for the District of Puerto Rico from the definition of the term "court of the United States".

1959—Pub. L. 86-3 substituted "including the United States District for the District of Puerto Rico" for "including the district courts of the United States for the districts of Hawaii and Puerto Rico" in provisions defining "court of the United States".

### EFFECTIVE DATE OF 1959 AMENDMENT

Section 10 of Pub. L. 86-3 provided in part that the amendment of this section shall be effective upon the admission of the State of Hawaii into the Union. Admission of Hawaii into the Union was accomplished Aug. 21, 1959, upon issuance of Proc. No. 3309, Aug. 21, 1959, 25 F.R. 6868, 73 Stat. c74, as required by sections 1 and 7(c) of Pub. L. 86-3, Mar. 18, 1959, 73 Stat. 4, set out as notes preceding 491 of Title 48, Territories and Insular Possessions.

### "CIRCUIT COURT OF APPEALS;" "SENIOR CIRCUIT JUDGE," ETC. DEFINED

Section 32 of act June 25, 1948, as amended by act May 24, 1949, ch. 139, § 127, 63 Stat. 107, provided that:

"(a) All laws of the United States in force on September 1, 1948, in which reference is made to a 'circuit court of appeals'; 'senior circuit judge'; 'senior district judge'; 'presiding judge'; 'chief justice', except when reference to the Chief Justice of the United States is intended; or 'justice', except when used with respect to a justice of the Supreme Court of the United States in his capacity as such or as a circuit justice, are hereby amended by substituting 'court of appeals' for 'circuit court of appeals'; 'chief judge of the circuit' for 'senior circuit judge'; 'chief judge of the district court' for 'senior district judge'; 'chief judge' for 'presiding judge'; 'chief judge' for 'chief justice', except when reference to the Chief Justice of the United States is intended; and 'judge' for 'justice', except when the latter term is used with respect to a justice of the Supreme Court of the United States in his capacity as such or as a circuit justice.

"(b) All laws of the United States in force on September 1, 1948, in which reference is made to the Supreme Court of the District of Columbia or to the District Court of the United States for the District of Columbia are amended by substituting 'United States District Court for the District of Columbia' for such designations.

"(c) All laws of the United States in force on September 1, 1948, in which reference is made to the 'Conference of Senior Circuit Judges,' or to the 'Judicial Conference of Senior Circuit Judges' are amended by substituting 'Judicial Conference of the United States' for such designations.

"(d) This section shall not be construed to amend historical references to courts or judicial offices which have no present or future application to such courts or offices."

### JUDGES OF THE UNITED STATES

Section 2(a) of act June 25, 1948, amended Sept. 3, 1954, ch. 1263, § 51(a), 68 Stat. 1245, provided that: "The Chief Justices of the United States Court of Appeals for the District of Columbia, the District Court of the United States for the District of Columbia, and the Court of Claims, and the presiding judge of the Court of Customs and Patent Appeals, in office on the effective date of this Act shall be the chief judges of their respective courts. The Chief Justice of the United States Court of Appeals for the District of Columbia and the Associate Justices thereof, the Chief Justice of the District Court of the United States for the District of Columbia (formerly named the Supreme Court of the District of Columbia) and the Associate Justices thereof, the Chief Justice of the Court of Claims, and the presiding judge of the Court of Customs and Patent Appeals, in office on the effective date of this Act, shall be judges of the United States within the meaning of Section 451 of Title 28, Judiciary and Judicial Procedure, of the United States Code, set out in Section 1 of this Act. The Chief Justice of the United States Court of Appeals for the District of Columbia and the Associate Justices thereof, in office on the effective date of this Act, shall be circuit judges of the District of Columbia Circuit and vested with all the rights, powers, and duties thereof, and the said Chief Justice of the United States Court of Appeals for the District of Columbia shall be Chief Judge of said Circuit. The Chief Justice of the District Court of the United States for the District of Columbia (formerly named the Supreme Court of the District of Columbia) and the Associate Justices thereof, in office on the effective date of this Act, shall be district judges for the District of Columbia and vested with all the rights, powers, and duties thereof."

Section 51(b) of act Sept. 3, 1954, provided that this amendment should take effect as of Sept. 1, 1948.

### CROSS REFERENCES

District Court of Guam as having jurisdiction, in all courses arising under the laws of the United States, of a district court of United States as defined in this section, see section 1424 of Title 48, Territories and Insular Possessions.

### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 376 of this title; title 2 section 130b; title 5 sections 5537, 8331; title 12 sections 1464, 1730.

## § 452. Courts always open; powers unrestricted by expiration of sessions

All courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and orders.

The continued existence or expiration of a session of a court in no way affects the power of the court to do any act or take any proceeding.

(June 25, 1948, ch. 646, 62 Stat. 907; Oct. 16, 1963, Pub. L. 88-139, § 2, 77 Stat. 248.)

### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§ 13 and 302 (Mar. 3, 1911, ch. 231, §§ 9, 189, 36 Stat. 1088, 1143; Mar. 2, 1929, ch. 488, § 1, 45 Stat. 1475).

Sections 13 and 302 of title 28, U.S.C., 1940 ed., related only to district courts and the Court of Customs and Patent Appeals, and this section has been written to cover all other courts of the United States.

Other provisions of said section 302 of title 28, U.S.C., 1940 ed., are incorporated in sections 214, 456, and 604 of this title.

The phrase "always open" means "never closed" and signifies the time when a court can exercise its functions. With respect to matters enumerated by statute or rule as to which the court is "always open," there is no time when the court is without power to act. (Ex parte Branch, 63 Ala. 383, 387.)

Section 13 of title 28, U.S.C., 1940 ed., provided that "The district courts, as courts of admiralty and as courts of equity, shall be deemed always open * * *" for enumerated purposes, and that the judge "at chambers or in the clerk's office, and in vacation as well as in term," may make orders and issue process. The revised section omits all reference to the nature of the action or proceeding and enumeration of the acts which may be performed by the court. This is in accord with Rules 45(c) and 56 of the new Federal Rules of Criminal Procedure which contain similar provisions with respect to criminal procedure both in the courts of appeals and in the district courts.

Rules 6(c) and 77(a) of the Federal Rules of Civil Procedure contain provisions similar to the second and first paragraphs, respectively, of this section with respect to civil actions in district courts.

### AMENDMENTS

1963—Pub. L. 88-139 substituted "expiration of sessions" for "terms" in the section catchline, and "session" for "term" in the text.

### FEDERAL RULES OF CIVIL PROCEDURE

District courts always open, see rule 77, Appendix to this title.

One form of action, see rule 2.

Time unaffected by expiration of term, see rule 6.

## § 453. Oaths of justices and judges

Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of this office: "I, ——— ———, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as ——— according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States. So help me God."

(June 25, 1948, ch. 646, 62 Stat. 907.)

### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§ 241, 372, and District of Columbia Code, 1940 ed., §§ 11-203, 11-303 (R.S.D.C., § 752, 18 Stat. pt. II, 90; Feb. 9, 1893, ch. 74, § 3, 27 Stat. 435; Mar. 3, 1901, ch. 854, § 223, 31 Stat. 1224; Mar. 3, 1911, ch. 231, §§ 136, 137, 257, 36 Stat. 1135, 1161; Feb. 25, 1919, ch. 29, § 4, 40 Stat. 1157).

This section consolidates sections 11-203 and 11-303 of District of Columbia Code, 1940 ed., and section 372 of title 28, U.S.C., 1940 ed., with that portion of section 241 of said title 28 providing that judges of the Court of Claims shall take an oath of office. The remainder of said section 241 comprises sections 171 and 173 of this title.

The phrase "justice or judge of the United States" was substituted for "justices of the Supreme Court, the circuit judges, and the district judges" appearing in said section 372, in order to extend the provisions of this section to judges of the Court of Claims, Customs Court, and Court of Customs and Patent Appeals and to all judges of any court which may be created by enactment of Congress. See definition in section 451 of this title.

The Attorney General has ruled that the expression "any judge of any court of the United States" applied to the Chief Justice and all judges of the Court of Claims. (21 Op. Atty.-Gen. 449.)

### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 631 of this title.

## § 454. Practice of law by justices and judges

Any justice or judge appointed under the authority of the United States who engages in the practice of law is guilty of a high misdemeanor.

(June 25, 1948, ch. 646, 62 Stat. 908.)

### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 373 (Mar. 3, 1911, ch. 231, § 258, 36 Stat. 1161).

Changes in phraseology were made.

### RULES OF THE SUPREME COURT

Clerks to justices not to practice, see rule 7, Appendix to this title.

## § 455. Disqualification of justice, judge, magistrate, or referee in bankruptcy

(a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, magistrate, or referee in bankruptcy shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(June 25, 1948, ch. 646, 62 Stat. 908; Dec. 5, 1974, Pub. L. 93-512, § 1, 88 Stat. 1609.)

### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 24 (Mar. 3, 1911, ch. 231, § 20, 36 Stat. 1090).

Section 24 of title 28, U.S.C., 1940 ed., applied only to district judges. The revised section is made applicable to all justices and judges of the United States.

The phrase "in which he has a substantial interest" was substituted for "concerned in interest in any suit."

The provision of section 24 of title 28, U.S.C., 1940 ed., as to giving notice of disqualification to the "senior circuit judge," and words "and thereupon such proceedings shall be had as are provided in sections 17 and 18 of this title," were omitted as unnecessary and covered by section 291 et seq. of this title relating to designation and assignment of judges. Such provision is not made by statute in case of disqualification or incapacity, for other cause. See sections 140, 143, and 144 of this title. If a judge or clerk of court is remiss in failing to notify the chief judge of the district or circuit, the judicial council of the circuit has ample power under section 332 of this title to apply a remedy.

Relationship to a party's attorney is included in the revised section as a basis of disqualification in conformity with the views of judges cognizant of the grave possibility of undesirable consequences resulting from a less inclusive rule.

Changes were made in phraseology.

### AMENDMENTS

1974—Pub. L. 93-512 substituted "Disqualification of justice, judge, magistrate, or referee in bankruptcy" for "Interest of justice or judge" in section catchline, reorganized structure of provisions, and expanded applicability to include magistrates and referees in bankruptcy and grounds for which disqualification may be based, and added provisions relating to waiver of disqualification.

### EFFECTIVE DATE OF 1974 AMENDMENT

Section 3 of Pub. L. 93-512 provided that: "This Act [amending this section] shall not apply to the trial of any proceeding commenced prior to the date of this Act [Dec. 5, 1974], nor to appellate review of any proceeding which was fully submitted to the reviewing court prior to the date of this Act."

### CROSS REFERENCES

Disqualification of trial judge to hear appeal, see section 47 of this title.

## § 456. Traveling expenses of justices and judges

Each Justice or judge of the United States and each retired Justice or judge recalled or designated and assigned to active duty, while attending court or transacting official business at a place other than his official station, shall, upon his certificate, be paid by the Director of the Administrative Office of the United States Courts all necessary traveling expenses, and also a per diem allowance in lieu of actual expenses of subsistence (as defined in the Travel Expense Act of 1949, as amended, 63 Stat. 166; 5 U.S.C. 835) at the per diem rate provided for by the Travel Expense Act of 1949, as amended, or, in accordance with regulations prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States, reimbursement for his actual expenses of subsistence not in excess of the maximum amount fixed by the Travel Expense Act of 1949, as amended.

The official station of the Chief Justice of the United States, the Justices of the Supreme Court and the judges of the Court of Claims, the Court of Customs and Patent Appeals, the United States Court of Appeals for the District of Columbia, and the United States District Court for the District of Columbia, shall be the District of Columbia.

The official station of the judges of the Customs Court shall be New York City.

The official station of each circuit and district judge, including each district judge in the Territories and possessions, shall be that place where a district court is regularly held and at or near which the judge performs a substantial portion of his judicial work, which is nearest the place where he maintains an actual abode in which he customarily lives.

Each circuit judge and each district judge whose official station is not fixed expressly in the second paragraph of this section shall upon his appointment and from time to time thereafter as his official station may change, notify the Director of the Administrative Office of the United States Courts in writing of his actual abode and his official station.

(June 25, 1948, ch. 646, 62 Stat. 908; Aug. 8, 1953, ch. 376, 67 Stat. 488; Aug. 7, 1959, Pub. L. 86-138, 73 Stat. 285.)

### HISTORICAL AND REVISION NOTES

Based on section 1102(d) of title 26, U.S.C., 1940 ed., Internal Revenue Code, and title 28, U.S.C., 1940 ed., §§ 218, 270, 296, 296a, 302, 374, 449 (Mar. 3, 1911, ch. 231, §§ 189, 259, 36 Stat. 1143, 1161, and § 187(a) as added Oct. 10, 1940, ch. 843, § 1, 54 Stat. 1101; and section 307 as added Aug. 7, 1939, ch. 501, § 1, 53 Stat. 1224; Sept. 14, 1922, ch. 306, § 2, 42 Stat. 838; Feb. 24, 1925, ch. 301, § 2, 43 Stat. 965; May 29, 1928, ch. 852, § 711, 45 Stat. 882; Mar. 2, 1929, ch. 488, § 1, 45 Stat. 1475; June 23, 1930, ch. 573, § 1, 46 Stat. 799; Feb. 10, 1939, ch. 2, § 1102(d), 53 Stat. 159; Apr. 22, 1940, ch. 126, 54 Stat. 149; May 3, 1945, ch. 106, title I, § 1, 59 Stat. 127; May 21, 1945, ch. 129, title IV, 59 Stat. 197; July 5, 1946, ch. 541, title IV, 60 Stat. 477).

Section 270 of title 28, U.S.C., 1940 ed., related to the Chief Justice and each judge of the Court of Claims and provided for payment of expenses on order of court.

Sections 296, 296a of title 28, U.S.C., 1940 ed., provided for payment of such expenses of the Customs Court judges.

Section 302 of title 28, U.S.C., 1940 ed., provided for the payment of expenses of a judge of the Court of Customs and Patent Appeals upon his certificate. It contained no $10 limitation upon his daily subsistence expense and in addition authorized the necessary expenses for travel and attendance of one stenographic clerk who accompanied him. This latter provision is the basis for section 834 of this title. Other provisions of said section 302 of title 28, U.S.C., 1940 ed., are incorporated in sections 214 and 452 of this title.

Section 374 of title 28, U.S.C., 1940 ed., related to circuit justices, circuit judges and district judges, including district judges in Alaska, Hawaii, and Puerto Rico. References to these territories is omitted as unnecessary. Provision for Alaska judges is covered by section 460 of this title, and section 114 of title 48, U.S.C., 1940 ed., Territories and Insular Possessions, as amended by a separate section in the bill to enact this revision. Hawaii and Puerto Rico are included as districts by sections 91 and 119 of this title, and judges thereof are "judges of the United States" as defined in section 451 of this title.

The inconsistent provision of said section 270 of title 28, U.S.C., 1940 ed., with reference to payment on order of court was omitted to permit payment to every judge on his certificate.

The $10 per day subsistence limitation applicable to all other judges was extended to the judges of the Court of Customs and Patent Appeals.

The provision of said section 270 of title 28, U.S.C., 1940 ed., relating to traveling expenses of commissioners and stenographers is incorporated in sections 792 and 794 of this title.

The provisions of said section 296 of title 28, U.S.C., 940 ed., relating to organization of the Customs Court are the basis of sections 251, 252, 253, and 254 of this title. Other provisions of said section 296 are incorporated in sections 1581, 2071, 2639, and 2640 of this title, and the retirement provisions of that section are covered by sections 371 and 372 of this title.

The provision of section 296 of title 28, U.S.C., 1940 ed., expenses of retired judges was made applicable to all judges.

The provision of section 218 of title 28, U.S.C., 1940 ed., for payment of travel expenses of judges attending the Judicial Conference of the United States was omitted as covered by the first paragraph of the revised section.

The provision in section 218 of title 28, U.S.C., 1940 ed., requiring the marshal of the Supreme Court to pay the expenses of attending the Judicial Conference of the United States is omitted as covered in part by section 550 of this title under which United States marshals pay the travel allowances of circuit, district, and certain other judges. The expenses of the Chief Justice of the United States in attending such Conference were required also under said section 218 to be paid by the Supreme Court marshal. Such requirement is also omitted upon advice of the Director of the Administrative Office of the United States Courts that the matter of payment is one of administrative convenience. As to manner of payment of salaries to active and retired Justices of the Supreme Court, see reviser's note under section 550 of this title.

Words "justice or judge of the United States" were used to describe members of all courts. See definitive section 451 of this title.

The remaining provisions of sections 218 of title 28, U.S.C., 1940 ed., relating to the Judicial Conference of the United States and 449 of title 28, U.S.C., 1940 ed., relating to judicial conferences of circuits, are incorporated in sections 331 and 333, respectively.

Said section 1102(d) of title 26, U.S.C., 1940 ed., related to traveling and subsistence expenses of judges of The Tax Court of the United States, successor to the Board of Tax Appeals.

Numerous changes were made in phraseology.

### SENATE REVISION AMENDMENTS

Those provisions of this section which related to the Tax Court were eliminated by Senate amendment, therefore section 1102(d) of title 26, U.S.C., was not one of the sources of this section as finally enacted.

As finally enacted, part of act July 9, 1947, ch. 211, title IV, 61 Stat. 303, which was classified to title 28, U.S.C., 1946 ed., § 296a, became one of the sources of this section and was accordingly included in the schedule of repeals by Senate amendment. See 80th Congress Senate Report No. 1559.

### REFERENCES IN TEXT

The Travel Expense Act of 1949, as amended, referred to in text, was repealed and the provisions thereof were reenacted as subchapter I (§ 5701 et seq.) of chapter 57 of Title 5, Government Organization and Employees, by Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 378.

### AMENDMENTS

1959—Pub. L. 86-138 authorized payment to justices and judges of a per diem allowance or a maximum amount for actual expenses of subsistence in place of reasonable maintenance expenses actually incurred, not exceeding $15 per day.

1953—Act Aug. 8, 1953, increased the limit of reimbursable maintenance from $10 to $15 per day.

### PROMULGATION OF REGULATIONS BY DIRECTOR

Director to promulgate regulations effectuating increases in reimbursement for expenses, see section 6 of Pub. L. 87-139, Aug. 14, 1961, 75 Stat. 340, set out as a note under section 604 of this title.

### CROSS REFERENCES

Payment of expenses by Director of Administrative Office of United States Courts, see section 604 of this title.

Retired judges not subject to residence restrictions, see section 374 of this title.

United States marshal to make disbursements, see section 571 of this title.

### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 374 of this title; title 5 section 5702.

## § 457. Records; obsolete papers

The records of district courts and of courts of appeals shall be kept at one or more of the places where court is held. Such places shall be designated by the respective courts except when otherwise directed by the judicial council of the circuit.

Papers of any court established by Act of Congress which have become obsolete and are no longer necessary or useful, may be disposed of with the approval of the court concerned in the manner provided by sections 366-380 of Title 44 and in accordance with the rules of the Judicial Conference of the United States.

(June 25, 1948, ch. 646, 62 Stat. 908.)

### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§ 10, 523a, 523b, (Mar. 3, 1911, ch. 231, § 6, 36 Stat. 1088; June 3, 1930, ch. 396, §§ 1, 2, 46 Stat. 496).

Section consolidates and simplifies sections 10, 523a and 523b of title 28, U.S.C., 1940 ed., relating to filing district court records and destroying obsolete papers and bankruptcy proofs of claims.

The revised section enlarges scope of section 10 of title 28, U.S.C., 1940 ed., to include places of keeping records of courts of appeals which was not covered by existing law.

The provisions in section 10 of title 28, U.S.C., 1940 ed., that where court is held "at more than one place" and the place of keeping the records "is not specially provided by law, they shall be kept at either of the places" designated by the court, was changed to permit the judicial councils of the circuits to make the determination without requiring special enactment of Congress. See section 332 of this title as to purpose and duties of the judicial councils.

The provision of section 523a of title 28, U.S.C., 1940 ed., authorizing destruction of records by the Attorney General was rewritten in the second paragraph to give such authority, respecting court records, to the Director of the Administrative Office of the United States Courts. Such Director, under section 604 of this title, now exercises administrative authority over clerks and commissioners.

A similar provision with respect to records of United States attorneys and marshals was omitted as superseded by sections 366 and 380 of title 44, U.S.C., 1940 ed., Public Printing and Documents, which prescribe the exclusive method for disposition of such papers.

Substantial changes were made in phraseology and arrangement.

#### References in Text

Sections 366 to 380 of Title 44, referred to in text, were repealed and the provisions thereof reenacted as chapter 33 (§ 3301 et seq.) of Title 44, Public Printing and Documents, by Pub. L. 90-620, Oct. 22, 1968, 82 Stat. 1238.

### § 458. Relative of justice or judge ineligible to appointment

No person shall be appointed to or employed in any office or duty in any court who is related by affinity or consanguinity within the degree of first cousin to any justice or judge of such court.

(June 25, 1948, ch. 646, 62 Stat. 908.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 126 (Mar. 3, 1887, ch. 373, § 7, 24 Stat. 555; Aug. 13, 1888, ch. 866, § 7, 25 Stat. 437; Mar. 3, 1911, ch. 231, § 67, 36 Stat. 1105; Dec. 21, 1911, ch. 4, 37 Stat. 46).

A provision referring to circuit court employees as of December 21, 1911, was omitted as obsolete.

Changes in phraseology were made.

#### Cross References

Nepotism in appointment of receiver or trustee, see section 1910 of Title 18, Crimes and Criminal Procedure.

### § 459. Administration of oaths and acknowledgments

Each justice or judge of the United States may administer oaths and affirmations and take acknowledgments.

(June 25, 1948, ch. 646, 62 Stat. 908.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., §§ 264, 385, section 1509 of title 19, U.S.C., 1940 ed., Customs Duties, and section 1114(a) of title 26, U.S.C., 1940 ed., Internal Revenue Code (Mar. 3, 1911, ch. 231, §§ 158, 268, 36 Stat. 1139, 1163; June 17, 1930, ch. 497, title IV, § 509, 46 Stat. 733; Feb. 10, 1939, ch. 2, § 1114(a), 53 Stat. 160; Oct. 21, 1942, ch. 619, title V, § 504(a), (c), 56 Stat. 957; Feb. 25, 1944, ch. 63, title V, § 503, 58 Stat. 72).

Section consolidates provisions of sections 264 and 385 of title 28, U.S.C., 1940 ed., section 1509 of title 19, U.S.C., 1940 ed., and section 1114(a) of title 26, U.S.C., 1940 ed., relating to administration of oaths and acknowledgments by judges and courts.

The provision of section 385 of title 28, U.S.C., 1940 ed., giving to "all courts of the United States" power to impose and administer all necessary oaths is the only part of such section in this title. The remainder is incorporated in section 401 of revised title 18, U.S.C. (H.R. 1600, 80th Cong.), Crimes and Criminal Procedure.

Section 264 of title 28, U.S.C., 1940 ed., related only to the Court of Claims and provision of such section relating to clerks and deputies is incorporated in section 953 of this title.

Section 1509 of title 19, U.S.C., 1940 ed., related only to the Customs Court.

Section 1114(a) of title 26, U.S.C., 1940 ed., related only to The Tax Court. That portion of such section authorizing certain employees of The Tax Court to administer oaths and acknowledgments is incorporated in section 953 of this title. For distribution of other provisions thereof, see Distribution Table.

The revised section clarifies what was apparently a statutory omission in that no provision was made with reference to the Court of Customs and Patent Appeals, the judges of which now will have the same power respecting administering oaths as judges of other courts.

#### Senate Revision Amendment

By Senate amendment, all provisions relating to the Tax Court were eliminated, therefore, as finally enacted, section 1114(a) of Title 26, U.S.C., Internal Revenue Code, did not constitute part of the source of this section. However, no change in the text of this section was necessary. See 80th Congress Senate Report No. 1559.

### § 460. Application to Alaska,[1] Canal Zone, Guam and Virgin Islands

Sections 452-459 of this chapter shall also apply to the United States District Court for the District of the Canal Zone, the District Court of Guam and the District Court of the Virgin Islands and the judges thereof.

(June 25, 1948, ch. 646, 62 Stat. 908; Oct. 31, 1951, ch. 655, § 43(a), 65 Stat. 725; July 7, 1958, Pub. L. 85-508, § 12(e), 72 Stat. 348.)

#### Historical and Revision Notes

This section was included to make clear that the provisions of this chapter are equally applicable in Alaska, the Canal Zone and the Virgin Islands in view of definitive section 451 of this title.

#### Amendments

1958—Pub. L. 85-508 eliminated provisions which made sections 452 to 459 applicable to the District Court for the Territory of Alaska. See section 81A of this title which establishes a United States District Court for the State of Alaska.

1951—Act Oct. 31, 1951, inserted ", Guam" in catchline, and inserted a reference to the District Court of Guam in the text.

#### Effective Date of 1958 Amendment

Amendment by Pub. L. 85-508 effective Jan. 3, 1959, upon admission of Alaska into the Union pursuant to Proc. No. 3269, Jan. 3, 1959, 24 F.R. 81, 73 Stat. c16, as required by sections 1 and 8(c) of Pub. L. 85-508, see notes set out under section 81A of this title and preceding section 21 of Title 48, Territories and Insular Possessions.

#### Cross References

Convention on the Settlement of Investment Disputes, exclusive jurisdiction of district courts of the United States, including the courts enumerated in this section, over actions and proceedings for enforcement of arbitration awards under the Convention, regardless of amount in controversy, see section 1650a of Title 22, Foreign Relations and Intercourse.

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[1] Section amended by Pub. L. 85-508 to eliminate reference to Alaska without a conforming amendment to section catchline.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 9 section 203; title 16 section 1540; title 22 sections 285f, 290g-6, 1650a; title 33 section 1479.

### § 461. Adjustments in certain salaries

(a) Effective at the beginning of the first applicable pay period commencing on or after the first day of the month in which an adjustment takes effect under section 5305 of title 5 in the rates of pay under the General Schedule (except as provided in subsection (b)), each salary rate which is subject to adjustment under this section shall be adjusted by an amount, rounded to the nearest multiple of $100 (or if midway between multiples of $100, to the next higher multiple of $100) equal to the percentage of such salary rate which corresponds to the overall average percentage (as set forth in the report transmitted to the Congress under such section 5305) of the adjustments in the rates of pay under such Schedule.

(b) Subsection (a) shall not apply to the extent it would reduce the salary of any individual whose compensation may not, under section 1 of article III of the Constitution of the United States, be diminished during such individual's continuance in office.

(Added Pub. L. 94-82, title II, § 205(a)(1), Aug. 9, 1975, 89 Stat. 422.)

#### REFERENCES IN TEXT

The General Schedule, referred to in subsec. (a), is set out under section 5332 of Title 5, Government Organization and Employees.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 5, 44, 135, 173, 213, 252, 792 of this title; title 11 section 68.

## PART II—DEPARTMENT OF JUSTICE

| Chap. | | Sec. |
|---|---|---|
| 31. | The Attorney General | 501 |
| 33. | Federal Bureau of Investigation | 531 |
| 35. | United States Attorneys | 541 |
| 37. | United States Marshals | 561 |

#### AMENDMENTS

1966—Pub. L. 89-554, § 4(c), Sept. 6, 1966, 80 Stat. 611, added chapters 31 and 33, and redesignated former chapters 31 and 33 as 35 and 37, respectively.

## CHAPTER 31—THE ATTORNEY GENERAL

Sec.
501. Executive department.
502. Seal.
503. Attorney General.
504. Deputy Attorney General.
505. Solicitor General.
506. Assistant Attorneys General.
507. Assistant Attorney General for Administration.
508. Vacancies.
509. Functions of the Attorney General.
510. Delegation of authority.
511. Attorney General to advise the President.
512. Attorney General to advise heads of executive departments.
513. Attorney General to advise Secretaries of military departments.
514. Legal services on pending claims in departments and agencies.
515. Authority for legal proceedings; commission, oath, and salary for special attorneys.
516. Conduct of litigation reserved to Department of Justice.
517. Interests of United States in pending suits.
518. Conduct and argument of cases.
519. Supervision of litigation.
520. Transmission of petitions in Court of Claims; statement furnished by departments.
521. Publication and distribution of opinions.
522. Report of business and statistics.
523. Requisitions.
524. Appropriations for administrative expenses; notarial fees; meals and lodging of bailiffs.
525. Procurement of law books, reference books, and periodicals; sale and exchange.
526. Authority of the Attorney General to investigate United States attorneys and marshals, clerks of court, and others. [1]
527. Establishment of working capital fund.

#### AMENDMENTS

1975—Pub. L. 93-613, § 1(2), Jan. 2, 1975, 88 Stat. 1975, added item 527.

1966—Pub. L. 89-554, § 4(c) Sept. 6, 1966, 80 Stat. 611, substituted "The Attorney General" for "United States Attorneys" in the heading of chapter 31, "Executive Department" for "Appointment of United States attorneys" in item 501, "Seal" for "Appointment of assistant United States attorneys" in item 502, "Attorney General" for "Appointment of attorneys" in item 503, "Deputy Attorney General" for "Tenure and oath of office; removal" in item 504, "Solicitor General" for "Residence" in item 505, "Assistant Attorney General" for "Vacancies" in item 506, "Assistant Attorney General for Administration" for "Duties; supervision by Attorney General" in item 507, "Vacancies" for "Salaries" in item 508, "Functions of the Attorney General" for "Expenses" in item 509, "Delegation of authority" for "Clerical assistants and messengers" in item 510, and added items 511 to 526.

### § 501. Executive department

The Department of Justice is an executive department of the United States at the seat of Government.

(Added Pub. L. 89-554, § 4(c), Sept. 6, 1966, 80 Stat. 611.)

#### HISTORICAL AND REVISION NOTES

| *Derivation* | *U.S. Code* | *Revised Statutes and Statutes at Large* |
|---|---|---|
| .................. | 5 U.S.C. 291 (less last 10 words). | R.S. § 346 (less last 10 words). |

The words "There shall be", referring to the establishment of the Department, are omitted as executed.

#### PRIOR PROVISIONS

A prior section 501, acts June 25, 1948, ch. 646, 62 Stat. 909; Mar. 18, 1959, Pub. L. 86-3, § 11(a), 73 Stat. 9, related to appointment of United States attorneys, was repealed by Pub. L. 89-554, § 8(a), Sept. 6, 1966, 80 Stat. 663, and is now covered by section 541 of this title.

### § 502. Seal

The Attorney General shall have a seal for the Department of Justice. The design of the seal is subject to the approval of the President.

(Added Pub. L. 89-554, § 4(c), Sept. 6, 1966, 80 Stat. 611.)

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[1] So in original. Does not conform to section catchline.

#### HISTORICAL AND REVISION NOTES

| *Derivation* | *U.S. Code* | *Revised Statutes and Statutes at Large* |
|---|---|---|
| ................. | 5 U.S.C. 292 | R.S. § 353. |

The section is rewritten to conform to other statutes authorizing departmental seals. The words "The seal heretofore provided for the office of the Attorney General shall be" are omitted as obsolete.

#### PRIOR PROVISIONS

A prior section 502, act June 25, 1948, ch. 646, 62 Stat. 909, related to appointment of assistant United States attorneys, was repealed by Pub. L. 89-554, § 8(a), Sept. 6, 1966, 80 Stat. 663, and is now covered by section 542 of this title.

### § 503. Attorney General

The President shall appoint, by and with the advice and consent of the Senate, an Attorney General of the United States. The Attorney General is the head of the Department of Justice.

(Added Pub. L. 89-554, § 4(c), Sept. 6, 1966, 80 Stat. 612.)

#### HISTORICAL AND REVISION NOTES

| *Derivation* | *U.S. Code* | *Revised Statutes and Statutes at Large* |
|---|---|---|
| ................. | 5 U.S.C. 291 (last 10 words). | R.S. § 346 (last 10 words). |

The words "The President shall appoint, by and with the advice and consent of the Senate have been added to conform the section with the Constitution. See article II, section 2, clause 2.

#### PRIOR PROVISIONS

A prior section 503, act June 25, 1948, ch. 646, 62 Stat. 909, related to appointment of attorneys to assist United States attorneys, was repealed by Pub. L. 89-554, § 8(a), Sept. 6, 1966, 80 Stat. 633, and is now covered by section 543 of this title.

#### CROSS REFERENCES

Compensation of Attorney General, see section 5312 of Title 5, Government Organization and Employees.

Law Enforcement Assistance Administration, see section 3711 of Title 42, The Public Health and Welfare.

National Institute of Law Enforcement and Criminal Justice, see section 3742 of Title 42.

### § 504. Deputy Attorney General

The President may appoint, by and with the advice and consent of the Senate, a Deputy Attorney General.

(Added Pub. L. 89-554, § 4(c), Sept. 6, 1966, 80 Stat. 612.)

#### HISTORICAL AND REVISION NOTES

| *Derivation* | *U.S. Code* | *Revised Statutes and Statutes at Large* |
|---|---|---|
| ................. | 5 U.S.C. 294 | Mar. 3, 1903, ch. 1006, § 1 (so much of 2d par. under "Department of Justice" as provides for appointment, pay, and duties of an assistant to the Attorney General), 32 Stat. 1062. |
| ................. | [Uncodified] | 1950 Reorg. Plan No. 2, § 3, eff. May 24, 1950, 64 Stat. 1261. |

The words "may appoint" are substituted for "is authorized to appoint". So much of the Act of Mar. 3, 1903, as relates to pay is omitted as superseded by § 303(c) of the Act of Aug. 14, 1964, Pub. L. 88-426, 78 Stat. 416, which is codified in section 5314 of title 5, United States Code.

#### PRIOR PROVISIONS

A prior section 504, acts June 25, 1948, ch. 646, 62 Stat. 909; Mar. 18, 1959, Pub. L. 86-3, § 11(b), 73 Stat. 9, related to tenure and oath of office of United States attorneys, was repealed by Pub. L. 89-554, § 8(a), Sept. 6, 1966, 80 Stat. 663, and is now covered by sections 541 and 544 of this title.

#### CROSS REFERENCES

Compensation of Deputy Attorney General, see section 5314 of Title 5, Government Organization and Employees.

### § 505. Solicitor General

The President shall appoint in the Department of Justice, by and with the advice and consent of the Senate, a Solicitor General, learned in the law, to assist the Attorney General in the performance of his duties.

(Added Pub. L. 89-554, § 4(c), Sept. 6, 1966, 80 Stat. 612.)

#### HISTORICAL AND REVISION NOTES

| *Derivation* | *U.S. Code* | *Revised Statutes and Statutes at Large* |
|---|---|---|
| ................. | 5 U.S.C. 293 | R.S. § 347 (less last sentence). |

So much of R.S. § 347 as relates to the pay of the Solicitor General is omitted as superseded by § 303(c) of the Act of Aug. 14, 1964, Pub. L. 88-426, 78 Stat. 416, which is codified in section 5314 of title 5, United States Code.

#### PRIOR PROVISIONS

A prior section 505, act June 25, 1948, ch. 646, 62 Stat. 909, related to residence of United States attorneys, was repealed by Pub. L. 89-554, § 8(a), Sept. 6, 1966, 80 Stat. 663, and is now covered by section 545 of this title.

#### CROSS REFERENCES

Compensation of Solicitor General, see section 5314 of Title 5, Government Organization and Employees.

### § 506. Assistant Attorneys General

The President shall appoint, by and with the advice and consent of the Senate, nine Assistant Attorneys General, who shall assist the Attorney General in the performance of his duties.

(Added Pub. L. 89-554, § 4(c), Sept. 6, 1966, 80 Stat. 612.)

#### HISTORICAL AND REVISION NOTES

| *Derivation* | *U.S. Code* | *Revised Statutes and Statutes at Large* |
|---|---|---|
| ................. | 5 U.S.C. 295 | R.S. § 348.<br>July 11, 1890, ch. 667, § 1 (words between 3d and 4th semicolons under "Department of Justice"), 26 Stat. 265. |

| *Derivation* | *U.S. Code* | *Revised Statutes and Statutes at Large* |
|---|---|---|
| | | Mar. 3, 1903, ch. 1006, § 1 (so much of 2d par. under "Department of Justice" as provides for appointment, pay, and duties of an additional Assistant Attorney General), 32 Stat. 1062. |
| | | July 16, 1914, ch. 141, § 1 (words between 3d and 4th semicolons under "Department of Justice"), 38 Stat. 497. |
| | | Mar. 4, 1915, ch. 141, § 1 (words between 3d and 4th semicolons under "Department of Justice"), 38 Stat. 1038. |
| | | June 16, 1933, ch. 101, § 16(b), 48 Stat. 308. |
| | | Mar. 2, 1943, ch. 7, 57 Stat. 4. |
| .................. | [Uncodified] | 1950 Reorg. Plan No. 2, § 4, eff. May 24, 1950, 64 Stat. 1261. |
| .................. | [Uncodified] | 1953 Reorg. Plan No. 4, § 2, eff. June 20, 1953. 67 Stat. 636. |
| .................. | 5 U.S.C. 295-1 | Sept. 9, 1957, Pub. L. 85-315, § 111, 71 Stat. 637. |

The words "There shall be in the Department of Justice" are omitted as unnecessary as the title of the positions establishes their location in the Department of Justice.

The position of sixth Assistant Attorney General, referred to in the Acts of July 16, 1914, and Mar. 4, 1915, was made a permanent position by the Act of Mar. 4, 1915, ch. 141, § 6, 38 Stat. 1049.

The number of Assistant Attorneys General referred to in the Act of Mar. 2, 1943, is changed from "six" to "nine" to reflect the three additional Assistant Attorneys General authorized by 1950 Reorg. Plan No. 2, 1953 Reorg. Plan No. 4, and the Act of Sept. 9, 1957.

The words "learned in the law" are omitted as unnecessary. Such a requirement is not made of the Attorney General, United States attorneys, or United States judges. (See reviser's note under 28 U.S.C. 501, 1964 ed.)

The reference in former section 295 of title 5 to the Assistant Attorneys General assisting the Solicitor General are omitted on authority of the transfer of functions made by 1950 Reorg. Plan No. 2 and 1953 Reorg. Plan No. 4.

Provisions of 1950 Reorg. Plan No. 2, § 4, and 1953 Reorg. Plan No. 4, § 2, abolishing positions and transferring incumbents are omitted as executed.

Provisions relating to pay of Assistant Attorneys General are omitted as superseded by § 303(d) of the Act of August 14, 1964, Pub. L. 88-426, 78 Stat. 418, which is codified in section 5315 of title 5, United States Code.

#### PRIOR PROVISIONS

A prior section 506, act June 25, 1948, ch. 646, 62 Stat. 909, related to vacancies in the office of United States attorney, was repealed by Pub. L. 89-554, § 8(a), Sept. 6, 1966, 80 Stat. 663, and is now covered by section 546 of this title.

#### CROSS REFERENCES

Compensation of Assistant Attorneys General, see section 5315 of Title 5, Government Organization and Employees.

### § 507. Assistant Attorney General for Administration

(a) The Attorney General shall appoint, with the approval of the President, an Assistant Attorney General for Administration, who shall perform such duties as the Attorney General may prescribe.

(b) The position of Assistant Attorney General for Administration is in the competitive service.

(Added Pub. L. 89-554, § 4(c), Sept. 6, 1966, 80 Stat. 612.)

#### HISTORICAL AND REVISION NOTES

| *Derivation* | *U.S. Code* | *Revised Statutes and Statutes at Large* |
|---|---|---|
| .................. | [Uncodified] | 1950 Reorg. Plan No. 2, § 5 eff. May 24, 1950, 64 Stat. 1261. |

The title of the position was changed to "Assistant Attorney General for Administration" by § 307 of the Act of Aug. 14, 1964, Pub. L. 88-426, 78 Stat. 432.

The words "competitive service" are substituted for "classified civil service" because the term "classified civil service" formerly used to designate the merit system established by the Civil Service Act of 1883 has become ambiguous due to the creation of the "classified" pay system. The term "competitive service" is now customarily used, and appears throughout title 5, United States Code, in place of "classified civil service".

The words "There shall be in the Department of Justice" are omitted as unnecessary as the title of the position and the fact of appointment by the Attorney General establish the location of the position in the Department of Justice.

The last 12 words of section 5 of the Reorganization Plan are omitted on authority of the Act of June 5, 1952, ch. 369, § 1101 (3d proviso), 66 Stat. 121. The salary of the position is now fixed by § 303(e) of the Act of Aug. 14, 1964, Pub. L. 88-426, 78 Stat. 420, which is codified in section 5316 of title 5, United States Code.

#### PRIOR PROVISIONS

A prior section 507, acts June 25, 1948, ch. 646, 62 Stat. 910; May 24, 1949, ch. 139, § 71, 63 Stat. 100, related to duties of United States attorneys, and to supervision by the Attorney General, was repealed by Pub. L. 89-554, § 8(a), Sept. 6, 1966, 80 Stat. 663, and is now covered by sections 509 and 547 of this title.

#### CROSS REFERENCES

Compensation of Assistant Attorney General for Administration, see section 5316 of Title 5, Government Organization and Employees.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 20 section 1132c-2; title 26 section 7422; title 30 sections 816, 818, 819; title 42 section 3211.

### § 508. Vacancies

(a) In case of a vacancy in the office of Attorney General, or of his absence or disability, the Deputy Attorney General may exercise all the duties of that office, and for the purpose of section 3345 of title 5 the Deputy Attorney General is the first assistant to the Attorney General.

(b) When, by reason of absence, disability, or vacancy in office, neither the Attorney General nor the Deputy Attorney General is available to exercise the duties of the office of Attorney General, the Assistant Attorneys General and the Solicitor General, in such order of succession as the Attorney General may from time to time prescribe, shall act as Attorney General.

(Added Pub. L. 89-554, § 4(c), Sept. 6, 1966, 80 Stat. 612.)

HISTORICAL AND REVISION NOTES

| *Derivation* | *U.S. Code* | *Revised Statutes and Statutes at Large* |
|---|---|---|
| ................ | [Uncodified] | R.S. § 347 (last sentence).<br>1953 Reorg. Plan No. 4, § 1, eff. June 20, 1953, 67 Stat. 636. |

The last sentence of R.S. § 347 is cited as authority inasmuch as the function contained therein was the function transferred to the Deputy Attorney General by 1953 Reorg. Plan No. 4. The word "may" is substituted for "have the power". The words "During any period of time" are omitted as unnecessary.

PRIOR PROVISIONS

A prior section 508, acts June 25, 1948, ch. 646, 62 Stat. 910; Mar. 2, 1955, ch. 9, § 2(a), 69 Stat. 10; Oct. 11, 1962, Pub. L. 87-793, § 1003(a), 76 Stat. 865; Aug. 14, 1964, Pub. L. 88-426, title III, § 306(a)(1), 78 Stat. 428; Oct. 6, 1964, Pub. L. 88-631, § 3(b), 78 Stat. 1008, related to salaries of United States attorneys, assistant United States attorneys, and special attorneys was repealed by Pub. L. 89-554, § 8(a), Sept. 6, 1966, 80 Stat. 663, and is now covered by section 548 of this title.

**§ 509. Functions of the Attorney General**

All functions of other officers of the Department of Justice and all functions of agencies and employees of the Department of Justice are vested in the Attorney General except the functions—

(1) vested by subchapter II of chapter 5 of title 5 in hearing examiners employed by the Department of Justice;

(2) of the Federal Prison Industries, Inc.;

(3) of the Board of Directors and officers of the Federal Prison Industries, Inc.; and

(4) of the Board of Parole.

(Added Pub. L. 89-544, § 4(c), Sept. 6, 1966, 80 Stat. 612.)

HISTORICAL AND REVISION NOTES

| *Derivation* | *U.S. Code* | *Revised Statutes and Statutes at Large* |
|---|---|---|
| ................ | [Uncodified] | 1950 Reorg. Plan No. 2, § 1, eff. May 24, 1950, 64 Stat. 1261. |

The section is restated to allow incorporation into this chapter.

For Reviser's Note covering former section 507, upon which this section is partially derived, see Reviser's Note set out under section 547 of this title.

PRIOR PROVISIONS

A prior section 509, act June 25, 1948, ch. 646, 62 Stat. 910, related to expenses of United States attorneys, was repealed by Pub. L. 89-544, § 8(a), Sept. 6, 1966, 80 Stat. 663, and is now covered by section 549 of this title.

EMERGENCY PREPAREDNESS FUNCTIONS

For assignment of certain emergency preparedness functions to the Attorney General, see Parts 1, 5, and 30 of Ex. Ord. No. 11490, Oct. 28, 1969, 34 F.R. 17567, set out as a note under section 2292 of Title 50, App., War and National Defense.

POSITIONS IN DRUG ENFORCEMENT ADMINISTRATION; GRADES EXCEPTED FROM COMPETITIVE SERVICE; VACANCIES; REMOVAL, SUSPENSION, OR REDUCTION IN RANK OR PAY; RATE OF PAY

Pub. L. 94-503, title II, § 201, Oct. 15, 1976, 90 Stat. 2425, provided that:

"(a) Effective beginning one year after date of the enactment of this Act [Oct. 15, 1976], the following positions in the Drug Enforcement Administration (and individuals holding such positions) are hereby excepted from the competitive service:

"(1) positions at GS-16, 17, and 18 of the General Schedule under section 5332(a) of title 5, United States Code, and

"(2) positions at GS-15 of the General Schedule which are designated as—

"(A) regional directors,

"(B) office heads, or

"(C) executive assistants (or equivalent positions) under the immediate supervision of the Administrator (or the Deputy Administrator) of the Drug Enforcement Administration.

"(b) Effective during the one year period beginning on the date of the enactment of this Act [Oct. 15, 1976], vacancies in positions in the Drug Enforcement Administration (other than positions described in subsection (a)) at a grade not lower than GS-14 shall be filled—

"(1) first, from applicants who have continuously held positions described in subsection (a) since the date of the enactment of this Act and who have applied for, and are qualified to fill, such vacancies, and

"(2) then, from other applicants in the order which would have occurred in the absence of this subsection.

Any individual placed in a position under paragraph (1) shall be paid in accordance with subsection (d).

"(c)(1) Effective beginning one year after the date of the enactment of this Act [Oct. 15, 1976], an individual in a position described in subsection (a) may be removed, suspended for more than 30 days, furloughed without pay, or reduced in rank or pay by the Administrator of the Drug Enforcement Administration if—

"(A) such individual has been employed in the Drug Enforcement Administration for less than the one-year period immediately preceding the date of such action, and

"(B) the Administrator determines, in his discretion, that such action would promote the efficiency of the service.

"(2) Effective beginning one year after the date of the enactment of this Act [Oct. 15, 1976], an individual in a position described in subsection (a) may be reduced in rank or pay by the Administrator within the Drug Enforcement Administration if—

"(A) such individual has been continuously employed in such position since the date of the enactment of this Act, and

"(B) the Administrator determines, in his discretion, that such action would promote the efficiency of the service.

Any individual reduced in rank or pay under this paragraph shall be paid in accordance with subsection (d).

"(3) The provisions of sections 7512 and 7701 of title 5, United States Code, and otherwise applicable Executive orders, shall not apply with respect to actions taken by the Administrator under paragraph (1) or any reduction in rank or pay (under paragraph (2) or otherwise) of any individual in a position described in subsection (a).

"(d) Any individual whose pay is to be determined in accordance with this subsection shall be paid basic pay at the rate of basic pay he was receiving immediately before he was placed in a position under subsection (b)(1) or reduced in rank or pay under subsection (c)(2), as the case may be, until such time as the rate of basic pay he would receive in the absence of this subsection exceeds such rate of basic pay. The provisions of section 5337 of title 5, United States Code, shall not apply in any case in which this subsection applies."

REORGANIZATION PLAN NO. 1 OF 1968

Eff. Apr. 8, 1968, 33 F.R. 5611, 82 Stat. 1367, as amended Reorg. Plan No. 2 of 1973, § 3, eff. July 1, 1973, 38 F.R. 15932, 87 Stat. 1091.

Prepared by the President and transmitted to the Senate and the House of Representatives in Congress assembled, February 7, 1968, pursuant to the provisions of chapter 9 of title 5 of the United States Code.

### NARCOTICS; DRUG ABUSE CONTROL

#### Section 1. Transfer of Functions From Treasury Department

There are hereby transferred to the Attorney General:

(a) Those functions of the Secretary of the Treasury which are administered through or with respect to the Bureau of Narcotics.

(b) All functions of the Bureau of Narcotics, of the Commissioner of Narcotics, and of all other officers, employees and agencies of the Bureau of Narcotics.

(c) So much of other functions or parts of functions of the Secretary of the Treasury and the Department of the Treasury as is incidental to or necessary for the performance of the functions transferred by paragraphs (a) and (b) of this section.

#### Sec. 2. Transfer of Functions From the Department of Health, Education, and Welfare

There are hereby transferred to the Attorney General:

(a) The functions of the Secretary of Health, Education, and Welfare under the Drug Abuse Control Amendments of 1965 (Public Law 89-74; 79 Stat. 226) [see Short Title note under section 360a of Title 21], except the function of regulating the counterfeiting of those drugs which are not controlled "depressant or stimulant" drugs.

(b) So much of other functions or parts of functions of the Secretary of Health, Education, and Welfare, and of the Department of Health, Education, and Welfare, as is incidental to or necessary for the performance of the functions transferred by paragraph (a) of this section.

#### Sec. 3. Bureau of Narcotics and Dangerous Drugs

(a) [Repealed. Reorg. Plan No. 2 of 1973, § 3, 38 F.R. 15932, 87 Stat. 1091, eff. July 1, 1973. Subsec. (a) had provided for a Bureau of Narcotics and Dangerous Drugs in the Department of Justice.]

(b) There are hereby established in the Department of Justice, in addition to the positions transferred to that Department by this Plan, four new positions, appointment to which shall be made by the Attorney General in the competitive service. Two of those positions shall have compensation at the rate now or hereafter provided for GS-18 positions of the General Schedule and the other two shall have compensation at the rate now or hereafter provided for GS-16 positions of the General Schedule (5 U.S.C. 5332). Each such position shall have such title and duties as the Attorney General shall prescribe.

#### Sec. 4. Abolition

The Bureau of Narcotics in the Department of the Treasury, including the office of Commissioner of Narcotics (21 U.S.C. 161), is hereby abolished. The Secretary of the Treasury shall make such provision as he may deem necessary with respect to terminating those affairs of the Bureau of Narcotics not otherwise provided for in this reorganization plan.

#### Sec. 5. Performance of Transferred Functions

The Attorney General may from time to time make such provisions as he shall deem appropriate authorizing the performance of any of the functions transferred to him by the provisions of this reorganization plan by any officer, employee, or organizational entity of the Department of Justice.

#### Sec. 6. Incidental Transfers

(a) There are hereby transferred to the Department of Justice all of the positions, personnel, property, records, and unexpended balances of appropriations, allocations, and other funds, available or to be made available, (1) of the Bureau of Narcotics, and (2) of the Bureau of Drug Abuse Control of the Department of Health, Education, and Welfare.

(b) There shall be transferred to the Department of Justice, at such time or times as the Director of the Bureau of the Budget shall direct, so much as the Director shall determine of other positions, personnel, property, records and unexpended balances of appropriations, allocations, and other funds of the Department of the Treasury and of the Department of Health, Education, and Welfare employed, used, held, available or to be made available in connection with functions transferred by the provisions of this reorganization plan.

(c) Such further measures and dispositions as the Director of the Bureau of the Budget shall deem to be necessary in order to effectuate the transfers provided in this section shall be carried out in such manner as he may direct and by such agencies as he shall designate.

#### Message of the President

To the Congress of the United States:

In my first Reorganization Plan of 1968, I call for the creation of a new and powerful Bureau of Narcotics and Dangerous Drugs.

With this action, America will serve notice to the pusher and the peddler that their criminal acts must stop.

No matter how well organized they are, we will be better organized. No matter how well they have concealed their activities, we will root them out.

Today, Federal investigation and enforcement of our narcotics laws are fragmented. One major element—the Bureau of Narcotics—is in the Treasury Department and responsible for the control of marihuana and narcotics such as heroin. Another—the Bureau of Drug Abuse Control—is in the Department of Health, Education, and Welfare, and is responsible for the control of dangerous drugs including depressants, stimulants, and hallucinogens such as LSD.

Neither is located in the agency which is primarily concerned with Federal law enforcement—the Department of Justice.

This separation of responsibilities—despite the relentless and dedicated efforts of the agents of each Bureau—has complicated and hindered our response to a national menace.

For example, more than nine out of ten seizures of LSD made by the Bureau of Drug Abuse Control have also turned up marihuana—but that Bureau has no jurisdiction over marihuana.

In many instances, we are confronted by well organized disciplined and resourceful criminals who reap huge profits at the expense of their unfortunate victims.

The response of the Federal Government must be unified. And it must be total.

Today, in my Message on Crime, I recommended strong new laws to control dangerous drugs. I also recommended an increase of more than thirty percent in the number of Federal agents enforcing the narcotic and dangerous drug laws.

I now propose that a single Bureau of Narcotics and Dangerous Drugs be established in the Department of Justice to administer those laws and to bring to the American people the most efficient and effective Federal enforcement machinery we can devise.

Under this Reorganization Plan the Attorney General will have full authority and responsibility for enforcing the Federal laws relating to narcotics and dangerous drugs. The new Bureau of Narcotics and Dangerous Drugs, to be headed by a Director appointed by the Attorney General, will:

—consolidate the authority and preserve the experience and manpower of the Bureau of Narcotics and the Bureau of Drug Abuse Control.

—work with states and local governments in their crackdown on illegal trade in drugs and narcotics, and help to train local agents and investigators.

—maintain worldwide operations, working closely with other nations, to suppress the trade in illicit narcotics and marihuana.

—conduct an extensive campaign of research and a nationwide public education program on drug abuse and its tragic effects.

The Plan I forward today moves in the direction recommended by two distinguished groups:

—1949 Hoover Commission.

—the 1963 Presidential Advisory Commission on Narcotic and Drug Abuse.

This Administration and this Congress have the will and the determination to stop the illicit traffic in drugs.

But we need more than the will and the determination. We need a modern and efficient instrument of Government to transform our plans into action. That is what this Reorganization Plan calls for.

The Plan has been prepared in accordance with chapter 9 of title 5 of the United States Code.

I have found, after investigation, that each reorganization included in the plan is necessary to accomplish one or more of the purposes set forth in section 901(a) of title 5 of the United States Code.

I have also found that, by reason of these reorganizations, it is necessary to include in the accompanying plan provisions for the appointment and compensation of the five new positions as specified in section 3 of the plan. The rates of compensation fixed for these new positions are those which I have found to prevail in respect of comparable positions in the Executive Branch of the Government.

Should the reorganization I propose take effect, they will make possible more effective and efficient administration of Federal law enforcement functions. It is not practicable at this time, however, to itemize the reduction in expenditures which may result.

I recommend that the Congress allow this urgently needed and important Reorganization Plan to become effective.

Lyndon B. Johnson.

The White House, *February 7, 1968*

## REORGANIZATION PLAN NO. 2 OF 1973

Effective July 1, 1973, 38 F.R. 15932, 87 Stat. 1091, as amended by Pub. L. 93-253, § 1, Mar. 16, 1974, 88 Stat. 50.

Prepared by the President and transmitted to the Senate and the House of Representatives in Congress assembled, March 28, 1973, pursuant to the provisions of Chapter 9 of Title 5 of the United States Code.

## LAW ENFORCEMENT IN ILLICIT DRUG ACTIVITIES

### Section 1. Transfers to the Attorney General

There are hereby transferred from the Secretary of the Treasury, the Department of the Treasury, and any other officer or any agency of the Department of the Treasury, to the Attorney General all intelligence, investigative, and law enforcement functions, vested by law in the Secretary, the Department, officers, or agencies which relate to the suppression of illicit traffic in narcotics, dangerous drugs, or marihuana, except that the Secretary shall retain, and continue to perform, those functions, to the extent that they relate to searches and seizures of illicit narcotics, dangerous drugs, or marihuana or to the apprehension or detention of persons in connection therewith, at regular inspection locations at ports of entry or anywhere along the land or water borders of the United States: *Provided*, that any illicit narcotics, dangerous drugs, marihuana, or related evidence seized, and any person apprehended or detained by the Secretary or any officer of the Department of the Treasury, pursuant to the authority retained in them by virtue of this section, shall be turned over forthwith to the jurisdiction of the Attorney General: *Provided further*, that nothing in this section shall be construed as limiting in any way any authority vested by law in the Secretary of the Treasury, the Department of the Treasury, or any other officer or any agency of that Department on the effective date of this Plan with respect to contraband other than illicit narcotics, dangerous drugs, and marihuana: and *Provided further*, that nothing in this section shall be construed as limiting in any way any authority the Attorney General, the Department of Justice, or any other officer or any agency of that Department may otherwise have to make investigations or engage in law enforcement activities, including activities relating to the suppression of illicit traffic in narcotics, dangerous drugs, and marihuana, at ports of entry or along the land and water borders of the United States.

### Sec. 2. Transfers to the Secretary of the Treasury

[Repealed. Pub. L. 93-253, § 1(a)(1), (b), Mar. 16, 1974, 88 Stat. 50, eff. July 1, 1973. Section had provided for transfer to Secretary of Treasury of functions vested in Attorney General, Department of Justice, or any other officer of such Department respecting inspection at ports of entry of persons, and documents of persons, entering or leaving the United States.]

### Sec. 3. Abolition

The Bureau of Narcotics and Dangerous Drugs, including the Office of Director thereof, is hereby abolished, and section 3(a) of Reorganization Plan No. 1 of 1968 is hereby repealed. The Attorney General shall make such provision as he may deem necessary with respect to terminating those affairs of the Bureau of Narcotics and Dangerous Drugs not otherwise provided for in this Reorganization Plan.

### Sec. 4. Drug Enforcement Administration

There is established in the Department of Justice an agency which shall be known as the Drug Enforcement Administration, hereinafter referred to as "the Administration."

### Sec. 5. Officers of the Administration

(a) There shall be at the head of the Administration the Administrator of Drug Enforcement, hereinafter referred to as "the Administrator." The Administrator shall be appointed by the President by and with the advice and consent of the Senate, and shall receive compensation at the rate now or hereafter prescribed by law for positions of level III of the Executive Schedule Pay Rates (5 U.S.C. 5314). He shall perform such functions as the Attorney General shall from time to time direct.

(b) There shall be in the Administration a Deputy Administrator of the Drug Enforcement Administration, hereinafter referred to as "the Deputy Administrator," who shall be appointed by the President by and with the advice and consent of the Senate, shall perform such functions as the Attorney General may from time to time direct, and shall receive compensation at the rate now or hereafter prescribed by law for positions of level V of the Executive Schedule Pay Rates (5 U.S.C. 5316).

(c) The Deputy Administrator or such other official of the Department of Justice as the Attorney General shall from time to time designate shall act as Administrator during the absence or disability of the Administrator or in the event of a vacancy in the office of Administrator.

### Sec. 6. Performance of Transferred Functions

The Attorney General may from time to time make such provisions as he shall deem appropriate authorizing the performance of any of the functions transferred to him by the provisions of this Reorganization Plan by any officer, employee, or agency of the Department of Justice.

[Section, formerly subsec. (a), so designated and former subsec. (b) providing for performance of functions transferred to Secretary of Treasury by any officer, employee, or agency of Treasury Department, repealed by Pub. L. 93-253, § 1(a)(2), (b), Mar. 16, 1974, 88 Stat. 50, eff. July 1, 1973.]

### Sec. 7. Coordination

The Attorney General, acting through the Administrator and such other officials of the Department of Justice as he may designate, shall provide for the coordination of all drug law enforcement functions vested in the Attorney General so as to assure maximum cooperation between and among the Administration, the Federal Bureau of Investigation, and other units of the Department involved in the performance of these and related functions.

### Sec. 8. Incidental Transfers

(a) So much of the personnel, property, records, and unexpended balances of appropriations, allocations, and other funds employed, used, held, available or to be made available in connection with the functions transferred to the Attorney General and to the Secretary of the Treasury by this Reorganization Plan as the Director of the Office of Management and Budget shall determine shall be transferred to the Department of Justice and to the Department of the Treasury, respectively, at such time or times as the Director shall direct.

(b) Such further measures and dispositions as the Director of the Office of Management and Budget shall deem to be necessary in order to effectuate transfers referred to in subsection (a) of this section shall be carried out in such manner as he shall direct and by such Federal agencies as he shall designate.

### Sec. 9. Interim Officers

(a) The President may authorize any person who, immediately prior to the effective date of this Reorganization Plan, held a position in the Executive Branch of the Government to act as Administrator until the office of Administrator is for the first time filled pursuant to the provisions of this Reorganization Plan or by recess appointment as the case may be.

(b) The President may similarly authorize any such person to act as Deputy Administrator.

(c) The President may authorize any person who serves in an acting capacity under the foregoing provisions of this section to receive the compensation attached to the office in respect to which he so serves. Such compensation, if authorized, shall be in lieu of, but not in addition to, other compensation from the United States to which such person may be entitled.

### Sec. 10. Effective date

The provisions of this Reorganization Plan shall take effect as provided by section 906(a) of title 5 of the United States Code or on July 1, 1973, whichever is later.

### Message of the President

To the Congress of the United States:

Drug abuse is one of the most vicious and corrosive forces attacking the foundations of American society today. It is a major cause of crime and a merciless destroyer of human lives. We must fight it with all of the resources at our command.

This Administration has declared all-out, global war on the drug menace. As I reported to the Congress earlier this month in my State of the Union message, there is evidence of significant progress on a number of fronts in that war.

Both the rate of new addiction to heroin and the number of narcotic-related deaths showed an encouraging downturn last year. More drug addicts and abusers are in treatment and rehabilitation programs than ever before.

Progress in pinching off the supply of illicit drugs was evident in last year's stepped-up volume of drug seizures worldwide—which more than doubled in 1972 over the 1971 level.

Arrests of traffickers have risen by more than one-third since 1971. Prompt Congressional action on my proposal for mandatory minimum sentences for pushers of hard drugs will help ensure that convictions stemming from such arrests lead to actual imprisonment of the guilty.

Notwithstanding these gains, much more must be done. The resilience of the international drug trade remains grimly impressive—current estimates suggest that we still intercept only a small fraction of all the heroin and cocaine entering this country. Local police still find that more than one of every three suspects arrested for street crimes is a narcotic abuser or addict. And the total number of Americans addicted to narcotics, suffering terribly themselves and inflicting their suffering in countless others, still stands in the hundreds of thousands.

#### A UNIFIED COMMAND FOR DRUG ENFORCEMENT

Seeking ways to intensify our counter-offensive against this menace, I am asking the Congress today to join with this Administration in strengthening and streamlining the Federal drug law enforcement effort.

Funding for this effort has increased sevenfold during the past five years, from $36 million in fiscal year 1969 to $257 million in fiscal year 1974—more money is not the most pressing enforcement need at present. Nor is there a primary need for more manpower working on the problem, over 2100 new agents having already been added to the Federal drug enforcement agencies under this Administration, an increase of more than 250 percent over the 1969 level.

The enforcement work could benefit significantly, however, from consolidation of our anti-drug forces under a single unified command. Right now the Federal Government is fighting the war on drug abuse under a distinct handicap, for its efforts are those of a loosely confederated alliance facing a resourceful, elusive, worldwide enemy. Admiral Mahan, the master naval strategist, described this handicap precisely when he wrote that "Granting the same aggregate of force, it is never as great in two hands as in one, because it is not perfectly concentrated."

More specifically, the drug law enforcement activities of the United States now are not merely in two hands but in half a dozen. Within the Department of Justice, with no overall direction below the level of the Attorney General, these fragmented forces include the Bureau of Narcotics and Dangerous Drugs, the Office for Drug Abuse Law Enforcement, the Office of National Narcotics Intelligence, and certain activities of the Law Enforcement Assistance Administration. The Treasury Department is also heavily engaged in enforcement work through the Bureau of Customs.

This aggregation of Federal activities has grown up rapidly over the past few years in response to the urgent need for stronger anti-drug measures. It has enabled us to make a very encouraging beginning in the accelerated drug enforcement drive of this Administration.

But it also has serious operational and organizational shortcomings. Certainly the cold-blooded underworld networks that funnel narcotics from suppliers all over the world into the veins of American drug victims are no respecters of the bureaucratic dividing lines that now complicate our anti-drug efforts. On the contrary, these modern-day slave traders can derive only advantage from the limitations of the existing organizational patchwork. Experience has now given us a good basis for correcting those limitations, and it is time to do so.

I therefore propose creation of a single, comprehensive Federal agency within the Department of Justice to lead the war against illicit drug traffic.

Reorganization Plan No. 2 of 1973, which I am transmitting to the Congress with this message, would establish such an agency, to be called the Drug Enforcement Administration. It would be headed by an Administrator reporting directly to the Attorney General.

The Drug Enforcement Administration would carry out the following anti-drug functions, and would absorb the associated manpower and budgets:

—All functions of the Bureau of Narcotics and Dangerous Drugs (which would be abolished as a separate entity by the reorganization plan);
—Those functions of the Bureau of Customs pertaining to drug investigations and intelligence (to be transferred from the Treasury Department to the Attorney General by the reorganization plan).
—All functions of the Office of Drug Abuse Law Enforcement; and
—All functions of the Office of National Narcotics Intelligence.

Merger of the latter two organizations into the new agency would be effected by an executive order dissolving them and transferring their functions, to take effect upon approval of Reorganization Plan No. 2 by the Congress. Drug law enforcement research currently funded by the Law Enforcement Assistance Administration and other agencies would also be transferred to the new agency by executive action.

The major responsibility of the Drug Enforcement Administration would thus include:

—development of overall Federal drug law enforcement strategy, programs, planning, and evaluation;
—full investigation and preparation for prosecution of suspects for violations under all Federal drug trafficking laws;
—full investigation and preparation for prosecution of suspects connected with illicit drugs seized at U.S. ports-of-entry and international borders;
—conduct of all relations with drug law enforcement officials of foreign governments, under the policy guidance of the Cabinet Committee on International Narcotics Control;
—full coordination and cooperation with State and local law enforcement officials on joint drug enforcement efforts; and
—regulation of the legal manufacture of drugs and other controlled substances under Federal regulations.

The Attorney General, working closely with the Administrator of this new agency, would have authority to make needed program adjustments. He would take steps within the Department of Justice to ensure that high priority emphasis is placed on the prosecution and sentencing of drug traffickers following their apprehension by the enforcement organization. He would also have the authority and responsibility for securing the fullest possible cooperation-particularly with respect to collection of drug intelligence—from all Federal departments and agencies which can contribute to the anti-drug work, including the Internal Revenue Service and the Federal Bureau of Investigation.

My proposals would make possible a more effective antidrug role for the FBI, especially in dealing with the relationship between drug trafficking and organized crime. I intend to see that the resources of the FBI are fully committed to assist in supporting the new Drug Enforcement Administration.

The consolidation effected under Reorganization Plan No. 2 would reinforce the basic law enforcement and criminal justice mission of the Department of Justice. With worldwide drug law enforcement responsibilities no longer divided among several organizations in two different Cabinet departments, more complete and cumulative drug law enforcement intelligence could be compiled. Patterns of international and domestic illicit drug production, distribution, and sale could be more directly compared and interpreted. Case-by-case drug law enforcement activities could be more comprehensively linked, cross-referenced, and coordinated into a single, organic enforcement operation. In short, drug law enforcement officers would be able to spend more time going after the traffickers and less time coordinating with one another.

Such progress could be especially helpful on the international front. Narcotics control action plans, developed under the leadership of the Cabinet Committee on International Narcotics Control, are now being carried out by U.S. officials in cooperation with host governments in 59 countries around the world. This wide-ranging effort to cut off drug supplies before they ever reach U.S. borders or streets is just now beginning to bear fruit. We can enhance its effectiveness, with little disruption of ongoing enforcement activities, by merging both the highly effective narcotics force of overseas Customs agents and the rapidly developing international activities of the Bureau of Narcotics and Dangerous Drugs into the Drug Enforcement Administration. The new agency would work closely with the Cabinet Committee under the active leadership of the U.S. Ambassador in each country where anti-drug programs are underway.

Two years ago, when I established the Special Action Office for Drug Abuse Prevention within the Executive Office of the President, we gained an organization with the necessary resources, breadth, and leadership capacity to begin dealing decisively with the "demand" side of the drug abuse problem—treatment and rehabilitation for those who have been drug victims, and preventive programs for potential drug abusers. This year, by permitting my reorganization proposals to take effect, the Congress can help provide a similar capability on the "supply" side. The proposed Drug Enforcement Administration, working as a team with the Special Action Office, would arm Americans with a potent one-two punch to help us fight back against the deadly menace of drug abuse. I ask full Congressional cooperation in its establishment.

### IMPROVING PORT-OF-ENTRY INSPECTIONS

No heroin or cocaine is produced within the United States; domestic availability of these substances results solely from their illegal importation. The careful and complete inspection of all persons and goods coming into the United States is therefore an integral part of effective Federal drug law enforcement.

At the present time, however, Federal responsibility for conducting port-of-entry inspections is awkwardly divided among several Cabinet departments. The principal agencies involved are the Treasury Department's Bureau of Customs, which inspects goods, and the Justice Department's Immigration and Naturalization Service, which inspects persons and their papers. The two utilize separate inspection procedures, hold differing views of inspection priorities, and employ dissimilar personnel management practices.

To reduce the possibility that illicit drugs will escape detection at ports-of-entry because of divided responsibility, and to enhance the effectiveness of the Drug Enforcement Administration, the reorganization plan which I am proposing today would transfer to the Secretary of the Treasury all functions currently vested in Justice Department officials to inspect persons, or the documents of persons.

When the plan takes effect, it is my intention to direct the Secretary of the Treasury to use the resources so transferred—including some 1,000 employees of the Immigration and Naturalization Service—to augment the staff and budget of the Bureau of Customs. The Bureau's primary responsibilities would then include:

—inspection of all persons and goods entering the United States;
—valuation of goods being imported, and assessment of appropriate tariff duties;
—interception of contraband being smuggled into the United States;
—enforcement of U.S. laws governing the international movement of goods, except the investigation of contraband drugs and narcotics; and
—turning over the investigation responsibility for all drug law enforcement cases to the Department of Justice.

The reorganization would thus group most port-of-entry inspection functions in a single Cabinet department. It would reduce the need for much day-to-day interdepartmental coordination, allow more efficient staffing at some field locations, and remove the basis for damaging interagency rivalries. It would also give the Secretary of the Treasury the authority and flexibility to meet changing requirements in inspecting the international flow of people and goods. An important by-product of the change would be more convenient service for travellers entering and leaving the country.

For these reasons, I am convinced that inspection activities at U.S. ports-of-entry can more effectively support our drug law enforcement efforts if concentrated in a single agency. The processing of persons at ports-of-entry is too closely interrelated with the inspection of goods to remain organizationally separated from it any longer. Both types of inspections have numerous objectives besides drug law enforcement, so it is logical to vest them in the Treasury Department, which has long had the principal responsibility for port-of-entry inspection of goods, including goods being transported in connection with persons. As long as the inspections are conducted with full awareness of related drug concerns it is neither necessary nor desirable that they be made a responsibility of the primary drug enforcement organization.

### DECLARATIONS

After investigation, I have found that each action included in Reorganization Plan No. 2 of 1973 is necessary to accomplish one or more of the purposes set forth in Section 901(a) of Title 5 of the United States Code. In particular, the plan is responsive of the intention of the Congress as expressed in Section 901(a)(1): "to promote better execution of the laws, more effective management of the executive branch and of its agencies and functions, and expeditious administration of the public business;" Section 901(a)(3): "to increase the efficiency of the operations of the Government to the fullest extent practicable;" Section 901(a)(5) "to reduce the number of agencies by consolidating those having similar functions under a single head, and to abolish such agencies or functions as may not be necessary for the efficient conduct of the Government;" and Section 901(a)(6): "to eliminate overlapping and duplication of effort."

As required by law, the plan has one logically consistent subject matter: consolidation of Federal drug law enforcement activities in a manner designed to increase their effectiveness.

The plan would establish in the Department of Justice a new Administration designated as the Drug Enforcement Administration. The reorganizations provided for in the plan make necessary the appointment and compensation of new officers as specified in Section 5 of the plan. The rates of compensation fixed for these officers would be comparable to those fixed for officers in the executive branch who have similar responsibilities.

While it is not practicable to specify all of the expenditure reductions and other economies which may result from the actions proposed, some savings may be anticipated in administrative costs now associated with the functions being transferred and consolidated.

The proposed reorganization is a necessary step in upgrading the effectiveness of our Nation's drug law enforcement effort. Both of the proposed changes would build on the strengths of established agencies, yielding maximum gains in the battle against drug abuse with minimum loss of time and momentum in the transition.

I am confident that this reorganization plan would significantly increase the overall efficiency and effectiveness of the Federal Government. I urge the Congress to allow it to become effective.

RICHARD NIXON.

THE WHITE HOUSE, March 28, 1973

### EXECUTIVE ORDER NO. 11310

Ex. Ord. No. 11310, Oct. 11, 1966, 31 F.R. 13199, formerly set out as a note under this section, which related to the emergency preparedness functions of the Attorney General, was revoked by Ex. Ord. No. 11490, Oct. 28, 1969, 34 F.R. 17567, set out as a note under section 2292 of Title 50, App., War and National Defense.

### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 20 section 1082.

## § 510. Delegation of authority

The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General.

(Added Pub. L. 89-554, § 4(c), Sept. 6, 1966, 80 Stat. 612.)

### HISTORICAL AND REVISION NOTES

| *Derivation* | *U.S. Code* | *Revised Statutes and Statutes at Large* |
|---|---|---|
| .................. | [Uncodified] | 1950 Reorg. Plan No. 2, § 2, eff. May 24, 1950, 64 Stat. 1261. |

The words "including any function transferred to the Attorney General by the provisions of this reorganization plan" are omitted as executed and unnecessary as the words "any function of the Attorney General" include the functions transferred to the Attorney General by 1950 Reorg. Plan. No. 2.

### PRIOR PROVISIONS

A prior section 510, act June 25, 1948, ch. 646, 62 Stat. 910, related to clerical assistants and messengers for United States attorneys, was repealed by Pub. L. 89-554, § 8(a), Sept. 6, 1966, 80 Stat. 663, and is now covered by section 550 of this title.

## § 511. Attorney General to advise the President

The Attorney General shall give his advice and opinion on questions of law when required by the President.

(Added Pub. L. 89-554, § 4(c), Sept. 6, 1966, 80 Stat. 612.)

### HISTORICAL AND REVISION NOTES

| *Derivation* | *U.S. Code* | *Revised Statutes and Statutes at Large* |
|---|---|---|
| .................. | 5 U.S.C. 303 | R.S. § 354.<br>Feb. 27, 1877, ch. 69, § 1 (8th full par. on p. 241), 19 Stat. 241. |

## § 512. Attorney General to advise heads of executive departments

The head of an executive department may require the opinion of the Attorney General on questions of law arising in the administration of his department.

(Added Pub. L. 89-554, § 4(c), Sept. 6, 1966, 80 Stat. 613.)

### HISTORICAL AND REVISION NOTES

| *Derivation* | *U.S. Code* | *Revised Statutes and Statutes at Large* |
|---|---|---|
| .................. | 5 U.S.C. 304 | R.S. § 356. |

## § 513. Attorney General to advise Secretaries of military departments

When a question of law arises in the administration of the Department of the Army, the Department of the Navy, or the Department of the Air Force, the cognizance of which is not given by statute to some other officer from whom the Secretary of the military department concerned may require advice, the Secretary of the military department shall send it to the Attorney General for disposition.

(Added Pub. L. 89-554, § 4(c), Sept. 6, 1966, 80 Stat. 613.)

### HISTORICAL AND REVISION NOTES

| *Derivation* | *U.S. Code* | *Revised Statutes and Statutes at Large* |
|---|---|---|
| ................. | 5 U.S.C. 307 | R.S. § 357. |

The Department of War was designated the Department of the Army by the Act of July 26, 1947, ch. 343, § 205, 61 Stat. 501. "Department of the Air Force" is added on authority of the Act of July 26, 1947, ch. 343, § 207(a), (f), 61 Stat. 502. The word "Secretary" is substituted for "head." The words "military department" are substituted for "department" to conform to section 102 of title 5, United States Code, and section 101 of title 10, United States Code. The words "for disposition" are substituted for "to be by him referred to the proper officer in his department, or otherwise disposed of as he may deem proper."

## § 514. Legal services on pending claims in departments and agencies

When the head of an executive department or agency is of the opinion that the interests of the United States require the service of counsel on the examination of any witness concerning any claim, or on the legal investigation of any claim, pending in the department or agency, he shall notify the Attorney General, giving all facts necessary to enable him to furnish proper professional service in attending the examination or making the investigation, and the Attorney General shall provide for the service.

(Added Pub. L. 89-554, § 4(c), Sept. 6, 1966, 80 Stat. 613.)

### HISTORICAL AND REVISION NOTES

| *Derivation* | *U.S. Code* | *Revised Statutes and Statutes at Large* |
|---|---|---|
| ................. | 5 U.S.C. 48 | R.S. § 187. |
| ................. | 5 U.S.C. 313 | R.S. § 364. |

Sections 187 and 364 of the Revised Statutes are combined into one section since they both deal with the same subject matter and are derived from the Act of Feb. 14, 1871, ch. 51, § 3, 16 Stat. 412.

The words "executive department" are substituted for "Department" because "Department", as used in R.S. §§ 187 and 364, meant "executive department". (See R.S. § 159.) The word "agency" is substituted for "bureau" as it has a more common current acceptance. The word "concerning" is substituted for "touching". Reference to application for a subpena is omitted as R.S. § 364 gives the department head the same authority to request aid from the Attorney General whether or not application has been made for a subpena.

Section 187 of the Revised Statutes was part of title IV of the Revised Statutes. The Act of July 26, 1947, ch. 343, § 201(d), as added Aug. 10, 1949, ch. 412, § 4, 63 Stat. 579 (former 5 U.S.C. 171-1), which provides "Except to the extent inconsistent with the provisions of this Act [National Security Act of 1947], the provisions of title IV of the Revised Statutes as now or hereafter amended shall be applicable to the Department of Defense" is omitted from this title but is not repealed.

Minor changes are made in phraseology to allow for the combining of the two sections.

## § 515. Authority for legal proceedings; commission, oath, and salary for special attorneys.

(a) The Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought.

(b) Each attorney specially retained under authority of the Department of Justice shall be commissioned as special assistant to the Attorney General or special attorney, and shall take the oath required by law. Foreign counsel employed in special cases are not required to take the oath. The Attorney General shall fix the annual salary of a special assistant or special attorney at not more than $12,000.

(Added Pub. L. 89-554, § 4(c), Sept. 6, 1966, 80 Stat. 613.)

### HISTORICAL AND REVISION NOTES

| *Derivation* | *U.S. Code* | *Revised Statutes and Statutes at Large* |
|---|---|---|
| (a) | 5 U.S.C. 310 | June 30, 1906, ch. 3935, 34 Stat. 816. |
| (b) | 5 U.S.C. 315 | R.S. § 366.<br>Apr. 17, 1930, ch. 174, 46 Stat. 170.<br>June 25, 1948, ch. 646, § 3, 62 Stat. 985. |
| ................. | [Uncodified] | Aug. 5, 1953, ch. 328, § 202 (1st and 2d provisos, as applicable to special assistants and special attorneys), 67 Stat. 375. |
| ................. | [Uncodified] | July 2, 1954, ch. 456, § 202 (as applicable to special assistants and special attorneys), 68 Stat. 421. |

In subsection (a), the word "or counselor" are omitted as redundant. The words "United States attorneys" are substituted for attorneys" on authority of the Act of June 25, 1948, ch. 646, § 1, 62 Stat. 909. The words "any provision of" are omitted as unnecessary.

## § 516. Conduct of litigation reserved to Department of Justice

Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.

(Added Pub. L. 89-554, § 4(c), Sept. 6, 1966, 80 Stat. 613.)

### HISTORICAL AND REVISION NOTES

| *Derivation* | *U.S. Code* | *Revised Statutes and Statutes at Large* |
|---|---|---|
| ................. | 5 U.S.C. 306 | R.S. § 361.<br>Sept. 3, 1954, ch. 1263, § 11, 68 Stat. 1229. |

The section is revised to express the effect of the law. As agency heads have long employed, with the approval of Congress, attorneys to advise them in the conduct of their official duties, the first 56 words of R.S. § 361 and of former section 306 of title 5 are omitted as obsolete.

The section concentrates the authority for the conduct of litigation in the Department of Justice. The words "Except as otherwise authorized by law," are added to provide for existing and future exceptions (e.g., section 1037 of title 10). The words "an agency" are added for clarity and to align this section with section 519 which is of similar import. The words "as such officer" are omitted as unnecessary since it is implied that the officer is a party in his official capacity as an officer.

So much as prohibits the employment of counsel, other than in the Department of Justice, to conduct litigation is omitted as covered by R.S. § 365, which is codified in section 3106 of title 5, United States Code.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 19 section 2350.

### § 517. Interests of United States in pending suits

The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.

(Added Pub. L. 89–554, § 4(c), Sept. 6, 1966, 80 Stat. 613.)

#### HISTORICAL AND REVISION NOTES

| *Derivation* | *U.S. Code* | *Revised Statutes and Statutes at Large* |
|---|---|---|
| ................. | 5 U.S.C. 316 | R.S. § 367. |

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 7 section 943; title 19 section 1920; title 20 sections 1082, 1132c–2; title 42 sections 294h, 3211.

### § 518. Conduct and argument of cases

(a) Except when the Attorney General in a particular case directs otherwise, the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court and suits in the Court of Claims in which the United States is interested.

(b) When the Attorney General considers it in the interests of the United States, he may personally conduct and argue any case in a court of the United States in which the United States is interested, or he may direct the Solicitor General or any officer of the Department of Justice to do so.

(Added Pub. L. 89–554, § 4(c), Sept. 6, 1966, 80 Stat. 613.)

#### HISTORICAL AND REVISION NOTES

| *Derivation* | *U.S. Code* | *Revised Statutes and Statutes at Large* |
|---|---|---|
| ................. | 5 U.S.C. 309 | R.S. § 359. |

The words "and writs of error" are omitted on authority of the Act of Jan. 31, 1928, ch. 14, § 1, 45 Stat. 54. The word "considers" is substituted for "deems".

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 7 section 2050a; title 29 sections 663, 1132.

### § 519. Supervision of litigation

Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys appointed under section 543 of this title in the discharge of their respective duties.

(Added Pub. L. 89–554, § 4(c), Sept. 6, 1966, 80 Stat. 614.)

#### HISTORICAL AND REVISION NOTES

| *Derivation* | *U.S. Code* | *Revised Statutes and Statutes at Large* |
|---|---|---|
| ................. | 28 U.S.C. 507(b). | [None]. |

The words "Except as otherwise authorized by law," are added to provide for existing and future exceptions (e.g., section 1037 of title 10).

The words "or officer" are added for clarity and to align this section with section 516 which is of similar import.

The words "special attorneys appointed under section 543" are substituted for "attorneys appointed under section 543" to reflect the revision of this title.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 7 section 943; title 19 section 1920.

### § 520. Transmission of petitions in Court of Claims; statement furnished by departments

(a) In suits against the United States in the Court of Claims founded on a contract, agreement, or transaction with an executive department or military department, or a bureau, officer, or agent thereof, or when the matter or thing on which the claim is based has been passed on and decided by an executive department, military department, bureau, or officer authorized to adjust it, the Attorney General shall send to the department, bureau, or officer a printed copy of the petition filed by the claimant, with a request that the department, bureau, or officer furnish to the Attorney General all facts, circumstances, and evidence concerning the claim in the possession or knowledge of the department, bureau, or officer.

(b) Within a reasonable time after receipt of the request from the Attorney General, the executive department, military department, bureau, or officer shall furnish the Attorney General with a written statement of all facts, information, and proofs. The statement shall contain a reference to or description of all official documents and papers, if any, as may furnish proof of facts referred to in it, or may be necessary and proper for the defense of the United States against the claim, mentioning the department, office, or place where the same is kept or may be secured. If the claim has been passed on and decided by the department, bureau, or officer, the statement shall briefly state the reasons and principles on which the decision was based. When the decision was founded on an Act of Congress it shall be cited specifically, and if any previous interpretation or construction has been given to the Act, section, or clause by the department, bureau, or officer, it shall be set forth briefly in the statement and a copy of the opinion filed, if any, attached to it. When a decision in the case has been based on a regulation of a department or when a regulation has, in the opinion of the department, bureau, or officer sending the statement, any bearing on the claim, it shall be distinctly quoted at length in the statement. When more than one case or class of cases is pending, the defense of which rests on the same facts, circumstances, and proofs, the department, bureau, or officer may certify and send one statement and it shall be held to apply to all cases as if made out, certified, and sent in each case respectively.

(Added Pub. L. 89-554, § 4(c), Sept. 6, 1966, 80 Stat. 614.)

HISTORICAL AND REVISION NOTES

| *Derivation* | *U.S. Code* | *Revised Statutes and Statutes at Large* |
|---|---|---|
| .................. | 5 U.S.C. 91 | R.S. § 188. |

The section is reorganized and restated for clarity.

In subsection (a), the word "concerning" is substituted for "touching".

In subsection (b), the words "without delay" are omitted as unnecessary in view of the requirement that the statement be furnished "Within a reasonable time". The word "briefly" is substituted for "succinctly". The words "in suit" are omitted as unnecessary.

The words "executive department" are substituted for "department" because "department" as used in R.S. § 188 meant "executive department". (See R.S. § 159.) The words "military department" are inserted to preserve the application of the source law. Before enactment of the National Security Act Amendments of 1949 (63 Stat. 578), the Department of the Army, the Department of the Navy, and the Department of the Air Force were Executive departments. The National Security Act Amendments of 1949 established the Department of Defense as an Executive Department including the Department of the Army, the Department of the Navy, and the Department of the Air Force as military departments, not as Executive departments. However, the source law for this section, which was in effect in 1949, remained applicable to the Secretaries of the military departments by virtue of section 12(g) of the National Security Act Amendments of 1949 (63 Stat. 591), which is set out in the reviser's note for section 301 of title 5, United States Code.

### § 521. Publication and distribution of opinions

The Attorney General, from time to time—

(1) shall cause to be edited, and printed in the Government Printing Office, such of his opinions as he considers valuable for preservation in volumes; and

(2) may prescribe the manner for the distribution of the volumes.

Each volume shall contain headnotes, an index, and such footnotes as the Attorney General may approve.

(Added Pub. L. 89-554, § 4(c), Sept. 6, 1966, 80 Stat. 614.)

HISTORICAL AND REVISION NOTES

| *Derivation* | *U.S. Code* | *Revised Statutes and Statutes at Large* |
|---|---|---|
| .................. | 5 U.S.C. 305 (1st sentence, as applicable to the Attorney General; 2d and 3d sentences). | R.S. § 383 (1st sentence, as applicable to the Attorney General; 2d and 3d sentences). |

Section 188 of the Revised Statutes was part of title IV of the Revised Statutes. The Act of July 26, 1947, ch. 343, § 201(d), as added Aug. 10, 1949, ch. 412, § 4, 63 Stat. 579 (former 5 U.S.C. 171-1), which provides "Except to the extent inconsistent with the provisions of this Act [National Security Act of 1947], the provisions of title IV of the Revised Statutes as now or hereafter amended shall be applicable to the Department of Defense" is omitted from this title but is not repealed.

The words "his opinions" are substituted for "the opinions of the law officers herein authorized to be given" as the opinions of the Attorney General are his and only his and the reference to other "law officers" is misleading. All functions of all other officers of the Department of Justice were transferred to the Attorney General by 1950 Reorg. Plan No. 2, § 1, eff. May 14, 1950, 64 Stat. 1261. The word "considers" is substituted for "may deem".

In the last sentence, the words "proper" and "complete and full" are omitted as unnecessary.

### § 522. Report of business and statistics

The Attorney General, by April 1 of each year, shall report to Congress on the business of the Department of Justice for the last preceding fiscal year, and on any other matters pertaining to the Department that he considers proper, including—

(1) a statement of the several appropriations which are placed under the control of the Department and the amount appropriated;

(2) the statistics of crime under the laws of the United States; and

(3) a statement of the number of causes involving the United States, civil and criminal, pending during the preceding year in each of the several courts of the United States.

(Added Pub. L. 89-554, § 4(c), Sept. 6, 1966, 80 Stat. 615, and amended Pub. L. 94-273, § 19, Apr. 21, 1976, 90 Stat. 379.)

HISTORICAL AND REVISION NOTES

| *Derivation* | *U.S. Code* | *Revised Statutes and Statutes at Large* |
|---|---|---|
| .................. | 5 U.S.C. 333 | R.S. § 384. |

The words "The Attorney General . . . shall report" are substituted for "It shall be the duty of the Attorney General to make . . . a report". The word "beginning" is substituted for "commencement". The words "pertaining to the Department that he considers proper" are substituted for "appertaining thereto that he may deem proper".

The words "and a detailed statement of the amounts used for defraying the expenses of the United States courts in each judicial district" are omitted as obsolete in view of the creation of the Administrative Office of the United States Courts by the Act of Aug. 7, 1939, ch. 501, § 1, 53 Stat. 1223 (Chapter 41 of this title).

In paragraph (3), the words "involving the United States" are inserted for clarity. The function of reporting on all cases pending in the United States courts is now vested in the Administrative Office of the United States Courts, see 28 U.S.C. 604.

AMENDMENTS

1976—Pub. L. 94-273 substituted "by April 1 of each year" for "at the beginning of each regular session of Congress".

### § 523. Requisitions

The Attorney General shall sign all requisitions for the advance or payment of moneys appropriated for the Department of Justice, out of the Treasury, subject to the same control as is exercised on like estimates or accounts by the General Accounting Office.

(Added Pub. L. 89-554, § 4(c), Sept. 6, 1966, 80 Stat. 615.)

#### HISTORICAL AND REVISION NOTES

| Derivation | U.S. Code | Revised Statutes and Statutes at Large |
|---|---|---|
| ................ | 5 U.S.C. 319 | R.S. § 369. |

The words "General Accounting Office" are substituted for "First Auditor or First Comptroller of the Treasury" on authority of the Act of June 10, 1921, ch. 18, § 304, 42 Stat. 24.

### § 524. Appropriations for administrative expenses; notarial fees; meals and lodging of bailiffs

Appropriations for the Department of Justice are available for payment of—

(1) notarial fees, including such additional stenographic services as are required in connection therewith in the taking of depositions, and compensation and expenses of witnesses and informants, all at the rates authorized or approved by the Attorney General or the Assistant Attorney General for Administration; and

(2) when ordered by the court, actual expenses of meals and lodging for marshals, deputy marshals, or criers when acting as bailiffs in attendance on juries.

(Added Pub. L. 89-554, § 4(c), Sept. 6, 1966, 80 Stat. 615.)

#### HISTORICAL AND REVISION NOTES

| Derivation | U.S. Code | Revised Statutes and Statutes at Large |
|---|---|---|
| ................ | 5 U.S.C. 341 | July 28, 1950, ch. 503, § 1, 64 Stat. 380. |

The words "now or hereafter" are omitted as unnecessary. The words "Assistant Attorney General for Administration" are substituted for "his administrative assistant" to make the statute more specific and to reflect the current title of the position, see § 307 of the Act of Aug. 14, 1964, Pub. L. 88-426, 78 Stat. 432.

### § 525. Procurement of law books, reference books, and periodicals; sale and exchange

In the procurement of law books, reference books, and periodicals, the Attorney General may exchange or sell similar items and apply the exchange allowances or proceeds of such sales in whole or in part payment therefor.

(Added Pub. L. 89-554, § 4(c), Sept. 6, 1966, 80 Stat. 615.)

#### HISTORICAL AND REVISION NOTES

| Derivation | U.S. Code | Revised Statutes and Statutes at Large |
|---|---|---|
| ................ | 5 U.S.C. 341e | July 28, 1950, ch. 503, § 3, 64 Stat. 380. |

The words "Attorney General" are substituted for "Department of Justice".

### § 526. Authority of Attorney General to investigate United States attorneys and marshals, clerks of court, and others

(a) The Attorney General may investigate the official acts, records, and accounts of—

(1) the United States attorneys and marshals; and

(2) at the request and on behalf of the Director of the Administrative Office of the United States Courts, the clerks of the United States courts and of the district courts of the Canal Zone and the Virgin Islands, probation officers, referees, trustees and receivers in bankruptcy, United States commissioners, and court reporters;

for which purpose all the official papers, records, dockets, and accounts of these officers, without exception, may be examined by agents of the Attorney General at any time.

(b) Appropriations for the examination of judicial officers are available for carrying out this section.

(Added Pub. L. 89-554, § 4(c), Sept. 6, 1966, 80 Stat. 615.)

#### HISTORICAL AND REVISION NOTES

| Derivation | U.S. Code | Revised Statutes and Statutes at Large |
|---|---|---|
| ................ | 5 U.S.C. 341b | July 28, 1950, ch. 503, § 4, 64 Stat. 380.<br>July 7, 1958, Pub. L. 85-508, § 12(q), 72 Stat. 349. |

In subsection (b), the words "now or hereafter" and "the provisions of" are omitted as unnecessary.

#### CHANGE OF NAME

Reference to United States commissioners deemed to be reference to United States Magistrates pursuant to Pub. L. 90-578, title IV, § 402(b)(2), Oct. 17, 1968, 82 Stat. 1108. See chapter 43 (§ 631 et seq.) of this title.

### § 527. Establishment of working capital fund

There is hereby authorized to be established a working capital fund for the Department of Justice, which shall be available, without fiscal year limitation, for expenses and equipment necessary for maintenance and operations of such administrative services as the Attorney General, with the approval of the Office of Management and Budget, determines may be performed more advantageously as central services. The capital of the fund shall consist of the amount of the fair and reasonable value of such inventories, equipment, and other assets and inventories on order pertaining to the services to be carried on by the fund as the Attorney General may transfer to the fund less related liabilities and unpaid obligations together with any appropriations made for the purpose of providing capital. The fund shall be reimbursed or credited with advance payments from applicable appropriations and funds of the Department of Justice, other Federal agencies, and other sources authorized by law for supplies, materials, and services at rates which will recover the expenses of operations including accrual of annual leave and depreciation of plant and equipment of the fund. The fund shall also be credited with other receipts from sale or exchange of property or in payment for loss or damage to property held by the fund. There shall be transferred into the Treasury as miscellaneous receipts, as of the close of each fiscal year, any net income after making provisions for prior year losses, if any.

(Added Pub. L. 93-613, § 1(1), Jan. 2, 1975, 88 Stat. 1975.)

## CHAPTER 33—FEDERAL BUREAU OF INVESTIGATION

Sec.
531. Federal Bureau of Investigation.
532. Director of Federal Bureau of Investigation.
533. Investigative and other officials; appointment.

Sec.
534. Acquisition, preservation, and exchange of identification records; appointment of officials.
535. Investigation of crimes involving Government officers and employees; limitations.
536. Positions in excepted service.
537. Expenses of unforeseen emergencies of a confidential nature. [1]

### AMENDMENTS

1966—Pub. L. 89-554, § 4(c), Sept. 6, 1966, 80 Stat. 616, substituted "Federal Bureau of Investigation" for "United States Marshals" in the heading of chapter 33, added items 531 to 537, and eliminated items 541 to 556.

### CROSS REFERENCES

Powers of Federal Bureau of Investigation, see section 3052 of Title 18, Crimes and Criminal Procedure.

## § 531. Federal Bureau of Investigation

The Federal Bureau of Investigation is in the Department of Justice.

(Added Pub. L. 89-554, § 4(c), Sept. 6, 1966, 80 Stat. 616.)

### HISTORICAL AND REVISION NOTES

The section is supplied for convenience and clarification. The Bureau of Investigation in the Department of Justice, the earliest predecessor agency of the Federal Bureau of Investigation, was created administratively in 1908. It appears that funds used for the Bureau of Investigation were first obtained through the Department of Justice Appropriation Act of May 22, 1908, ch. 186, § 1 (par. beginning "From the appropriations for the prosecution of crimes"), 35 Stat. 236, although that statutory provision makes no express mention of the Bureau or of the investigative function.

Section 3 of Executive Order No. 6166 of June 10, 1933, specifically recognized the Bureau of Investigation in the Department of Justice and provided that all that Bureau's functions together with the investigative functions of the Bureau of Prohibition were "transferred to and consolidated in a Division of Investigation in the Department of Justice, at the head of which shall be a Director of Investigation."

The Division of Investigation was first designated as the "Federal Bureau of Investigation" by the Act of Mar. 22, 1935, ch. 39, title II, 49 Stat. 77, and has been so designated in statutes since that date.

## § 532. Director of the Federal Bureau of Investigation

The Attorney General may appoint a Director of the Federal Bureau of Investigation. The Director of the Federal Bureau of Investigation is the head of the Federal Bureau of Investigation.

(Added Pub. L. 89-554, § 4(c), Sept. 6, 1966, 80 Stat. 616.)

### HISTORICAL AND REVISION NOTES

The section is supplied for convenience and clarification and is based on section 3 of Executive Order No. 6166 of June 10, 1933, which provided for the transfer of the functions of the Bureau of Investigation together with the investigative functions of the Bureau of Prohibition to a "Division of Investigation in the Department of Justice, at the head of which shall be a Director of Investigation". The Division of Investigation was first designated as the "Federal Bureau of Investigation" by the Act of Mar. 22, 1935, ch. 39, title II, 49 Stat. 77, and has been so designated in statutes since that date. The title of "Director of the Federal Bureau of Investigation" was recognized by statute in the Act of June 5, 1936, ch. 529, 49 Stat. 1484, and has been used in statutes since that date.

### CONFIRMATION AND COMPENSATION OF DIRECTOR; TERM OF SERVICE

Pub. L. 90-351, title VI, § 1101, June 19, 1968, 82 Stat. 236, as amended by Pub. L. 94-503, title II, § 203, Oct. 15, 1976, 90 Stat. 2427, provided that:

"(a) Effective as of the day following the date on which the present incumbent in the office of Director ceases to serve as such, the Director of the Federal Bureau of Investigation shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive compensation at the rate prescribed for level II of the Federal Executive Salary Schedule [section 5313 of Title 5, Government Officers and Employees].

"(b) Effective with respect to any individual appointment by the President, by and with the advice and consent of the Senate, after June 1, 1973, the term of service of the Director of the Federal Bureau of Investigation shall be ten years. A Director may not serve more than one ten-year term. The provisions of subsections (a) through (c) of section 8335 of title 5, United States Code, shall apply to any individual appointed under this section."

## § 533. Investigative and other officials; appointment

The Attorney General may appoint officials—

(1) to detect and prosecute crimes against the United States;

(2) to assist in the protection of the person of the President; and

(3) to conduct such other investigations regarding official matters under the control of the Department of Justice and the Department of State as may be directed by the Attorney General.

This section does not limit the authority of departments and agencies to investigate crimes against the United States when investigative jurisdiction has been assigned by law to such departments and agencies.

(Added Pub. L. 89-554, § 4(c), Sept. 6, 1966, 80 Stat. 616.)

### HISTORICAL AND REVISION NOTES

| *Derivation* | *U.S. Code* | *Revised Statutes and Statutes at Large* |
|---|---|---|
| .................. | 5 U.S.C. 299, 300 (less applicability to acquisition etc. of identification and other records). | Aug. 31, 1964, Pub. L. 88-527, § 201 (1st 105 words of 1st par. under "Federal Bureau of Investigation", less applicability to acquisition etc. of identification and other records), 78 Stat. 717. |

The section is from the Department of Justice Appropriation Act, 1965. Similar provisions were contained in each appropriation Act for the Department running back to 1921, which Acts are identified in a note under sections 299 and 300 of title 5, U.S.C. 1964 ed.

The section is reorganized for clarity. The authority to appoint officials for the cited purposes is implied. The word "may" is substituted for "is authorized to". The words "who shall be vested with the authority necessary for the execution of such duties" are omitted as unnecessary as the appointment of the officials for the purposes indicated carries with it the authority necessary to perform their duties.

In paragraph (2), the words "to assist in" are added for clarity and in recognition of the provisions of 18 U.S.C. 3056 which vest in the United States Secret Service the responsibility for the protection of the person of the President. As so revised, this paragraph will assure that the Secret Service will continue to have primary responsibility for the protection of the President but at the same time will permit the Federal Bureau of Investigation to render assistance in such protection.

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[1] So in original. Does not conform to section analysis.

The last sentence is added because in various areas the authority to investigate certain criminal offenses has been specifically assigned by statute to departments and agencies other than the Federal Bureau of Investigation. For example, the enforcement of the internal revenue laws is specifically a function of the Secretary of the Treasury and he is authorized to employ such number of persons as he deems proper for the enforcement of such laws (26 U.S.C. 7801, 7803). The Secretary of the Treasury is specifically authorized to direct the collection of duties on imports and to appoint such employees for that purpose as he deems necessary (19 U.S.C. 3, 6). The U.S. Coast Guard is specifically authorized to enforce or assist in enforcing the Federal laws upon the high seas and waters subject to the jurisdiction of the United States (14 U.S.C. 2). Subject to the direction of the Secretary of the Treasury, the Secret Service is specifically authorized to detect and arrest persons committing offenses against the laws of the United States relating to coins and obligations and securities of the United States and foreign governments (18 U.S.C. 3056).

### § 534. Acquisition, preservation, and exchange of identification records; appointment of officials

(a) The Attorney General shall—

(1) acquire, collect, classify, and preserve identification, criminal identification, crime, and other records; and

(2) exchange these records with, and for the official use of, authorized officials of the Federal Government, the States, cities, and penal and other institutions.

(b) The exchange of records authorized by subsection (a)(2) of this section is subject to cancellation if dissemination is made outside the receiving departments or related agencies.

(c) The Attorney General may appoint officials to perform the functions authorized by this section.

(Added Pub. L. 89-554, § 4(c), Sept. 6, 1966, 80 Stat. 616.)

#### Historical and Revision Notes

| *Derivation* | *U.S. Code* | *Revised Statutes and Statutes at Large* |
|---|---|---|
| ................. | 5 U.S.C. 300 (as applicable to acquisition etc. of identification and other records). | Aug. 31, 1964, Pub. L. 88-527, § 201 (1st 105 words of 1st par. under "Federal Bureau of Investigation", as applicable to acquisition etc. of identification and other records), 78 Stat. 717. |
| ................. | 5 U.S.C. 340 | June 11, 1930, ch. 455, 46 Stat. 554. |

The sections are combined and reorganized for clarity. Former section 300 of title 5 was from the Department of Justice Appropriation Act, 1965. Similar provisions were contained in each appropriation Act for the Department of Justice running back to 1921, which Acts are identified in a note under former section 300 of title 5, U.S.C. 1964 ed.

In subsection (a), the word "shall" is substituted for "has the duty" as a more direct expression. The function of acquiring, collecting, classifying, etc., referred to in former section 340 of title 5 was transferred to the Attorney General by 1950 Reorg., Plan No. 2, § 1, eff. May 24, 1950, 64 Stat. 1261, which is codified in section 509 of this title. Accordingly, the first 29 words and last 30 words of former section 340 are omitted as unnecessary.

In subsection (c), the authority to appoint officials for the cited purposes is implied.

#### Funds for Exchange of Identification Records

Pub. L. 92-544, title II, § 201, Oct. 25, 1972, 86 Stat. 1115, provided that: "The funds provided for Salaries and Expenses, Federal Bureau of Investigation, may be used hereafter, in addition to those uses authorized thereunder, for the exchange of identification records with officials or federally chartered or insured banking institutions to promote or maintain the security of those institutions, and, if authorized by State statute and approved by the Attorney General, to officials of State and local governments for purposes of employment and licensing, any such exchange to be made only for the official use of any such official and subject to the same restriction with respect to dissemination as that provided for under the aforementioned appropriation."

### § 535. Investigation of crimes involving Government officers and employees; limitations

(a) The Attorney General and the Federal Bureau of Investigation may investigate any violation of title 18 involving Government officers and employees—

(1) notwithstanding any other provision of law; and

(2) without limiting the authority to investigate any matter which is conferred on them or on a department or agency of the Government.

(b) Any information, allegation, or complaint received in a department or agency of the executive branch of the Government relating to violations of title 18 involving Government officers and employees shall be expeditiously reported to the Attorney General by the head of the department or agency, unless—

(1) the responsibility to perform an investigation with respect thereto is specifically assigned otherwise by another provision of law; or

(2) as to any department or agency of the Government, the Attorney General directs otherwise with respect to a specified class of information, allegation, or complaint.

(c) This section does not limit—

(1) the authority of the military departments to investigate persons or offenses over which the armed forces have jurisdiction under the Uniform Code of Military Justice (chapter 47 of title 10); or

(2) the primary authority of the Postmaster General to investigate postal offenses.

(Added Pub. L. 89-554, § 4(c), Sept. 6, 1966, 80 Stat. 616.)

#### Historical and Revision Notes

| *Derivation* | *U.S. Code* | *Revised Statutes and Statutes at Large* |
|---|---|---|
| ................. | 5 U.S.C. 311a | Aug. 31, 1954, ch. 1143, § 1, 68 Stat. 998. |

The section is reorganized for clarity and continuity.

In subsection (a), the word "may" is substituted for "shall have authority". The word "is" is substituted for "may have been or may hereafter be".

In subsection (c), the words "This section does not limit" are substituted for "that the provisions of this section shall not limit, in any way". The words "(chapter 47 of title 10)" are added after "Uniform Code of Military Justice" to reflect the codification of that Code in title 10, United States Code.

### § 536. Positions in excepted service

All positions in the Federal Bureau of Investigation are excepted from the competitive service, and the incumbents of such positions occupy positions in the excepted service.

(Added Pub. L. 89-554, § 4(c), Sept. 6, 1966, 80 Stat. 617.)

#### HISTORICAL AND REVISION NOTES

| Derivation | U.S. Code | Revised Statutes and Statutes at Large |
|---|---|---|
| ................. | 5 U.S.C. 300d | Aug. 31, 1964, Pub. L. 88-527, § 201 (2nd par. under "Federal Bureau of Investigation"), 78 Stat. 718. |
| ................. | 5 U.S.C. 341c (last sentence). | July 28, 1950, ch. 503, § 5 (last sentence), 4 Stat. 380. |

The section is revised and restated to eliminate ambiguity and give true effect to the prohibition against the use of appropriations to the Federal Bureau of Investigation. The language used to define the excepted status of the positions, officers, and employees is based on revised sections 2102 and 2103 of title 5, United States Code.

The provisions of this section were made permanent by the Act of July 28, 1950, 64 Stat. 380. Identical provisions appearing in former section 300d of title 5 are derived from the Departmen of Justice Appropriation Act, 1965, and earlier appropriation Acts for the Department of Justice running back to 1942, which Acts are identified in a note under former section 300d of title 5, U.S.C. 1964 ed.

### § 537. Expenses of unforeseen emergencies of a confidential character

Appropriations for the Federal Bureau of Investigation are available for expenses of unforeseen emergencies of a confidential character, when so specified in the appropriation concerned, to be spent under the direction of the Attorney General. The Attorney General shall certify the amount spent that he considers advisable not to specify, and his certification is a sufficient voucher for the amount therein expressed to have been spent.

(Added Pub. L. 89-554, § 4(c), Sept. 6, 1966, 80 Stat. 617.)

#### HISTORICAL AND REVISION NOTES

| Derivation | U.S. Code | Revised Statutes and Statutes at Large |
|---|---|---|
| ................. | 5 U.S.C. 341c (less last sentence). | July 28, 1950, ch. 503, § 5 (less last sentence), 64 Stat. 380. |

The section is revised and reorganized for clarity. The words "now or hereafter provided" are omitted as unnecessary. The words "for expenses of membership in the International Commission of Criminal Police and" are omitted as obsolete. The Act of Aug. 27, 1958, Pub. L. 85-768, 72 Stat. 921 (22 U.S.C. 263a) authorizes the Attorney General to accept and maintain, on behalf of the United States, membership in the International Criminal Police Organization, and to designate any departments and agencies which may participate in the United States representation with that organization; and authorizes each participating department and agency to pay its pro rata share, as determined by the Attorney General, of the expenses of such membership. The word "spent" is substituted for "expended". The words "certify the amount spent that he considers" are substituted for "make a certificate of the amount of any such expenditure as he may think it". The words "his certification is a sufficient voucher" are substituted for "and every such certificate shall be deemed a sufficient voucher".

## CHAPTER 35—UNITED STATES ATTORNEYS

Sec.
541. United States attorneys.
542. Assistant United States attorneys.
543. Special attorneys.
544. Oath of office.
545. Residence.
546. Vacancies.
547. Duties.
548. Salaries.
549. Expenses.
550. Clerical assistants and messengers.

#### AMENDMENTS

1966—Pub. L. 89-554, § 4(c), Sept. 6, 1966, 80 Stat. 617, added chapter 35 and items 541 to 550.

#### CROSS REFERENCES

United States attorney for Guam, this chapter as applicable, see section 1424b of Title 48, Territories and Insular Possessions.

#### CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in title 48 sections 1424b, 1617.

### § 541. United States attorneys

(a) The President shall appoint, by and with the advice and consent of the Senate, a United States attorney for each judicial district.

(b) Each United States attorney shall be appointed for a term of four years. On the expiration of his term, a United States attorney shall continue to perform the duties of his office until his successor is appointed and qualifies.

(c) Each United States attorney is subject to removal by the President.

(Added Pub. L. 89-554, § 4(c), Sept. 6, 1966, 80 Stat. 617.)

#### HISTORICAL AND REVISION NOTES

##### 1966 ACT

| Derivation | U.S. Code | Revised Statutes and Statutes at Large |
|---|---|---|
| (a) | 28 U.S.C. 501 | [None]. |
| (b) | 28 U.S.C. 504(a). | [None]. |
| (c) | 28 U.S.C. 504(b) (less 2d sentence). | [None]. |

In subsection (c), the word "is" is substituted for "shall be".

##### 1948 ACT

*Prior section 501.*—Based on title 28, U.S.C., 1940 ed., § 481, sections 643 and 863 of title 48, U.S.C., 1940 ed., Territories and Insular Possessions, and section 11-1001, District of Columbia Code, 1940 ed. (R.S., § 767; June 26, 1876, ch. 147, §§ 1, 4, 19 Stat. 61, 62; Feb. 24, 1879, ch. 97, § 8, 20 Stat. 320; Mar. 3, 1881, ch. 144, § 7, 21 Stat. 507; Apr. 25, 1882, ch. 87, §§ 1, 3, 22 Stat. 47; July 20, 1882, ch. 312, § 3, 22 Stat. 172; Aug. 5, 1886, ch. 928, § 7, 24 Stat. 309; Feb. 22, 1889, ch. 180, § 21, 25 Stat. 682; July 3, 1890, ch. 656, § 16, 26 Stat. 217; July 10, 1890, ch. 664, § 16, 26 Stat. 225; Mar. 3, 1893, ch. 220, 27 Stat. 745; July 16, 1894, ch. 138, §§ 14, 16, 28 Stat. 110, 111; June 24, 1898, ch. 495, § 1, 30 Stat. 487; Apr. 12, 1900, ch. 191, § 34, 31 Stat. 85; Apr. 30, 1900, ch. 339, § 86, 31 Stat. 158; May 12, 1900, ch. 391, § 9, 31 Stat. 176; Jan. 22, 1901, ch. 105, §§ 4, 7, 31 Stat. 736, 737; Feb. 12, 1901, ch. 355, §§ 5, 7, 31 Stat. 782; Mar. 2, 1901, ch. 801, §§ 3, 5, 31 Stat. 881; Mar. 3, 1901, ch. 854, § 183, 31 Stat. 1220; Mar. 11, 1902, ch. 183, §§ 5, 6, 32

Stat. 66; June 30, 1902, ch. 1329, 32 Stat. 527; Mar. 2, 1905, ch. 1305, §§ 4, 6, 33 Stat. 824; Mar. 3, 1905, ch. 1427, §§ 13, 15, 19, 33 Stat. 995, 996; June 16, 1906, ch. 3335, § 13, 34 Stat. 275; Mar. 3, 1909, ch. 269, § 1, 35 Stat. 838; Jan. 7, 1913, ch. 6, 37 Stat. 648; Mar. 3, 1915, ch. 100, §§ 3, 4, 38 Stat. 961; Mar. 2, 1917, ch. 145, § 41, 39 Stat. 965; Mar. 4, 1921, ch. 161, § 1, 41 Stat. 1412; July 9, 1921, ch. 42, § 313, 42 Stat. 119; May 28, 1926, ch. 414, § 2(b), 44 Stat. 672; Apr. 21, 1928, ch. 393, 45 Stat. 437; Mar. 26, 1928, ch. 51, § 2, 52 Stat. 118).

Section consolidates section 481 of title 28, U. S. C., 1940 ed., and section 11-1001 of the District of Columbia Code, 1940 ed., with parts of sections 643 and 863 of title 48, U.S.C., 1940 ed., relating to appointment of United States attorneys.

The term "United States attorney" was adopted in this section for "attorney for the United States." Since the decision of the Supreme Court of the United States in In re Neagle, 1890 (10 S. Ct. 658, 135 U.S. 1, 34, L. Ed. 55) where the terms "attorneys of the United States" and "district attorneys" were used interchangeably, Congress has also designated such officers as either "United States attorneys" or as "district attorneys." See Acts of Feb. 22, 1886, ch. 928, § 7, 24 Stat. 309; July 3, 1890, ch. 656, § 16, 26 Stat. 217; July 10, 1890, ch. 664, § 16, 26 Stat. 225, and Acts of July 20, 1882, ch. 312, § 3, 22 Stat. 172; Mar. 3, 1915, ch. 100, § 3, 38 Stat. 961; May 28, 1926, ch. 414, § 2(b), 44 Stat. 672.

At present, such officers are invariably designated as "United States attorneys" by Federal courts and the Department of Justice.

Words "The President may appoint, by and with the advice and consent of the Senate," were inserted to conform section with the Constitution. See article II, section 2, clause 2.

Words "including the District of Columbia" were omitted, because the District is made a judicial district by section 88 of this title. District of Columbia Code, 1940 ed., § 11-1001, provided for appointment of an "attorney of the United States for the District" by the President, subject to Senate confirmation.

Words "learned in the law" were omitted as unnecessary. Such requirement is not made of United States judges and no reason appears to make a distinction respecting United States attorneys.

Parts of section 863 of title 48, U.S.C., 1940 ed., remain in said title 48. For remainder thereof, see Distribution Table. Other provisions of section 643 of such title are incorporated in sections 133, 504, [now sections 541 and 544] and 541 [now section 561], of this title.

Changes were made in phraseology.

For Reviser's Note covering former section 504, from which this section is partially derived, see Reviser's note set out under section 544 of this title.

PRIOR PROVISIONS

A prior section 541, acts June 25, 1948, ch. 646, 62 Stat 910; Mar. 18, 1959, Pub. L. 86-3, § 11 (c), (d), 73 Stat. 9 related to appointment, residence and tenure of marshals, was repealed by Pub. L. 89-554, § 8(a), Sept. 6, 1966, 80 Stat. 663, and is now covered by section 561 of this title.

CROSS REFERENCES

Guam and Virgin Islands, appointment of district or United States attorneys, see sections 1424b and 1617 of Title 48, Territories and Insular Possessions.

### § 542. Assistant United States attorneys

(a) The Attorney General may appoint one or more assistant United States attorneys in any district when the public interest so requires.

(b) Each assistant United States attorney is subject to removal by the Attorney General.

(Added Pub. L. 89-554, § 4(c), Sept. 6, 1966, 80 Stat. 618.)

HISTORICAL AND REVISION NOTES

1966 ACT

| Derivation | U.S. Code | Revised Statutes and Statutes at Large |
|---|---|---|
| (a) | 28 U.S.C. 502 | [None]. |
| (b) | 28 U.S.C. 504(b) (2d sentence, as applicable to assistant United States attorneys). | [None]. |

In subsection (b), the word "is" is substituted for "shall be".

1948 ACT

*Prior section 502.*—Based on title 28, U.S.C., 1940 ed., §§ 483, 594 (May 28, 1896, ch. 252, § 8, 29 Stat. 181; July 19, 1919, ch. 24, § 1, 41 Stat. 209; Mar. 4, 1923, ch. 295, 42 Stat. 1560; June 25, 1936, ch. 804, 49 Stat. 1921).

Section consolidates sections 483 and 594 of title 28, U.S.C., 1940 ed., relating to appointment of assistant United States attorneys.

Words "United States attorneys" were substituted for "district attorneys." (See reviser's note under section 501 of this title.)

The exception of Alaska from the operation of such section 483 was omitted as covered by section 109 of title 48, U.S.C., 1940 ed., Territories and Insular Possessions, authorizing appointment of assistant United States attorneys in Alaska.

Reference in such section 483 to "District of Columbia" was omitted. (See reviser's note under section 501 [now section 541] of this title.)

The provisions of sections 483 and 594 of title 28, U.S.C., 1940 ed., requiring the judges and United States attorneys to certify or evidence in writing the necessity for assistant United States attorneys in their respective districts, and specifying that such opinion of the judge shall state to the Attorney General the facts as distinguished from conclusions, showing the necessity therefor, were omitted. The Attorney General, as chief law enforcement officer, is in a better position to determine such necessity.

The salary provisions of such section 594 were omitted as covered by section 508 [now section 548] of this title.

Changes were made in phraseology.

PRIOR PROVISIONS

A prior section 542, act June 25, 1948, ch. 646, 62 Stat. 911, related to appointment and tenure of deputies and assistants for United States marshals, was repealed by Pub. L. 89-554, § 8(a), Sept. 6, 1966, 80 Stat. 663, and is now covered by section 562 of this title.

CROSS REFERENCES

Virgin Islands, United States attorney and assistant, appointment, compensation, duties, etc., see section 1617 of Title 48, Territories and Insular Possessions.

### § 543. Special attorneys

(a) The Attorney General may appoint attorneys to assist United States attorneys when the public interest so requires.

(b) Each attorney appointed under this section is subject to removal by the Attorney General.

(Added Pub. L. 89-554, § 4(c), Sept. 6, 1966, 80 Stat. 618.)

#### Historical and Revision Notes

#### 1966 Act

| *Derivation* | *U.S. Code* | *Revised Statutes and Statutes at Large* |
|---|---|---|
| (a) | 28 U.S.C. 503 | [None]. |
| | 5 U.S.C. 298 | July 28, 1916, ch. 261, § 1 (6th par. on p. 413), 39 Stat. 413. |
| (b) | 28 U.S.C. 504(b) (2d sentence, less applicability to assistant United States attorneys). | [None]. |

The text of former section 298 of title 5 is omitted as unnecessary. The position so authorized has not been filled in recent years, and the authority is preserved by this section and revised section 3101 of title 5, United States Code.

In subsection (b), the word "is" is substituted for "shall be".

#### 1948 Act

*Prior section 503.*—Based on section 312 of title 5, U.S.C., 1940 ed., Executive Departments and Government Officers and Employees (R.S. § 363).

Other provisions of section 312 of title 5, U.S.C., 1940 ed., are incorporated in sections 507 [now sections 509 and 547] and 508 [now section 548] of this title.

Changes were made in phraseology.

#### Prior Provisions

A prior section 543, act June 25, 1948, ch. 646, 62 Stat. 911, related to oath of office for United States Marshals, was repealed by Pub. L. 89-554, § 8(a), Sept. 6, 1966, 80 Stat. 663, and is now covered by section 563 of this title.

#### Cross References

Virgin Islands, United States attorney and assistant, appointment, compensation, duties, etc., see section 1617 of Title 48, Territories and Insular Possessions.

#### Section Referred to in Other Sections

This section is referred to in sections 519, 544, 548 of this title.

## § 544. Oath of office

Each United States attorney, assistant United States attorney, and attorney appointed under section 543 of this title, before taking office, shall take an oath to execute faithfully his duties.

(Added Pub. L. 89-554, § 4(c), Sept. 6, 1966, 80 Stat. 618.)

#### Historical and Revision Notes

#### 1966 Act

| *Derivation* | *U.S. Code* | *Revised Statutes and Statutes at Large* |
|---|---|---|
| ................ | 28 U.S.C. 504(c) | [None]. |

#### 1948 Act

*Prior section 504.*—Based on section 315 of title 5, U.S.C., 1940 ed., Executive Departments and Government Officers and Employees, title 28, U.S.C., 1940 ed., § 482, and sections 643 and 863 of title 48, U.S.C., 1940 ed., Territories and Insular Possessions (R.S. §§ 366, 769; June 24, 1898, ch. 495, § 1, 30 Stat. 487; Apr. 12, 1900, ch. 191, § 34, 31 Stat. 85; Apr. 30, 1900, ch. 339, § 86, 31 Stat. 158; Mar. 3, 1909, ch. 269, § 1, 35 Stat. 838; Jan. 7, 1913, ch. 6, 37 Stat. 648; Mar. 2, 1917, ch. 145, § 41, 39 Stat. 965; Mar. 4, 1921, ch. 161, § 1, 41 Stat. 1412; July 9, 1921, ch. 42, § 313, 42 Stat. 119; Feb. 12, 1925, ch. 220, 43 Stat. 890; Apr. 17, 1930, ch. 174, 46 Stat. 170; Mar. 26, 1938, ch. 51, § 2, 52 Stat. 118).

Section consolidates parts of sections 315 of title 5, U.S.C., 1940 ed., and 643 and 863 of title 48, both U. S. C., 1940 ed., with section 482 of title 28, U.S.C., 1940 ed. It is recommended that said section 315 be amended so as to omit those provisions relating to special attorneys to assist "district attorneys" which were used as part of the basis for this section, as other parts of said section 315, relating to special assistants to the Attorney General, and to foreign counsel, are to remain in title 5.

Words "United States attorney" were substituted for district attorney, and reference to District of Columbia was omitted. (See reviser's note under section 501 [now section 541] of this title.)

Reference to the territories in said section 482, was also omitted as covered by provisions of title 48, U.S.C., 1940 ed., Territories and Insular Possessions. See sections 109 and 112 of such title applicable to United States attorney in Alaska, and 1353 applicable in the Canal Zone, and 1405y applicable in the Virgin Islands.

The provision as to the tenure of the assistant United States attorneys and special attorneys is new. Existing law contains no provision as to tenure or removal of such officials. While the Supreme Court has held that the power of removal of executive officials is incident to the power of appointment, this section expressly provides for removal. See Meyers v. United States, 1926 (47 S. Ct. 21, 272 U.S. 52, 71 L. Ed. 160).

Said section 315 contained a provision that special attorneys appointed to assist United States attorneys should take the same oath required of the latter. This section was extended to assistant United States attorneys, respecting whom no provision existed as to oaths.

A portion of section 863 of title 48, U.S.C., 1940 ed., is retained in said title 48. For remainder of said section 863, see Distribution Table. Other provisions of section 643 of such title are incorporated in sections 133, 501 [now section 541] and 541 [now section 561] of this title.

Other changes were made in phraseology.

#### Prior Provisions

A prior section 544, acts June 25, 1948, ch. 646, 62 Stat. 911; Sept. 2, 1958, Pub. L. 85-856, 72 Stat. 1104, related to bonds of United States marshals, was repealed by Pub. L. 89-554, § 8(a), Sept. 6, 1966, 80 Stat. 663, and is now covered by section 564 of this title.

#### Cross References

Guam and Virgin Islands district or United States attorneys, tenure, see sections 1424b and 1617 of Title 48, Territories and Insular Possessions.

## § 545. Residence

(a) Each United States attorney and assistant United States attorney shall reside in the district for which he is appointed, except that these officers of the District of Columbia and the Southern District of New York may reside within 20 miles thereof.

(b) The Attorney General may determine the official stations of United States attorneys and assistant United States attorneys within the districts for which they are appointed.

(Added Pub. L. 89-554, § 4(c), Sept. 6, 1966, 80 Stat. 618.)

#### Historical and Revision Notes

1966 Act

| *Derivation* | *U.S. Code* | *Revised Statutes and Statutes at Large* |
|---|---|---|
| ................. | 28 U.S.C. 505 | [None]. |

In subsection (a), the word "shall" is substituted for "must". The word "thereof" is substituted for "of the District".

1948 Act

*Prior section 505.*—Based on title 28, U.S.C., 1940 ed., § 524 (June 20, 1874, ch. 328, § 2, 18 Stat. 109; May 28, 1896, ch. 252, §§ 8, 12, 29 Stat. 181, 183; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167; June 14, 1941, ch. 203, §§ 1, 2, 55 Stat. 251).

The provisions of section 524 of title 28, U.S.C., 1940 ed., that the United States attorney shall give his personal attention to the duties of his office and declaring the office of United States attorney vacant upon his removal from his district or neglect of duty, were omitted as unnecessary and inconsistent with former section 507(b) of this title, [see sections 509 and 547 of this title], charging the Attorney General with the duty of supervising the United States attorneys in the performance of their duties.

The provision permitting the United States attorney and his assistants to reside within twenty miles of the District of Columbia was added because of the relatively small and congested area of the District, as a result of which few Federal officers are appointed from the District or reside therein. Also the residence requirement of this section has no relation to domicile or voting residence nor does it affect the citizenship or residence status of District of Columbia officeholders in the several States from which appointed.

Only citizens of Hawaii resident therein at least 3 years preceding appointment may be appointed as United States Attorneys for the district of Hawaii. See section 501 [now section 541] of this title.

Other provisions of section 524 of title 28, U.S.C., 1940 ed., were incorporated in sections 541 [now section 561] and 751 of this title.

Changes were made in phraseology.

#### Prior Provisions

A prior section 545, act June 25, 1948, ch. 646, 62 Stat. 911, related to vacancies in the office of the United States Marshal, was repealed by Pub. L. 89-554, § 8(a), Sept. 6, 1966, 80 Stat. 663, and is now covered by section 565 of this title.

#### Cross References

Virgin Islands, United States attorney and assistant, appointment, compensation, duties, etc., see section 1617 of Title 48, Territories and Insular Possessions.

### § 546. Vacancies

The district court for a district in which the office of United States attorney is vacant may appoint a United States attorney to serve until the vacancy is filled. The order of appointment by the court shall be filed with the clerk of the court.

(Added Pub. L. 89-554, § 4(c), Sept. 6, 1966, 80 Stat. 618.)

#### Historical and Revision Notes

1966 Act

| *Derivation* | *U.S. Code* | *Revised Statutes and Statutes at Large* |
|---|---|---|
| ................. | 28 U.S.C. 506 | [None]. |

1948 Act

*Prior section 506.*—Based on title 28, U.S.C., 1940 ed., § 511 (R.S. § 793; June 24, 1898, ch. 495, § 2, 30 Stat. 487; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167).

Words "United States attorney" were substituted for "district attorney." (See Reviser's Note under section 501 of this title.)

Words "The Supreme Court of the Territory, and the district court of the United States for the District of Columbia" were omitted as obsolete. This section, as revised, applies to all districts enumerated in chapter 5 of this title. There were no provisions respecting vacancies in Hawaii and Puerto Rico. Therefore this section remedies this situation and establishes a uniform method to fill interim vacancies.

Words "and a copy shall be entered on the journal of the court" after "filed in the clerk's office of said court", in section 511 of title 28, U.S.C., 1940 ed., were omitted as unnecessary.

The provisions of section 511 of title 28, U.S.C., 1940 ed., relating to marshals, are incorporated in sections 544 [now section 564] and 545 [now section 565] of this title.

Changes were made in phraseology.

#### Prior Provisions

A prior section 546, act June 25, 1948, ch. 646, 62 Stat. 911, related to the death of a marshal, was repealed by Pub. L. 89-554, § 8(a), Sept. 6, 1966, 80 Stat. 663, and is now covered by section 566 of this title.

#### Cross References

Virgin Islands, United States attorney and assistant, appointment, compensation, duties, etc., see section 1617 of Title 48, Territories and Insular Possessions.

### § 547. Duties

Except as otherwise provided by law, each United States attorney, within his district, shall—

(1) prosecute for all offenses against the United States;

(2) prosecute or defend, for the Government, all civil actions, suits or proceedings in which the United States is concerned;

(3) appear in behalf of the defendants in all civil actions, suits or proceedings pending in his district against collectors, or other officers of the revenue or customs for any act done by them or for the recovery of any money exacted by or paid to these officers, and by them paid into the Treasury;

(4) institute and prosecute proceedings for the collection of fines, penalties, and forfeitures incurred for violation of any revenue law, unless satisfied on investigation that justice does not require the proceedings; and

(5) make such reports as the Attorney General may direct.

(Added Pub. L. 89-554, § 4(c), Sept. 6, 1966, 80 Stat. 618.)

#### Historical and Revision Notes

1966 Act

| *Derivation* | *U.S. Code* | *Revised Statutes and Statutes at Large* |
|---|---|---|
| ................. | 28 U.S.C. 507(a). | [None]. |

The word "shall" is substituted for "it shall be the duty of".

1948 Act

*Prior section 507.*—Based on sections 312, 317, 323, 324, 327, 329, 330, 331 of title 5, U.S.C., 1940 ed., Executive Departments and Government Officers and Employees; second paragraph of section 305e of title 25, U.S.C., 1940 ed., Indians; and title 28, U.S.C., 1940 ed., §§ 485, 486, 487, 488, 489 (R.S. §§ 362, 363, 373, 374, 377, 379-381, 771-775, 838; Feb. 27, 1877, ch. 69, § 1, 19

Stat. 241; Apr. 9, 1910, ch. 152, 36 Stat. 294; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167; May 10, 1934, ch. 277, § 512, 48 Stat. 758; Aug. 27, 1935, ch. 748, § 6, 49 Stat. 893).

This section consolidates provisions of the sections enumerated above.

Other provisions of section 312 of title 5, U.S.C., 1940 ed., are incorporated in sections 503 [now section 543] and 508 [now section 548] of this title.

All requirements in said sections for reports to officers other than the Attorney General are omitted as unnecessary and are simplified in subsection (a)(5) [now par. (5)] of this section. The Attorney General directs the course of litigation in government cases and makes appropriate rules for furnishing information promptly to the Departments interested.

Specific duties fixed by sections 485—489 of title 28, U.S.C., 1940 ed., and the second paragraph of section 305e of title 25, U.S.C., 1940 ed., to prosecute and defend both civil and criminal proceedings, are covered in subsections (a)(1)-(4) [now pars. (1)-(4)] of this section.

Use of "revenue law" in subsection (a)(4) [now par. (4)] in this section, which is based on section 486 of title 28, U.S.C., 1940 ed., obviates repetition of provisions relating to customs and revenue laws as both are covered by the term. For discussion of this point, see reviser's note under section 3283 in House Report 152, to accompany H.R. 1600 Eightieth Congress, for revision of the Criminal Code.

The following sections of said title 5, U.S.C., 1940 ed., are superseded by, covered by, or inconsistent with subsection (a)(2)(5) [now pars. (2)(5)] of this section, subsection (b) of this section [see section 509 of this title], and section 5 of Executive Order No. 6166 of June 10, 1933, transferring to the Department of Justice the function of supervising the work of United States attorneys in connection with suits by or against the United States exercised by any agency or officer:

Section 323 requiring the General Counsel of the Treasury to make entries of bonds delivered to United States attorneys by collectors for suit until the amounts have been paid or judgments secured;

Section 324 requiring said General Counsel to examine and compare the reports made by collectors of bonds delivered by them to United States attorneys for suit, and of the returns of such bonds;

Section 329 authorizing said General Counsel to instruct United States attorneys, marshals and clerks in all matters relating to suits, except for taxes, forfeitures and penalties, and to require them to make such reports to him as he may direct. The first provision of section 329 of title 5, U.S.C., 1940 ed., is covered by the last paragraph of this section [see section 509 of this title], under which the Attorney General exercises supervision of the duties of United States attorneys. The Director of the Administrative Office of the United States Courts supervises the duties of clerks under chapter 41 of this title. The provision for authority of said General Counsel over marshals, also contained in section 329, is incorporated in section 547 [now section 569] of this title in which such authority is vested in the Attorney General.

Section 327 of title 5, U.S.C., 1940 ed., authorized said General Counsel to establish regulations, subject to approval by the Attorney General, to be observed by United States attorneys and marshals in which the United States is a party. The provision as to United States attorneys is also covered by the last paragraph of this section, [see section 509 of this title], and that as to marshals is covered by section 547 [now section 569] of this title.

Provisions of section 327 of title 5, U.S.C., 1940 ed., relating to establishment of regulations for the observance of collectors of the customs, by the General Counsel for the Department of the Treasury, with the approbation of the Secretary of the Treasury, was omitted and recommended for repeal as covered by section 66 of title 19, U.S.C., 1940 ed., Customs Duties.

The last paragraph of this section, [see section 509 of this title], is based on the first clause of section 317 of title 5, U.S.C., 1940 ed.; see also section 309 of title 5. The second clause of said section 317 is covered by subsection (a)(5) [now par. (5)] of this section. The authority of the Attorney General over marshals and the requirement that they shall report to him the conduct and state of their offices, contained also in said section 317, is incorporated in section 547 [now section 569] of this title.

Section 330 of title 5, U.S.C., 1940 ed., which required that United States attorneys should conduct, under direction of the General Counsel of the Treasury, all suits and proceedings involving the United States under the laws governing national banking associations is covered by subsection (a)(2) [now par. (2)] of this section.

Section 331 of title 5, U.S.C., 1940 ed., requiring United States attorneys to obey directions of the Department of Justice in suits for money due the Post Office Department, is covered also by subsection (a)(2) [now par. (2)] of this section.

Changes in arrangement and phraseology were made.

#### PRIOR PROVISIONS

A prior section 547, acts June 25, 1948, ch. 646, 62 Stat. 912; Oct. 18, 1962, Pub. L. 87-845, § 8, 76A Stat. 699, related to powers and duties of marshals, was repealed by Pub. L. 89-554, § 8(a), Sept. 6, 1966, 80 Stat. 663, and is now covered by section 569 of this title.

#### CROSS REFERENCES

Guam and Virgin Islands district attorneys or United States attorneys, duties, see sections 1424b and 1617 of Title 48, Territories and Insular Possessions.

Bankruptcy offenses, duties of United States attorneys, see section 3057 of Title 18, Crimes and Criminal Procedure.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 19 section 2350; title 20 section 1082; title 42 section 294h.

### § 548. Salaries

Subject to sections 5315-5317 of title 5, the Attorney General shall fix the annual salaries of United States attorneys, assistant United States attorneys, and attorneys appointed under section 543 of this title at rates of compensation not in excess of the highest rate of GS-18 of the General Schedule set forth in section 5332 of title 5.

(Added Pub. L. 89-554, § 4(c), Sept. 6, 1966, 80 Stat. 618.)

#### HISTORICAL AND REVISION NOTES

#### 1966 ACT

| *Derivation* | *U.S. Code* | *Revised Statutes and Statutes at Large* |
|---|---|---|
| .................. | 28 U.S.C. 508 | [None]. |

The words "sections 5315-5317 of title 5" are substituted for "subsection (f) and (g) of section 303 of the Federal Executive Salary Act of 1964" to reflect the codification of those subsections in title 5. The words "GS-18 of the General Schedule set forth in section 5332 of title 5" are substituted for "grade 18 of the General Schedule of the Classification Act of 1949, as amended".

#### 1948 ACT

*Prior section 508.*—Based on section 312 of title 5, U.S.C., 1940 ed., Executive Departments and Government Officers and Employees, and title 28, U.S.C., 1940 ed., §§ 579 and 580 (R.S. § 363; May 28, 1896, ch. 252, §§ 8, 24, 29 Stat. 181, 186; Mar. 3, 1903, ch. 1007, § 1, 32 Stat. 1141; Mar. 4, 1907, ch. 2918, § 1, 34 Stat. 1360; May 27, 1908, ch. 200, § 1, 35 Stat. 375; July 19, 1919, ch. 24, § 1, 41 Stat. 209; June 1, 1922, ch. 204, title

II (part), 42 Stat. 616; Jan. 3, 1923, ch. 21, title II, 42 Stat. 1083; Mar. 4, 1923, ch. 295, 42 Stat. 1560; May 28, 1924, ch. 204, title II (part), 43 Stat. 220).

Section consolidates part of section 312 of title 5, U.S.C., 1940 ed., and part of section 579 of title 28, U.S.C., 1940 ed., with section 580 of title 28, U.S.C., 1940 ed.

Sections 579 and 580 of title 28, U.S.C., 1940 ed., fixed specific salaries for the United States attorneys and assistants, while section 312 of title 5, U.S.C., 1940 ed., provided for a contractual arrangement for compensation of special attorneys.

According to a Department of Justice interpretation, provisions for specific salaries were superseded by section 678 of title 5, [repealed], which provides for adjustment of compensation by heads of departments. Hence, this section leaves the amount of compensation to the Attorney General.

Section 578b of title 28, U.S.C., 1940 ed., providing that United States attorneys shall be paid for their services, was omitted as unnecessary.

Section 578c of title 28, U.S.C., 1940 ed., providing that United States attorneys shall not receive fees in addition to their salaries, was omitted as obsolete, in view of this section and current practice.

Other provisions of section 312 of title 5, U.S.C., 1940 ed., are incorporated in sections 503 [now section 543] and 507 [now sections 509 and 547] of this title, and other provisions of section 579 of title 28, U.S.C., 1940 ed., are incorporated in section 552 [now section 572] of this title.

### Prior Provisions

A prior section 548, act June 25, 1948, ch. 646, 62 Stat. 912, related to administration of oaths by marshals, was repealed by Pub. L. 89-554, § 8(a), Sept. 6, 1966, 80 Stat. 663.

### 1970 Increase in Pay Rates of United States Attorneys and Assistant United States Attorneys

Increase in the rates of pay of United States Attorneys and Assistant United States Attorneys whose annual salaries are fixed pursuant to this section, effective on the first day of the first pay period which begins on or after Dec. 27, 1969, by amounts equal, as nearly as may be practicable, to the increases provided pursuant to section 2 of Pub. L. 91-231, which raised corresponding rates by 6 percent, see Pub. L. 91-231, set out as a note under section 5332 of Title 5, Government Organization and Employees.

### 1967 Increase in Basic Compensation of United States Attorneys and Assistant United States Attorneys

Pub. L. 90-206, title II, § 211(a), Dec. 16, 1967, 81 Stat. 633, provided that: "The rates of basic pay of United States attorneys and assistant United States attorneys whose annual salaries are fixed pursuant to section 548 of title 28, United States Code [this section] shall be increased, effective on the effective date of section 202 of this title [see Effective Date of 1967 Amendment note under section 5332 of Title 5, Government Organization and Employees] by amounts equal, as nearly as may be practicable, to the increases provided by section 202(a) of this title [see section 5332(a) of Title 5] for corresponding rates of basic pay."

Section 211(a) of Pub. L. 90-206 effective as of the beginning of the first pay period which begins on or after Oct. 1, 1967, see section 220(a)(2) of Pub. L. 90-206, set out as a note under section 5332 of title 5.

### 1966 Increase in Basic Compensation of Assistant United States Attorneys

Pub. L. 89-504, title I, § 108(a), July 18, 1966, 80 Stat. 293, provided that: "The rates of basic compensation of assistant United States attorneys whose basic salaries are fixed pursuant to section 508 of title 28, United States Code [now this section] shall be increased, effective on the effective date of section 102 of this title [see Effective Date note below], by amounts equal, as nearly as may be practicable, to the increases provided by section 102(a) of this title [see section 5332(a) of Title 5], Government Organization and Employees, for corresponding rates of compensation."

Provision effective July 18, 1966, see section 109(1) of Pub. L. 89-504.

### 1965 Increase in Basic Compensation of Assistant United States Attorneys

Pub. L. 89-301, § 15(a), Oct. 29, 1965, 79 Stat. 1122, provided that: "The rates of basic compensation of assistant United States attorneys whose basic salaries are fixed pursuant to section 508 of title 28, United States Code, [now this section], shall be increased by 3.6 per centum effective on the first day of the first pay period which begins on or after October 1, 1965."

### 1962 Increase of Basic Compensation of Assistant United States Attorneys

Pub. L. 87-793, § 1003(b), Oct. 11, 1962, 76 Stat. 866, provided that: "The rates of basic compensation of assistant United States attorneys whose basic salaries are fixed by section 508 of title 28, United States Code, [now this section], shall be increased by 7½ per centum effective on the first day of the first pay period which begins on or after the date of enactment of this Act [Oct. 11, 1962]."

### Compensation of Incumbent United States Attorneys and Assistant United States Attorneys

Pub. L. 88-426, § 306(a)(2), Aug. 14, 1962, 78 Stat. 428, as amended by Pub. L. 88-631, § 3(c), Oct. 6, 1964, 78 Stat. 1008, provided that: "Subject to section 303(f) and (g) of this Act [see sections 5315 to 5317 of Title 5, Government Organization and Employees], each incumbent United States attorney and assistant United States attorney shall be paid compensation at a rate equal to that of attorneys of comparable responsibility and professional qualifications, as determined by the Attorney General, whose compensation is prescribed in the General Schedule of the Classification Act of 1949, as amended [now covered by chapter 51 and subchapter III of chapter 53 of Title 5]."

### Alaska, Canal Zone and Virgin Islands

Act Mar. 2, 1955, ch. 9, § 2(b), 69 Stat. 10, provided that: "The salaries of United States attorneys and assistant United States attorneys for the districts of Alaska, Canal Zone, and the Virgin Islands are subject to the provisions of section 508 of title 28, United States Code [now this section.]"

### Salary Limitations

Acts Aug. 5, 1953, ch. 328, title II, § 202, 67 Stat. 375; July 2, 1954, ch. 456, title II, § 202, 68 Stat. 421, which prescribed salary limitations, were repealed by Pub. L. 89-554, § 8(a), Sept. 6, 1966, 80 Stat. 657.

### Cross References

Guam and Virgin Islands district attorneys or United States attorneys, compensation, see sections 1424b and 1617 of Title 48, Territories and Insular Possessions.

Payment of salaries by marshal, see section 571 of this title.

## § 549. Expenses

Necessary office expenses of United States attorneys shall be allowed when authorized by the Attorney General.

(Added Pub. L. 89-554, § 4(c), Sept. 6, 1966, 80 Stat. 618.)

### HISTORICAL AND REVISION NOTES

### 1966 ACT

| *Derivation* | *U.S. Code* | *Revised Statutes and Statutes at Large* |
|---|---|---|
| .................. | 28 U.S.C. 509 | [None]. |

The second paragraph of former section 509 is omitted as it was superseded by the Travel Expense Act of 1949, which is codified in subchapter I of chapter 57 of title 5, United States Code.

The second paragraph was based in part on former section 73 of title 5, 1940 ed., which was superseded by the Subsistence Expense Act of 1926.

Section 6 of the Travel Expense Act of 1949, which is codified in section 5706 of title 5, United States Code, substantially reenacted former section 73 of title 5, 1940 ed., which was repealed by the Act of June 25, 1948, ch. 646, by which title 28 was originally enacted. The purpose of section 6 was to allow reimbursement for only such actual and necessary travel expenses incurred unless otherwise permitted by the Act of 1949 itself or by laws relating to the military. Section 6 did not, however, provide for the exception of United States attorneys as did former section 73.

Sections 2 and 3 of the Act of 1949, which are codified in sections 5701 and 5702 of title 5, United States Code, defined the coverage of the Act and allowed for specific exclusions in the legislative and judicial branches but did not mention an exclusion in the executive branch for United States attorneys.

Section 7 of the 1949 Act, which is codified in section 5707 of title 5, United States Code, expressly vested in the Director of the Bureau of the Budget the authority to prescribe regulations covering travel allowances and the reimbursement of travel expenses.

Section 8 of the 1949 Act, which is codified in section 5708(1), (2) of title 5, United States Code, made specific exclusions from the coverage of the Act, and United States attorneys were not so excluded.

Section 9 of the 1949 Act, which is codified in section 5708(3), (4) of title 5, United States Code, modified acts inconsistent with the 1949 Act, and specifically mentioned acts which authorize reimbursement of "actual and necessary" expenses.

### 1948 ACT

*Prior section 509.*—Based on sections 73 and 318 of title 5, U.S.C., 1940 ed., Executive Departments and Government Officers and Employees, and title 28, U.S.C., 1940 ed., §§ 586, 587 and 592 (R.S. §§ 368, 833, 834; Mar. 3, 1875, ch. 133, § 1, 18 Stat. 452; May 28, 1896, ch. 252, §§ 13, 14, 24, 29 Stat. 183, 186; Mar. 4, 1907, ch. 2918, § 1, 34 Stat. 1360; May 27, 1908, ch. 200, § 1, 35 Stat. 375; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167; July 1, 1918, ch. 113, § 1, 40 Stat. 683; July 19, 1919, ch. 24, § 1, 41 Stat. 209; Dec. 24, 1942, ch. 825, § 3, 56 Stat. 1089).

Section consolidates parts of sections 73 and 318 of title 5, U.S.C., 1940 ed., and of sections 586, 587, and 592 of title 28, U.S.C., 1940 ed.

First paragraph of this section is from section 587 of title 28, U.S.C., 1940 ed., which did not apply to Alaska because of the restriction in section 591 of said title 28. However, the latter section has been superseded, in that respect, by subsequent appropriation acts, the latest being act July 5, 1946, ch. 541, title II, 60 Stat. 460, which specifically allows office expenses for United States attorneys in Alaska. This section applies to all United States attorneys.

Section 73 of title 5, U.S.C., 1940 ed., allowed only actual traveling expenses to Government employees, except "district attorneys," marshals and clerks of courts and their deputies. It has been superseded by the Subsistence Expense Act of 1926. See sections 821 et seq. of said title 5.

References in section 592 of title 28, U.S.C., 1940 ed., to absence "from their respective official residences" and to going to and returning from attendance before courts, etc., were omitted as surplusage and covered by the phrase "on official business." Language relating to Standardized Government Travel Regulations was also omitted as the reference in this section is to the provision in the Subsistence Expense Act, supra, authorizing those regulations. Verification under oath provision was omitted as covered by section 553 [now section 571] of this title which simplifies procedure by requiring payment upon certification by the payee. The penal provisions of title 18 are ample protection against fraud and an oath alone is no deterrent.

The requirement in section 592 of title 28, U.S.C., 1940 ed., that the marshals should include such payments in their accounts for auditing and allowance, was omitted as unnecessary. See section 541 et seq. [now section 561 et seq.] of this title and section 71 et seq. of title 31, U.S.C., 1940 ed.

Section 318 of title 5, U.S.C., 1940 ed., required the Attorney General to supervise the accounts of "district" attorneys, marshals, clerks, and other court officers. The language of this section covers that requirement. The provision as to marshals is incorporated in section 547 [now section 569] of this title.

Quarterly expense accounts were required of United States attorneys and marshals by section 586 of title 28, U.S.C., 1940 ed. Such provision is omitted as unnecessary in view of this section and section 547 [now section 569] of this title. Further provisions of said section 586 that office expenses of United States attorneys, assistants, and marshals should be allowed under regulations of the Attorney General and verified under oath, are simplified by this section and section 550 [now section 571] of this title. Another provision that accounts therefor should be submitted to, examined by the district court and, when approved by the court then audited and allowed by law, was omitted. The power of the Attorney General is sufficient. The reference to audit and allowance was unnecessary as covered by section 71 et seq. of title 31, U.S.C., 1940 ed., Money and Finance. Said section 586 applied also to marshals and deputies and those provisions are incorporated in section 550 [now section 571] of this title.

The exception in sections 586 and 591 of title 28, U.S.C., 1940 ed., that the former should not apply in Alaska was omitted as unnecessary. Section 114 of title 48, U.S.C., 1940 ed., Territories and Insular Possessions, requires travel expense accounts to be rendered and paid as in other districts.

Changes were made in phraseology.

### PRIOR PROVISIONS

A prior section 549, act June 25, 1948, ch. 646, 62 Stat. 912, related to the marshal's power as a sheriff, was repealed by Pub. L. 89-554, § 8(a), Sept. 6, 1966, 80 Stat. 663, and is now covered by section 570 of this title.

### CROSS REFERENCES

Payment of expenses by marshal, see section 571 of this title.

## § 550. Clerical assistants and messengers

The United States attorneys may employ clerical assistants and messengers on approval of the Attorney General.

(Added Pub. L. 89-554, § 4(c), Sept. 6, 1966, 80 Stat. 619.)

### HISTORICAL AND REVISION NOTES

### 1966 ACT

| *Derivation* | *U.S. Code* | *Revised Statutes and Statutes at Large* |
|---|---|---|
| .................. | 28 U.S.C. 510 | [None]. |

The words "and at salaries fixed by" are omitted as superseded by the Classification Act of 1949, as amended, which is codified in chapter 51 and subchapter III of chapter 53 of title 5, United States Code.

#### 1948 Act

*Prior section 510.*—Based on title 28, U.S.C., 1940 ed., §§ 484, 593 (May 28, 1896, ch. 252, § 15, 29 Stat. 183; June 30, 1906, ch. 3914, § 1, 34 Stat. 753; July 19, 1919, ch. 24, § 1, 41 Stat. 209).

Section consolidates and simplifies sections 484 and 593 of title 28, U.S.C., 1940 ed. For provisions with respect to classified civil service, see sections 631–684 of title 5, U.S.C., 1940 ed., Executive Departments and Government Officers and Employees.

Section 593 of title 28, U.S.C., 1940 ed., related to clerks and messengers in the office of United States attorney, southern district of New York. Section 484 of title 28, U.S.C., 1940 ed., related to clerical assistants for all United States attorneys. It was not affected by section 678 of title 5 U.S.C. 1940 ed., Executive Departments and Government Officers and Employees, according to a Department of Justice interpretation.

Provision of said section 593 for office expenses of United States attorneys is covered by section 509 [now section 549] of this title.

Said section 593 also required that payment of salaries of such clerks and messengers be made by the disbursing clerk of the Department of Justice. Under section 550 [now section 571] of this title the marshals will make such payments including the office expenses of United States attorneys.

The restriction that section 484 of title 28, U.S.C., 1940 ed., did not apply to Alaska is omitted as unnecessary since section 109 of title 48, U.S.C., 1940 ed., Territories and Insular Possessions, authorizes employment of clerical assistants to United States attorneys in Alaska by the Attorney General.

The provision in such section 484 of title 28, U.S.C., 1940 ed., that the need for clerical assistants be certified by the district judge, was omitted as unnecessary. The need may be determined by the Attorney General.

Changes were made in phraseology.

#### Prior Provisions

A prior section 550, acts June 25, 1948, ch. 646, 62 Stat. 912; Sept. 9, 1959, Pub. L. 86–243, § 2, 73 Stat. 474, related to disbursement of salaries and expenses, was repealed by Pub. L. 89–554, § 8(a), Sept. 6, 1966, 80 Stat. 663, and is now covered by section 571 of this title.

A prior section 551, act June 25, 1948, ch. 646, 62 Stat. 912, which related to the collection of fees by United States marshals, was repealed by Pub. L. 89–554, § 8(a), Sept. 6, 1966, 80 Stat. 663, and is now covered by section 572 of this title.

A prior section 552, act June 25, 1948, ch. 646, 62 Stat. 912, which related to the fixing of salaries of United States marshals, their deputies and assistants, by the Attorney General, was repealed by Pub. L. 89–554, § 8(a), Sept. 6, 1966, 80 Stat. 663, and is now covered by section 571 of this title.

A prior section 553, acts June 25, 1948, ch. 646, 62 Stat. 912; May 24, 1949, ch. 139, § 72, 63 Stat. 100; Aug. 4, 1955, ch. 550, 69 Stat. 492; Aug. 14, 1961, Pub. L. 87–139, § 5, 75 Stat. 340, related to expenses of marshal, was repealed by Pub. L. 89–554, § 8(a), Sept. 6, 1966, 80 Stat. 663, and is now covered by section 567 of this title.

A prior section 554, act June 25, 1948, ch. 646, 62 Stat. 913, which related to the delivery of prisoners to the successor marshal, was repealed by Pub. L. 89–554, § 8(a), Sept. 6, 1966, 80 Stat. 663, and is now covered by section 573 of this title.

A prior section 555, act June 25, 1948, ch. 646, 62 Stat. 913, which related to the delivery of all unserved process to the successor marshal or his deputies, was repealed by Pub. L. 89–554, § 8(a), Sept. 6, 1966, 80 Stat. 663, and is now covered by section 574 of this title.

A prior section 556, act June 25, 1948, ch. 646, 62 Stat. 913, which related to the prohibition of the practice of law by a marshal or deputy marshal, was repealed by Pub. L. 89–554, § 8(a), Sept. 6, 1966, 80 Stat. 663, and is now covered by section 575 of this title.

#### Cross References

Payment of salaries and expenses by marshal, see section 571 of this title.

## CHAPTER 37—UNITED STATES MARSHALS

Sec.
561. United States marshals.
562. Deputy marshals and clerical assistants.
563. Oath of office.
[564. Repealed.]
565. Vacancies.
566. Death of a marshal.
567. Expenses of marshals.
568. Availability of appropriations; transfer of prisoners to narcotic farms.
569. Powers and duties generally; supervision by Attorney General.
570. Power as sheriff.
571. Disbursement of salaries and moneys.
572. Collection of fees; accounting.
573. Delivery of prisoners to successor.
574. Delivery of unserved process to successor.
575. Practice of law prohibited.

#### Amendments

1972—Pub. L. 92–310, title II, § 206(a)(2), June 6, 1972, 86 Stat. 203, struck out item 564.

1966—Pub. L. 89–554, § 4(c), Sept. 6, 1966, 80 Stat. 619, added chapter 37 and items 561 to 575.

#### Chapter Referred to in Other Sections

This chapter is referred to in title 48 sections 1424b, 1614.

#### Cross References

Marshals of Court of Customs and Patent Appeals, and Customs Court, see sections 832 and 872 of this title.

Supreme Court marshal, see section 672 of this title.

United States marshal for Guam, chapter as applicable, see section 1424b of Title 48, Territories and Insular Possessions.

### § 561. United States marshals

(a) The President shall appoint, by and with the advice and consent of the Senate, a United States marshal for each judicial district.

(b) Each marshal shall be appointed for a term of four years. On expiration of his term, a marshal shall continue to perform the duties of his office until his successor is appointed and qualifies, unless sooner removed by the President.

(c) The Attorney General shall designate places within the district for the official station and offices of each marshal. Each marshal shall reside within the district for which he was appointed, except that the marshal for the District of Columbia and the Southern District of New York may reside within 20 miles thereof.

(Added Pub. L. 89–554, § 4(c), Sept. 6, 1966, 80 Stat. 619.)

#### Historical and Revision Notes

#### 1966 Act

| *Derivation* | *U.S. Code* | *Revised Statutes and Statutes at Large* |
|---|---|---|
| ................. | 28 U.S.C. 541 | [None]. |

#### 1948 Act

*Prior section 541.*—Based on D.C. Code § 11–1101, 1940 ed., title 28, U.S.C., 1940 ed., §§ 490, 491 and 524, and sections 643 and 863 of title 48, U.S.C., 1940 ed., Territories and Insular Possessions (R.S. §§ 776, 779; June 20, 1874, ch. 328, § 2, 18 Stat. 109; June 26, 1876, ch. 147, §§ 1, 4, 19 Stat. 61, 62; Feb. 24, 1879, ch. 97, § 8, 20 Stat. 320; Mar. 3, 1881, ch. 144, § 7, 21 Stat. 507; Apr. 25, 1882, ch. 87, §§ 1, 3, 22 Stat. 47; July 20, 1882, ch. 312, § 3, 22 Stat. 172; Aug. 5, 1886, ch. 928, § 7, 24 Stat. 309; Feb. 22, 1889, ch. 180, § 21, 25 Stat. 682; July 3, 1890, ch. 656, § 16, 26 Stat. 217; July 10, 1890, ch. 664, § 16, 26 Stat. 225; Mar. 3, 1893, ch. 220, 27 Stat. 745; July 16, 1894, ch. 138, §§ 14, 16, 28 Stat. 110, 111; May 28, 1896, ch. 252, §§ 8, 12, 29 Stat. 181, 183; June 24, 1898, ch. 495, § 1, 30 Stat. 487; Apr. 12, 1900, ch. 191, § 34, 31 Stat. 85; Apr. 30, 1900, ch. 339, § 86, 31 Stat. 158; May 12, 1900, ch. 391, § 9, 31 Stat. 176; Jan. 22, 1901, ch. 105, §§ 4, 7, 31 Stat. 736, 737; Feb. 12, 1901, ch. 355, §§ 5, 7, 31 Stat. 782; Mar. 2, 1901, ch. 801, §§ 3, 5, 31 Stat. 881; Mar. 3, 1901, ch. 854, § 186, 31 Stat. 1220; Mar. 11, 1902, ch. 183, §§ 4, 5, 6, 32 Stat. 66; Mar. 2, 1905, ch. 1305, §§ 4, 6, 33 Stat. 824; Mar. 3, 1905, ch. 1427, §§ 13, 15, 19, 33 Stat. 995, 996; June 16, 1906, ch. 3335, § 13, 34 Stat. 275; Mar. 3, 1909, ch. 269, § 1, 35 Stat. 838; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167; Jan. 7, 1913, ch. 6, 37 Stat. 648; Mar. 3, 1915, ch. 100, §§ 3, 4, 38 Stat. 961; Mar. 2, 1917, ch. 145, § 41, 39 Stat. 965; Mar. 4, 1921, ch. 161, § 1, 41 Stat. 1412; July 9, 1921, ch. 42, § 313, 42 Stat. 119; May 28, 1926, ch. 414, § 2(b), 44 Stat. 672; Apr. 21, 1928, ch. 393, 45 Stat. 437; Mar. 26, 1938, ch. 51, § 2, 52 Stat. 118; June 14, 1941, ch. 203, §§ 1, 2, 55 Stat. 251).

Section consolidates section 11-1101 of the District of Columbia Code, 1940 ed., with sections 490, 491, and part of section 524 of title 28, U.S.C., 1940 ed., and parts of sections 643 and 863 of title 48, U.S.C., 1940 ed.

Words "including the District of Columbia" in section 11-1101 of District of Columbia Code, 1940 ed., were omitted as surplusage since the words "each judicial district" include the District of Columbia.

Words "and offices of each marshal" were added because of many special provisions, in sections 141-196 of title 28, U.S.C., 1940 ed., for the maintenance of offices by the marshals at numerous places. Such provisions have been omitted, as covered by this section. The requirement for residence "at one of the places of holding court" was omitted as an unnecessary restriction on the Attorney General's discretion.

Words "The President, by and with the advice and consent of the Senate, may appoint a United States marshal for each judicial district" were substituted for "A marshal shall be appointed in each district," to make the section conform with the Constitution. See article II, section 2, clause 2.

The provision authorizing the marshal in the District of Columbia to reside within twenty miles of his district was added because of the relatively small and congested area of the District, and many Federal officials are compelled to reside elsewhere. The residence requirement of this section has no relation to domicile or voting residence nor does it affect the citizenship or residence status of District of Columbia officeholders in the several States from which appointed.

Provisions of section 524 of title 28, U.S.C., 1940 ed., that the marshal shall give his personal attention to his official duties and declaring the office of marshal vacant upon removal from his district or neglect of duty, were omitted as unnecessary and inconsistent with section 547 [now section 569] of this title, charging the Attorney General with supervision of United States marshals in the performance of their duties.

References to Territories in section 491 of title 28, U.S.C., 1940 ed., were omitted as unnecessary. Provision is made in title 48 for the marshals for Alaska (sections 110, 112), Canal Zone (section 1353), and Virgin Islands (section 1405y [repealed]).

Other provisions of section 524 of title 28, U.S.C., 1940 ed., are incorporated in sections 505 [now section 545] and 751 of this title. Other provisions of section 643 of title 48, U.S.C., 1940 ed., are incorporated in sections 133, 501 [now section 541] and 504 [now sections 541 and 544] of this title. Parts of said section 863 remain in said title 48. For remainder of said section, see Distribution Table.

Changes were made in phraseology.

CROSS REFERENCES

Guam; marshals, appointment, residence and tenure, see section 1424b of Title 48, Territories and Insular Possessions.

Virgin Islands, appointment of marshal, see section 1614 of Title 48.

### § 562. Deputy marshals and clerical assistants

The Attorney General may authorize a United States marshal to appoint deputies and clerical assistants. Each deputy marshal is subject to removal by the marshal pursuant to civil-service regulations.

(Added Pub. L. 89-554, § 4(c), Sept. 6, 1966, 80 Stat. 619.)

HISTORICAL AND REVISION NOTES

1966 ACT

| *Derivation* | *U.S. Code* | *Revised Statutes and Statutes at Large* |
|---|---|---|
| .................. | 28 U.S.C. 542 | [None]. |

In the second sentence, the word "is" is substituted for "shall be".

1948 ACT

*Prior section 542.*—Based on title 28, U.S.C., 1940 ed., §§ 492 and 493 (R.S. § 780; Aug. 8, 1888, ch. 792, § 4, 25 Stat. 390; May 28, 1896, ch. 252, §§ 10, 11, 29 Stat. 182; June 1, 1900, ch. 601, § 4, 31 Stat. 250; Feb. 19, 1909, ch. 161, 35 Stat. 640; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167; Mar. 4, 1911, ch. 269, 36 Stat. 1355).

This section consolidates sections 492 and 493 of title 28, U.S.C., 1940 ed.

Section 492 of title 28, U.S.C., 1940 ed., authorized the marshal to appoint field deputies and report the appointments to the Attorney General who could "at any time cancel any such appointment as the public interest may require."

Section 493 of title 28, U.S.C., 1940 ed., did not include any mention of the office deputies holding office at the pleasure of the marshals and the Attorney General.

Since, however, each marshal's bond covers both field and office deputies, there is no apparent reason for any distinction with respect to tenure or method of appointment.

Such phrases as "when * * * the public interest requires" and the requirement that each marshal shall in his report or recommendation "state the facts as distinguished from conclusions, showing necessity for the same" were omitted as surplusage since presumably the Attorney General makes all such appointments in the public interest and only upon a showing of necessity.

Words "on the recommendation of the marshal" in section 493 of title 28, U.S.C., 1940 ed., were omitted as unnecessary.

Deputies are now members of the civil service and removable only in accordance with civil-service regulations. Therefore all reference to removal by the Attorney General or the district court are omitted from the revised section. There seem to have been no removals of deputy marshals by district courts in the last 25 years.

Clerical assistants are civil service employees removable only after filing of charges and opportunity for hearing. See section 652 of title 5, U.S.C., 1940 ed.

The exception of the Territory of Alaska, contained in section 591 of title 28, U.S.C., 1940 ed., and referred to in sections 492 and 493 of title 28, U.S.C., 1940 ed., was omitted as covered by section 110 of title 48, U.S.C., 1940 ed., Territories and Insular Possessions.

Provision for the Canal Zone is made by section 1353 of title 48, U.S.C., 1940 ed.; and for the Virgin Islands by section 1405y [repealed] of said title 48.

Changes were made in phraseology.

CROSS REFERENCES

Virgin Islands, appointment of marshal, see section 1614 of Title 48, Territories and Insular Possessions.

### § 563. Oath of office

Each United States marshal and deputy marshal before assuming the duties of his office shall take the following oath or affirmation:

"I, __________ __________, do solemnly swear (or affirm) that I will faithfully execute all lawful precepts directed to the __________________under the authority of the United States, make true returns, take only lawful fees, and in all things well and truly, and without malice or partiality, perform the duties of the office of__________________during my continuance in office. So help me God",

(Added Pub. L. 89–554, § 4(c), Sept. 6, 1966, 80 Stat. 619.)

HISTORICAL AND REVISION NOTES

1966 ACT

| *Derivation* | *U.S. Code* | *Revised Statutes and Statutes at Large* |
|---|---|---|
| ................ | 28 U.S.C. 543 | [None]. |

1948 ACT

*Prior section 543.*—Based on title 28, U.S.C., 1940 ed., § 494 (R.S. § 782; Dec. 22, 1896, ch. 3, 29 Stat. 481).

The last sentence of section 494 of title 28, U.S.C., 1940 ed., "The words 'so help me God' shall be omitted in all cases where an affirmation is admitted instead of an oath," was omitted as unnecessary because, on affirmation, such words would not be included. As revised, the section is in conformity with section 453 of this title, providing for the form of judicial oath and with section 951 of this title, providing for the form of oath for the clerks of the United States courts.

Changes were made in phraseology.

### [§ 564. Repealed. Pub. L. 92–310, title II, § 206(a)(1), June 6, 1972, 86 Stat. 203]

Section, Pub. L. 89–554, § 4(c), Sept. 6, 1966, 80 Stat. 619, related to bonds of United States marshals.

### § 565. Vacancies

The district court for a district in which the office of United States marshal is vacant may appoint a United States marshal to serve until the vacancy is filled. The order of appointment by the court shall be filed with the clerk of the court.

(Added Pub. L. 89–554, § 4(c), Sept. 6, 1966, 80 Stat. 620.)

HISTORICAL AND REVISION NOTES

1966 ACT

| *Derivation* | *U.S. Code* | *Revised Statutes and Statutes at Large* |
|---|---|---|
| ................ | 28 U.S.C. 545 | [None]. |

1948 ACT

*Prior section 545.*—Based on District of Columbia Code, 1940 ed., § 11–1103; title 28, U.S.C., 1940 ed., § 511 (R.S. § 793; June 24, 1898, ch. 495, § 2, 30 Stat. 487; Mar. 3, 1901, ch. 854, § 189, 31 Stat. 1220; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167; June 25, 1936, ch. 804, 49 Stat. 1921).

Section consolidates section 11–1103 of the District of Columbia Code, 1940 ed., with part of section 511 of title 28, U.S.C., 1940 ed.

Similar provisions of section 511 of title 28, U.S.C., 1940 ed., relating to United States attorneys are incorporated in section 506 [now section 546] of this title. The provisions of said section 511 of title 28, U.S.C., 1940 ed., relating to bonds to be furnished by marshals serving during vacancies are incorporated in section 544 [now section 564] of this title.

Words "and the district court of the United States for the District of Columbia" were omitted as surplusage and as covered by the words "any district."

Words "the Supreme Court of the Territory" in section 511 of title 28, U.S.C., 1940 ed., were omitted as obsolete. (See reviser's note under section 506 [now section 546] of this title.)

Words "and a copy shall be entered on the journal of the court" in said section 511, were omitted as unnecessary.

Changes were made in phraseology.

### § 566. Death of a marshal

On the death of a United States marshal, his deputy or deputies shall perform the duties of the deceased marshal in his name until his successor is appointed and qualifies.

(Added Pub. L. 89–554, § 4(c), Sept. 6, 1966, 80 Stat. 620, and amended Pub. L. 92–310, title II, § 206(b), June 6, 1972, 86 Stat. 203.)

HISTORICAL AND REVISION NOTES

1966 ACT

| *Derivation* | *U.S. Code* | *Revised Statutes and Statutes at Large* |
|---|---|---|
| ................ | 28 U.S.C. 546 | [None]. |

In subsection (b), the word "is" is substituted for "shall". The word "has" is substituted for "shall".

1948 ACT

*Prior section 546.*—Based on title 28, U.S.C., 1940 ed., § 506 (R.S. § 789).

Changes were made in phraseology.

AMENDMENTS

1972—Pub. L. 92–310 repealed subsec. (b) which provided that the default or misfeasance of a deputy marshal was a breach of the deceased marshal's bond, and struck out the designation "(a)" which preceded "On the death".

### § 567. Expenses of marshals

Under regulations prescribed by the Attorney General, each United States marshal shall be allowed—

(1) his actual and necessary office expenses;

(2) the expense of transporting prisoners, including the cost of necessary guards and the travel and subsistence expense of prisoners and guards; and

(3) other necessary expenditures in line of duty, approved by the Attorney General.

(Added Pub. L. 89–554, § 4(c), Sept. 6, 1966, 80 Stat. 620.)

HISTORICAL AND REVISION NOTES

1966 ACT

| *Derivation* | *U.S. Code* | *Revised Statutes and Statutes at Large* |
|---|---|---|
| ................ | 28 U.S.C. 553 | [None]. |

Paragraphs (2) and (3) are omitted as they were superseded by the Travel Expense Act of 1949, which is codified in subchapter I of chapter 57, of title 5, United States Code. The 1949 Act covered, among others, all civilian officers and employees of the executive departments which includes United States marshals and their deputies who are officers and employees, respectively, of the Department of Justice.

The Act of 1949 vested the promulgation of regulations under it in the Director of the Bureau of the Budget. Under former section 827 of title 5, the Attorney General had the authority to promulgate regulations governing the travel of marshals, however, that section was repealed by the 1949 Act and the authority to prescribe regulations covering travel allowances and the reimbursement of travel expenses is now vested in the Director of the Bureau of the Budget, and is codified in section 5707 of title 5, United States Code.

The Acts of Aug. 4, 1955, ch. 550, 69 Stat. 492, and Aug. 14, 1961, Pub. L. 87-139, § 5, 75 Stat. 340, were introduced in Congress on the apparent assumption that the Act of 1949 did not apply to marshals and that the raise in mileage allowances proposed as amendments to the Act of 1949 would not benefit marshals as the amendment of the 1949 Act did not specifically amend former section 553 of this title. The Acts of Aug. 4, 1955 and Aug. 14, 1961, were unnecessary as the new rate contained in the amendments of the 1949 Act were applicable to marshals by reason of the fact that the 1949 Act had superseded paragraph (3) of former section 553 in which the former rate was set forth.

#### 1948 ACT

*Prior section 553.*—Based on title 28, U.S.C., 1940 ed., §§ 574, 576, 582, 583, 584, 584a, 585, and 587 (R.S. §§ 823, 829; Aug. 18, 1894, ch. 301, § 1, 28 Stat. 416; May 28, 1896, ch. 252, §§ 6, 10, 11, 12, 14, 24, 29 Stat. 179, 182, 183, 186; June 6, 1900, ch. 791, § 1, 31 Stat. 639; Feb. 19, 1909, ch. 161, 35 Stat. 640; Mar. 4, 1911, ch. 269, 36 Stat. 1355; July 19, 1919, ch. 24, § 1, 41 Stat. 209; June 1, 1922, ch. 204, title II, 42 Stat. 615; Jan. 3, 1923, ch. 21, title II, 42 Stat. 1083; May 28, 1924, ch. 204, title II, 43 Stat. 220; Feb. 27, 1925, ch. 364, title II, 43 Stat. 1029; Apr. 29, 1926, ch. 195, title II, 44 Stat. 345; May 29, 1930, ch. 356, 46 Stat. 486; Aug. 3, 1935, ch. 431, § 2, 49 Stat. 513; Apr. 27, 1938, ch. 180, title II, § 1, 52 Stat. 267; June 29, 1939, ch. 248, title II, 53 Stat. 900; May 14, 1940, ch. 189, title III, 54 Stat. 204; June 28, 1941, ch. 258, title III, 55 Stat. 295; July 2, 1942, ch. 472, title II, 56 Stat. 486; July 1, 1943, ch. 182, title II, § 1, 57 Stat. 286; June 28, 1944, ch. 294, 58 Stat. 410; May 21, 1945, ch. 129, title II, 59 Stat. 183).

This section consolidates provisions of sections 574, 576, 582, 583, 584, 584a, 585 and 587 of title 28, U.S.C., 1940 ed. For distribution of other provisions of such sections, see Distribution Table.

Sections 582 and 583 of title 28, U.S.C., 1940 ed., related to expenses of deputies and not of marshals. Inasmuch as section 550 [now section 571] of this title provides for payment of such expenses by marshals, this section is worded to allow them to marshals.

The Chief of the Division of Accounts in the Department of Justice advises that marshals' travel is governed entirely by regulations promulgated by the Attorney General pursuant to section 827 of title 5, U.S.C., 1940 ed., Executive Departments and Government Officers and Employees. This section is consistent with such regulations and with sections 73b and 821-833 of said title 5.

Changes were made in phraseology.

### § 568. Availability of appropriations; transfer of prisoners to narcotic farms

Appropriations for salaries and expenses of United States marshals are available for actual and necessary expenses incident to the transfer of prisoners in the custody of the marshals to narcotic farms.

(Added Pub. L. 89-554, § 4(c), Sept. 6, 1966, 80 Stat. 620.)

#### HISTORICAL AND REVISION NOTES

| *Derivation* | *U.S. Code* | *Revised Statutes and Statutes at Large* |
|---|---|---|
| .................. | 5 U.S.C. 341a | July 28, 1950, ch. 503, § 2, 64 Stat. 380. |

The words "now or hereafter provided" are omitted as unnecessary. The word "are" is substituted for "shall be".

### § 569. Powers and duties generally; supervision by Attorney General

(a) The United States marshal of each district is the marshal of the district court and of the court of appeals when sitting in his district, and of the Customs Court holding sessions in his district elsewhere than in the Southern and Eastern Districts of New York, and may, in the discretion of the respective courts, be required to attend any session of court.

(b) United States marshals shall execute all lawful writs, process and orders issued under authority of the United States, including those of the courts and Government of the Canal Zone, and command all necessary assistance to execute their duties.

(c) The Attorney General shall supervise and direct United States marshals in the performance of public duties and accounting for public moneys. Each marshal shall report his official proceedings, receipts and disbursements and the condition of his office as the Attorney General directs.

(Added Pub. L. 89-554, § 4(c), Sept. 6, 1966, 80 Stat. 620.)

#### HISTORICAL AND REVISION NOTES

#### 1966 ACT

| *Derivation* | *U.S. Code* | *Revised Statutes and Statutes at Large* |
|---|---|---|
| .................. | 28 U.S.C. 547 | [None]. |

#### 1948 ACT

*Prior section 547.*—Based on sections 317, 318, and 329 of title 5, U.S.C., 1940 ed., Executive Departments and Government Officers and Employees and title 28, U.S.C., 1940 ed., §§ 220, 503 (R.S. §§ 362, 368, 379, 787; Mar. 3, 1911, ch. 231, §§ 123, 291, 36 Stat. 1132, 1167; June 15, 1935, ch. 259, § 1, 49 Stat. 377).

Section consolidates parts of sections 317, 318 and 329 of title 5, U.S.C., 1940 ed., with sections 220 and 503 of title 28, U.S.C., 1940 ed.

Section 220 of title 28, U.S.C., 1940 ed., authorized the United States marshals, in attendance on the courts of appeals, to "exercise the same powers and perform the same duties, under the regulations of the court, as are exercised and performed by the marshal of the Supreme Court of the United States."

This section gives effect to all the pertinent provisions of the component sections. The words "process and orders" were substituted for the word "precepts" contained in section 503 of title 28, U.S.C., 1940 ed., to conform to section 672 of this title, defining the duties of the marshal of the Supreme Court of the United States.

Like provisions of section 317 of title 5, U.S.C., 1940 ed., with respect to United States attorneys, are incorporated in section 507 [now sections 509 and 547] of this title.

Provisions of section 318 of title 5, U.S.C., 1940 ed., with respect to the Attorney General's supervision of the accounts of clerks and other court officials were omitted as covered by section 601 et seq. of this title.

Sections 509 and 510 of title 28, U.S.C., 1940 ed., are also omitted as unnecessary in view of this section.

Said section 509 requires reports by marshals to the General Counsel of the Treasury Department of public moneys collected on process.

Section 510 of title 28, U.S.C., 1940 ed., requires reports by marshals to the Comptroller General of proceedings to collect on execution moneys due the Post Office Department.

This section enables the Attorney General to take appropriate steps to furnish each department or agency with necessary information concerning marshals' activities without requiring duplicate reports of matters already reported to their superiors.

Similarly, section 586a of title 28, U.S.C., 1940 ed., requiring quarterly accounts to be rendered, except by marshals of the United States courts in China and the Canal Zone, was omitted as covered by this section.

Section 329 of title 5, U.S.C., 1940 ed., authorized the General Counsel of the Treasury to instruct marshals as well as United States attorneys and clerks in matters respecting suits in which the Government was interested. This section vests such authority in the Attorney General consistently with similar authority, under section 507 [now sections 509 and 547] of this title, over United States attorneys.

A reference in section 317 of title 5, U.S.C., 1940 ed., to the Territories was omitted as surplusage, since this section applies to the Territories.

Other provisions of sections 317, 318 and 329 of title 28, U.S.C., 1940 ed., are incorporated in sections 507 [now sections 509 and 547] and 509 [now section 549] of this title.

The phrase "and of the Customs Court holding sessions elsewhere than in the Southern and Eastern Districts of New York" was added pursuant to suggestion of the Customs Court to conform to existing practice.

#### CROSS REFERENCES

Fees of marshal, see section 1921 of this title.

Marshal to serve as marshal for Court of Customs and Patent Appeals outside District of Columbia, see section 832 of this title.

### § 570. Power as sheriff

A United States marshal and his deputies, in executing the laws of the United States within a State, may exercise the same powers which a sheriff of the State may exercise in executing the laws thereof.

(Added Pub. L. 89-554, § 4(c), Sept. 6, 1966, 80 Stat. 620.)

#### HISTORICAL AND REVISION NOTES

##### 1966 ACT

| *Derivation* | *U.S. Code* | *Revised Statutes and Statutes at Large* |
|---|---|---|
| .................. | 28 U.S.C. 549 | [None]. |

##### 1948 ACT

*Prior section 549.*—Based on title 28, U.S.C., 1940 ed., § 504 (R.S. § 788).

Changes were made in phraseology.

#### CROSS REFERENCES

Marshals and deputies may arrest without warrant and may carry firearms, see section 3053 of Title 18, Crimes and Criminal Procedure.

Powers and duties of marshals in general, see section 569 of this title.

### § 571. Disbursement of salaries and moneys

(a) The United States marshals, under regulations prescribed by the Attorney General, shall pay the salaries, office expenses and travel and per diem allowances of United States attorneys, their assistants, clerks and messengers, and of the marshals, their deputies and clerical assistants.

(b) The United States marshals, under regulations prescribed by the Director of the Administrative Office of the United States Courts, shall pay the salaries, office expenses, and travel and per diem allowances of circuit and district judges, clerks of court and their deputies, court reporters, and other personnel of courts within their districts.

(c) On all disbursements made by United States marshals for official salaries or expenses, the certificate of the payee is sufficient without verification on oath.

(Added Pub. L. 89-554, § 4(c), Sept. 6, 1966. 80 Stat. 621.)

#### HISTORICAL AND REVISION NOTES

##### 1966 ACT

| *Derivation* | *U.S. Code* | *Revised Statutes and Statutes at Large* |
|---|---|---|
| .................. | 28 U.S.C. 550 | [None]. |

In subsections (a) and (b), the words "per diem" are substituted for "subsistence" on authority of the Travel Expense Act of 1949, which is codified in subchapter I of chapter 57 of title 5, United States Code.

In subsection (c), the word "is" is substituted for "shall be".

##### 1948 ACT

*Prior section 550.*—Based on title 28, U.S.C., 1940 ed., §§ 9a(c), 505, 586 (R.S. §§ 833, 834; May 28, 1896, ch. 252, §§ 13, 24, 29 Stat. 183; Mar. 3, 1911, ch. 231, § 5a, as added Jan. 20, 1944, ch. 3, § 1(c), 58 Stat. 6; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167; Aug. 1, 1914, ch. 223, § 1, 38 Stat. 653; July 19, 1919, ch. 24, § 1, 41 Stat. 209; Reorg. Plan No. IV, § 3, 5 Fed. Reg. 2421, 54 Stat. 1234).

Section consolidates parts of sections 9a(c) and 586 with section 505, all of title 28, U.S.C., 1940 ed.

The provisions of section 505 of title 28, U.S.C., 1940 ed., with respect to payment of salaries of United States attorneys, marshals, and the personnel of their offices are unchanged except in phraseology and arrangement.

The provisions of section 505 of title 28, U.S.C., 1940 ed., with respect to payment of judges and court personnel are rewritten to provide for such payment under regulations prescribed by the Director of the Administrative Office of the United States Courts.

The marshals, under such regulations, disburse the salaries of circuit and district judges but not of retired justices and judges. Retired justices and judges are paid directly by the disbursing officer of the Administrative Office. (See act Aug. 7, 1939, § 4, following section 446 of title 28, U.S.C., 1940 ed.)

Judges of the Customs Court are paid by the marshal for the Southern District of New York.

Judges of the Court of Claims, Court of Customs and Patent Appeals and Tax Court are paid by personnel of such courts designated by the Director of the Administrative Office as disbursing officers.

The Chief Justice of the United States and Associate Justices of the Supreme Court are now paid by a disbursing officer of the Department of Justice. Under section 672 of this title, their salaries will be paid by the marshal of the Supreme Court. (See further explanation in reviser's note under section 672 of this title.)

The Assistant Director of the Administrative Office of the United States Courts, after outlining the methods of payment of court salaries, stated in a letter dated December 18, 1944:

The fact that under the law the Director of the Administrative Office is given charge of the disbursement of money (section 604 of this title) appropriated for the support of the courts and then is given the option of disbursing the money directly or through the United States marshal as may seem better in the particular instance, provides a flexible and satisfactory method of disbursing the moneys appropriated for the courts, other than the Supreme Court.

The requirement of section 505 of title 28, U.S.C., 1940 ed., that each marshal give a bond was omitted as unnecessary in view of section 544 [now section 564] of this title.

The words "travel and subsistence allowances" were inserted to conform to administrative practice established by the Department of Justice and clearly implicit in existing laws and regulations, making the marshals the disbursing officers for the courts, the United States attorneys' offices and their own offices.

This section is extended to require the marshals to pay the office expenses of United States attorneys. Such requirement was not specifically provided for by existing law but is covered by the words "office expenses" in the first paragraph of this section. Such words also cover the same requirements in section 586 of title 28, U.S.C., 1940 ed., that each marshal shall pay his own expense accounts and those of his office and field deputies. Words "clerical assistants" were added at end of first paragraph to cover all employees in marshals' offices.

Words "court reporters" were inserted based on section 9a(c) of title 28, U.S.C., 1940 ed., under which those officers were required to be paid "in the same manner and at the same time that the salary of the clerk of the court is paid."

This section applies to the expenses of judges attending the Judicial Conference of the United States.

Other provisions of section 9a(c) and 586 of title 28, U.S.C., 1940 ed., are incorporated in sections 509 [now section 549] and 753 of this title.

Subsec. (c) is new. The present requirement that a payee shall swear to his salary or expense voucher is superfluous. Under section 80 of title 18, U.S.C., 1940 ed., Criminal Code and Criminal Procedure, his liability for false statements in an expense account are not dependent on oath. There is no necessity for having another employee administer an oath, sign the verification and affix a seal, as it would involve unnecessary expenditure of public funds and wasted effort.

*Prior section 552.*—Based on title 28, U.S.C., 1940 ed., §§ 579, 582, and 583 (May 28, 1896, ch. 252, §§ 10, 11, 24, 29 Stat. 182, 186; Feb. 19, 1909, ch. 161, 35 Stat. 640; Mar. 4, 1911, ch. 269, 36 Stat. 1355; June 1, 1922, ch. 204, title II, 42 Stat. 615; Mar. 4, 1923, ch. 295, 42 Stat. 1560; Feb. 27, 1925, ch. 364, title II, 43 Stat. 1029).

Section consolidates parts of sections 579, 582, and 583 of title 28, U.S.C., 1940 ed.

Sections 579 and 583 of title 28, U.S.C., 1940 ed., provided for specific amounts as compensation for marshals and their field deputies.

According to Department of Justice interpretations, sections 579 and 583, of title 28, U.S.C., 1940 ed., have been superseded by section 678 of title 5, U.S.C., 1940 ed., Executive Departments and Government Officers and Employees, providing for adjustment of compensation by heads of departments. Accordingly this section leaves to the Attorney General the power to fix salaries for marshals, deputies, and clerical assistants. For provisions with respect to classified civil service, see sections 631-684 of title 5, U.S.C., 1940 ed., Executive Departments and Government Officers and Employees.

This section extends the salary fixing power of the Attorney General to the marshals and their deputies. Section 582 of title 28, U.S.C., 1940 ed., referred only to office deputies and clerical assistants.

Section 578b of title 28, U.S.C., 1940 ed., providing merely that United States marshals shall be paid for their services, was omitted as unnecessary.

Other provisions of sections 579, 582, and 583 of title 28, U.S.C., 1940 ed., are incorporated in sections 508 [now section 548] and 553 [now this section] of this title.

#### CROSS REFERENCES

Expenses allowed to judges, United States attorneys and other court officers and employees, see sections 456, 460, 549 and 604 of this title.

Witness fees, payment by marshal where United States is party, see section 1825 of this title.

### § 572. Collection of fees; accounting

(a) Each United States marshal shall collect, as far as possible, his lawful fees and account for the same as public moneys.

(b) The marshal's accounts of fees and costs paid to a witness or juror on certificate of attendance issued as provided by sections 1825 and 1871 of this title may not be reexamined to charge him for an erroneous payment of the fees or costs.

(Added Pub. L. 89-554, § 4(c), Sept. 6, 1966, 80 Stat. 621.)

#### HISTORICAL AND REVISION NOTES

##### 1966 ACT

| *Derivation* | *U.S. Code* | *Revised Statutes and Statutes at Large* |
|---|---|---|
| ................ | 28 U.S.C. 551 | [None]. |

In subsection (b), the words "may not" are substituted for "shall not".

##### 1948 ACT

*Prior section 551.*—Based on title 28, U.S.C., 1940 ed., §§ 577, 578a (R.S. § 846; May 28, 1896, ch. 252, §§ 6, 13, 24, 29 Stat. 179, 183, 186; May 27, 1908, ch. 200, § 1, 35 Stat. 375; June 6, 1930, ch. 409, 46 Stat. 522; Oct. 13, 1941, ch. 431, § 1, 55 Stat. 736).

Section consolidates first sentence of section 577 with section 578a of title 28, U.S.C., 1940 ed., with changes of phraseology necessary to effect consolidation. Other provisions of said section 577 are incorporated in section 1929 of this title.

The qualification that payments of witness fees or costs be made upon "order of court," contained in said section 577 of title 28, U.S.C., 1940 ed., was omitted as obsolete and suitable reference was made to sections 1825 and 1871 of this title under which payments are now made on certificates of attendance.

Section 578a of title 28, U.S.C., 1940 ed., is rewritten in simplified terms without change of substance. The proviso of such section 578a, prohibiting the collection of fees from the United States, was omitted as covered by section 2412 of this title, providing that the United States should be liable only for fees when such liability is expressly provided by Congress.

The provision of section 578a of title 28, U.S.C., 1940 ed., requiring that fees and emoluments collected by the marshal shall be deposited by him in accordance with the provisions of section 495 of title 31, U.S.C., 1940 ed., Money and Finance, was omitted as said section 495 governs such deposits without implementation in this section.

### § 573. Delivery of prisoners to successor

Each United States marshal shall deliver to his successor all prisoners in his custody.

(Added Pub. L. 89-554, § 4(c), Sept. 6, 1966, 80 Stat. 621.)

#### HISTORICAL AND REVISION NOTES

##### 1966 ACT

| *Derivation* | *U.S. Code* | *Revised Statutes and Statutes at Large* |
|---|---|---|
| ................ | 28 U.S.C. 554 | [None]. |

##### 1948 ACT

*Prior section 554.*—Based on title 28, U.S.C., 1940 ed., § 507 (R.S. § 790).

Provision in section 507 of title 28, U.S.C., 1940 ed., that the marshal might retain prisoners until his successor was appointed and qualified, was omitted as superfluous.

Changes were made in phraseology.

### § 574. Delivery of unserved process to successor

All unserved process remaining in the hands of a United States marshal or his deputies shall be delivered to his successor. When a deputy marshal resigns or is removed, he shall deliver to the marshal all process in his hands.

(Added Pub. L. 89-554, § 4(c), Sept. 6, 1966, 80 Stat. 621.)

#### HISTORICAL AND REVISION NOTES

1966 ACT

| *Derivation* | *U.S. Code* | *Revised Statutes and Statutes at Large* |
|---|---|---|
| | 28 U.S.C. 555 | [None]. |

1948 ACT

*Prior section 555.*—Based on title 28, U.S.C., 1940 ed., § 508 (Mar. 3, 1899, ch. 427, § 1, 30 Stat. 1237).

The phrase "upon request" in section 508 of title 28, U.S.C., 1940 ed., was deleted in two places since it should be the unqualified duty of any process server to turn over all process in his hands upon termination of his commission.

Changes were made in phraseology.

### § 575. Practice of law prohibited

A United States marshal or deputy marshal may not practice law in any court of the United States.

(Added Pub. L. 89-554, § 4(c), Sept. 6, 1966, 80 Stat. 621.)

#### HISTORICAL AND REVISION NOTES

1966 ACT

| *Derivation* | *U.S. Code* | *Revised Statutes and Statutes at Large* |
|---|---|---|
| | 28 U.S.C. 556 | [None]. |

The words "may not" are substituted for "shall not".

1948 ACT

*Prior section 556.*—Based on title 28, U.S.C., 1940 ed., §§ 395 and 396 (Mar. 3, 1911, ch. 231, §§ 273, 274, 36 Stat. 1164).

Section consolidates parts of sections 395 and 396 of title 28, U.S.C., 1940 ed. Similar provisions in said sections, relating to clerks, are incorporated in section 955 of this title.

The revised section substitutes, as simpler and more appropriate, the prohibition against practice of law "in any court of the United States" for the more involved language of section 395 of title 28, U.S.C., 1940 ed., which provided that no clerks or marshals, deputies, or assistants within the district for which appointed "shall act as solicitor, proctor, attorney or counsel, in any cause depending in any of said courts, or in any district for which he is acting as such officer."

Provisions of section 396 of title 28, U.S.C., 1940 ed., for striking the name of an offender from the roll of attorneys and for recommendation of dismissal, were omitted as unnecessary and as covered by section 541 of this title.

Changes were made in phraseology.

## PART III—COURT OFFICERS AND EMPLOYEES

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#### SENATE REVISION AMENDMENT

Chapter 59 was renumbered as Chapter 57 but without change in its section numbers, by Senate amendment. See 80th Congress Senate Report No. 1559.

#### AMENDMENTS

1968—Pub. L. 90-578, title I, § 102(a), Oct. 17, 1968, 82 Stat. 1114, substituted "United States Magistrates" for "United States Commissioners" as the heading of chapter 43.

1967—Pub. L. 90-219, title II, § 204, Dec. 20, 1967, 81 Stat. 669, added chapter 42.

## CHAPTER 41—ADMINISTRATIVE OFFICE OF UNITED STATES COURTS

Sec.
601. Creation; Director and Deputy Director.
602. Employees.
603. Salaries.
604. Duties of Director generally.
605. Budget estimates.
606. Duties of Deputy Director.
607. Practice of law prohibited.
608. Seal.
609. Courts' appointive power unaffected.
610. Courts defined.
611. Retirement of Director.

#### AMENDMENTS

1967—Pub. L. 90-219, title II, § 201(b), Dec. 20, 1967, 81 Stat. 668, inserted item 611.

1959—Pub. L. 86-370, § 5(a)(2), Sept. 23, 1959, 73 Stat. 652, substituted "Deputy Director" for "Assistant Director" in items 601 and 606.

1949—Act May 24, 1949, ch. 139, § 72a, 63 Stat. 100, inserted an apostrophe after "Courts" and deleted the comma which followed "Courts" in item 609.

#### CROSS REFERENCES

District Court of Guam, chapter as applicable, see section 1424b of Title 48, Territories and Insular Possessions.

### § 601. Creation; Director and Deputy Director

The Administrative Office of the United States Courts shall be maintained at the seat of government. It shall be supervised by a Director and a Deputy Director appointed and subject to removal by the Supreme Court.

(June 25, 1948, ch. 646, 62 Stat. 913; Sept. 23, 1959, Pub. L. 86-370, § 5(a)(1), 73 Stat. 652.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C. 1940 ed., § 444 (Mar. 3, 1911, ch. 231, § 302 as added Aug. 7, 1939, ch. 501, § 1, 53 Stat. 1223).

This section contains part of section 444 of title 28, U.S.C., 1940 ed. The remainder of said section 444 is incorporated in sections 603, 606 and 608 of this title.

Changes were made in phraseology.

#### AMENDMENTS

1959—Pub. L. 86-370 substituted "Deputy Director" for "Assistant Director".

### Effective Date of 1959 Amendment

Amendment of section by Pub. L. 86-370 was effective Sept. 23, 1959.

### Reference to Assistant Director Deemed Reference to Deputy Director

Section 5(a)(4) of Pub. L. 86-370 provided that: "Whenever the Assistant Director of the Administrative Office of the United States Courts is referred to in any other law, such reference shall be deemed to be to the Deputy Director of the Administrative Office of the United States Courts."

### Continuation of Law Existing on Sept. 1, 1948

Section 2(b) of act June 25, 1948, provided that: "The provisions of title 28, Judiciary and Judicial Procedure, of the United States Code, set out in section 1 of this Act, with respect to the organization of each of the several courts therein provided for and of the Administrative Office of the United States Courts, shall be construed as continuations of existing law, and the tenure of the judges, officers, and employees thereof and of the United States attorneys and marshals and their deputies and assistants, in office on the effective date of this Act [Sept. 1, 1948], shall not be affected by its enactment, but each of them shall continue to serve in the same capacity under the appropriate provisions of title 28, as set out in section 1 of this Act, pursuant to his prior appointment: *Provided, however,* That each circuit court of appeals shall, as in said title 28 set out, hereafter be known as a United States court of appeals. No loss of rights, interruption of jurisdiction, or prejudice to matters pending in any of such courts on the effective date of this Act shall result from its enactment."

## § 602. Employees

The Director, subject to the civil service laws, may appoint necessary employees of the Administrative Office.

(June 25, 1948, ch. 646, 62 Stat. 913.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 445 (Mar. 3, 1911, ch. 231, § 303, as added Aug. 7, 1939, ch. 501, § 1, 53 Stat. 1223).

This section contains provisions in section 445 of title 28, U.S.C., 1940 ed., for appointment of employees.

Words "with the approval of the Supreme Court" were omitted to relieve the court of the burden of approving appointments which in practice should properly be made by the Director under the supervision of the Judicial Conference of the United States.

The remainder of section 445 of title 28, U.S.C., 1940 ed., is incorporated in sections 603 and 607 of this title.

Changes were made in phraseology.

### References in Text

The civil service laws, referred to in text, are set forth in Title 5, Government Organization and Employees. See, particularly, section 3301 et seq. of that title.

### Employment of Experts or Consultants; Rates

Pub. L. 86-370, § 5(b), Sept. 23, 1959, 73 Stat. 652, provided that: "The Director of the Administrative Office of the United States Courts, may, in accordance with the provisions of section 15 of the Administrative Expenses Act of 1946 [section 3109 of Title 5, Government Organization and Employees], procure the temporary or intermittent services of experts or consultants at rates not in excess of $75 per diem."

## § 603. Salaries

The salary of the Director shall be the same as the salary of a district judge. The salary of the Deputy Director shall be in the same amount as the annual rate of basic pay for positions at level V of the Executive Schedule under section 5316 of title 5.

The Director shall fix the compensation of Administrative Office employees according to the Classification Act of 1949.

(June 25, 1948, ch. 646, 62 Stat. 913; Oct. 15, 1949, ch. 695, §§ 5(b), 6(b), 63 Stat. 881; Oct. 31, 1951, ch. 655, § 43(b), 65 Stat. 725; Sept. 23, 1959, Pub. L. 86-370, § 5(a)(1), 73 Stat. 652; Aug. 14, 1964, Pub. L. 88-426, title IV, § 403(g), 78 Stat. 434; Dec. 16, 1967, Pub. L. 90-206, title II, § 213(d), 81 Stat. 635.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., §§ 444, 445 (Mar. 3, 1911, ch. 231, §§ 302, 303, as added Aug. 7, 1939, ch. 501, § 1, 53 Stat. 1223).

This section consolidates parts of title 28, U.S.C., 1940 ed., §§ 444, 445. The remainder of said sections are incorporated in sections 601, 602, 606, 607, and 608 of this title.

The figure "$9,376.50" was substituted for "$7,500" as the salary of the Assistant Director in conformity with section 934 of title 5, U.S.C., 1940 ed., Executive Departments and Government Officers and Employees.

Changes were made in phraseology.

### Senate Revision Amendment

The [former] figure, "$7,500," with respect to salary of the Assistant Director, was restored by Senate amendment. See 80th Congress Senate Report No. 1559, amendments Nos. 15 and 65.

### References in Text

The Classification Act of 1949, referred to in text, is act Oct. 28, 1949, ch. 782, 63 Stat. 972, which was repealed by Pub. L. 89-554, § 8(a), Sept. 6, 1966, 80 Stat. 632, and reenacted by the first section thereof as chapter 51 (§ 5101 et seq.) and subchapter III (§ 5331 et seq.) of chapter 53 of Title 5, Government Organization and Employees.

### Amendments

1967—Pub. L. 90-206 increased the salaries of the Director and the Deputy Director from $27,000 and $26,000 per year to a salary equivalent to a United States district judge and the same amount of basic pay for positions at level V of the Executive Schedule under section 5316 of Title 5, respectively.

1964—Pub. L. 88-426 substituted "$27,000 for "$15,000 and "$26,000" for "$12,500".

1959—Pub. L. 86-370 substituted "Deputy Director" for "Assistant Director".

1951—Act Oct. 31, 1951, substituted reference in second paragraph to the Classification Act of 1949 for reference to former Classification Act of 1923.

1949—Act Oct. 15, 1949, increased the compensation of the Director from $10,000 to $15,000 per annum and the Assistant Director from $7,500 to $12,500 per annum.

### Effective Date of 1967 Amendment

Section 220(a)(3) of Pub. L. 90-206 provided, except as otherwise expressly provided, that: "Sections 213(d) and (e) [which amended this section and section 792 of this title], 214(j), (k), (*l*), (n), and (*o*) [which amended sections 60j and 61-1 of Title 2, The Congress, and section 5533 of Title 5, Government Organization and Employees], 215 [which amended sections 5314 to 5316 of Title 5] 217 [which amended section 5545 of Title 5], 219 [which amended sections 136a and 136a-1 of Title 2, sections 42a and 51a of Title 31, Money and Finance, sections 162a, 166b, and 166b-1 of Title 40, Public Buildings, Property, and Works, and section 39a of Title 44, Public Printing and Documents], and

224(c) [which amended material set out as a note under section 102 of Title 2], shall become effective at the beginning of the first pay period which begins on or after the date of enactment of this title [Dec. 16, 1967]."

### Effective Date of 1964 Amendment

Amendment by Pub. L. 88-426 effective on the first day of the first pay period which begins on or after July 1, 1964, except to the extent provided in section 501(c) of Pub. L. 88-426.

### Effective Date of 1959 Amendment

Amendment by Pub. L. 86-370 was effective Sept. 23, 1959.

### Effective Date of 1949 Amendment

The increased compensation provided for by act Oct. 15, 1949, took effect on the first day of the first pay period which began after Oct. 15, 1949, by the provisions of section 9 of act Oct. 15, 1949.

### 1977 Increases in Salaries

Salaries of the Director and Deputy Director increased respectively to $54,500 and $48,500 per annum, upon recommendation of the President of the United States, see note set out under section 358 of Title 2, The Congress.

### 1969 Increases in Salaries of Director and Deputy Director

Salaries of the Director and Deputy Director increased respectively from $30,000 and $28,000 to $40,000 and $36,000 per annum, commencing February 14, 1969, upon recommendation of the President of the United States, see note set out under section 358 of Title 2, The Congress.

### 1967 Increase in Compensation Rates

Section 213(a) of Pub. L. 90-206 provided that: "The rates of basic compensation of officers and employees in or under the judicial branch of the Government whose rates of compensation are fixed by or pursuant to paragraph (2) of subdivision of a section 62 of the Bankruptcy Act (11 U.S.C. 102(a)(2)), section 3656 of Title 18, United States Code, the third sentence of section 603, sections 671 to 675, inclusive, or section 604(a)(5), of Title 28, United States Code, insofar as the latter section applies to graded positions, are hereby increased by amounts reflecting the respective applicable increases provided by section 202(a) of this title [amending section 5332(a) of Title 5, Government Organization and Employees] in corresponding rates of compensation for officers and employees subject to section 5332 of Title 5, United States Code. The rates of basic compensation of officers and employees holding ungraded positions and whose salaries are fixed pursuant to such section 604(a)(5) may be increased by the amounts reflecting the respective applicable increases provided by section 202(a) of this title [amending section 5332(a) of Title 5] in corresponding rates of compensation for officers and employees subject to section 5332 of Title 5, United States Code."

Section 213(a) of Pub. L. 90-206 effective as of the beginning of the first pay period which begins on or after Oct. 1, 1967, see section 220(a)(2) of Pub. L. 90-206, set out as a note under section 5332 of Title 5.

### 1966 Increase in Compensation Rates; Effective Date

Pub. L. 89-504, title II, § 202(a), July 18, 1966, 80 Stat. 293, provided that: "The rates of basic compensation of officers and employees in or under the judicial branch of the Government whose rates of compensation are fixed by or pursuant to paragraph (2) of subdivision a of section 62 of the Bankruptcy Act (11 U.S.C. 102(a)(2)), section 3656 of title 18, United States Code, the third sentence of section 603, sections 671 to 675, inclusive, or section 604(a)(5), of title 28, United States Code, insofar as the latter section applies to graded positions, are hereby increased by amounts reflecting the respective applicable increases provided by section 102(a) of title I of this Act [amending section 1113(b) of former Title 5, Executive Departments and Government Officers and Employees] in corresponding rates of compensation for officers and employees subject to the Classification Act of 1949, as amended. The rates of basic compensation of officers and employees holding ungraded positions and whose salaries are fixed pursuant to such section 604(a)(5) may be increased by the amounts reflecting the respective applicable increases provided by section 102(a) of title I of this Act in corresponding rates of compensation for officers and employees subject to the Classification Act of 1949, as amended [chapter 51 and subchapter III of chapter 53 of Title 5, Government Organization and Employees]."

Section 203 of Pub. L. 89-504 provided that:

"This title [sections 201-203 of Pub. L. 89-504] shall become effective as follows:

"(1) This section and section 201 [enacting Short Title note hereunder] shall become effective on the date of enactment of this Act [July 18, 1966],

"(2) Section 202 [enacting provisions set out as note above and under sections 604 and 753 of this title] shall become effective on the first day of the first pay period which begins on or after July 1, 1966."

### 1965 Increase in Compensation Rates

Pub. L. 89-301, § 12(a), Oct. 29, 1965, 79 Stat. 1121, provided that: "The rates of basic compensation of officers and employees in or under the judicial branch of the Government whose rates of compensation are fixed by or pursuant to paragraph (2) of subdivision a of section 62 of the Bankruptcy Act (11 U.S.C. 102(a)(2)) section 3656 of Title 18, United States Code, the third sentence of section 603, sections 671 to 675, inclusive, or section 604(a)(5), of Title 28, United States Code, insofar as the latter section applies to graded positions, are hereby increased by amounts reflectiong the respective applicable increases provided by section 2(a) of this Act [amending section 1113(b) of former Title 5, Executive Departments and Government Officers and Employees] in corresponding rates of compensation for officers and employees subject to the Classification Act of 1949, as amended [chapter 51 and subchapter III of chapter 53 of Title 5, Government Organization and Employees]. The rates of basic compensation of officers and employees holding ungraded positions and whose salaries are fixed pursuant to such section 604(a)(5) [section 604(a)(5) of this title] may be increased by the amounts reflecting the respective applicable increases provided by section 2(a) of this Act in corresponding rates of compensation for officers and employees subject to the Classification Act of 1949, as amended [chapter 51 and subchapter III of chapter 53 of Title 5]."

### 1964 Increase in Compensation Rates

Section 402(a) of Pub. L. 88-426, title IV, Aug. 14, 1964, 78 Stat. 433, provided that: "The rates of basic compensation of officers and employees in or under the judicial branch of the Government whose rates of compensation are fixed by or pursuant to paragraph (2) of subdivision a of section 62 of the Bankruptcy Act (11 U.S.C. 102(a)(2)), section 3656 of title 18, United States Code, the third sentence of section 603, sections 672 to 675, inclusive, or section 604(a)(5), of title 28, United States Code, insofar as the latter section applies to graded positions, are hereby increased by amounts reflecting the respective applicable increases provided by title I of this Act in corresponding rates of compensation for officers and employees subject to the Classification Act of 1949, as amended [chapter 51 and subchapter III of chapter 53 of Title 5, Government Organization and Employees]. The rates of basic compensation of officers and employees holding ungraded positions and whose salaries are fixed pursuant to section 604(a)(5) [section 604(a)(5) of this title] may be increased by the amounts reflecting the respective applicable increases provided by title I of this Act in corresponding rates of compensation for officers and employees subject to the Classification Act of 1949, as amended [chapter 51 and subchapter III of chapter 53 of Title 5]."

### 1962 Increase in Compensation Rates

Section 1004(a) of Pub. L. 87-793, Oct. 11, 1962, 76 Stat. 866, provided that: "The rates of basic compensation of officers and employees in or under the judicial branch of the Government whose rates of compensation are fixed by or pursuant to paragraph (2) of subdivision a of section 62 of the Bankruptcy Act (11 U.S.C. 102(a)(2)), section 3656 of title 18 of the United States Code, the third sentence of section 603, section 604(a)(5), or section 672 to 675 inclusive, of title 28 of the United States Code, or section 107(a)(6) of the Act of July 31, 1956, as amended (5 U.S.C. 2206(a)(6)) [section 2206(a)(b) of former Title 5, Executive Departments and Government Officers and Employees], are hereby increased by two amounts, the first amount to be effective for the period beginning as of the first day of the first pay period which begins on or after the date of enactment of this Act [Oct 11, 1962], and ending immediately prior to the first day of the first pay period which begins on or after January 1, 1964, and the second amount to be effective on the first day of the first pay period which begins on or after January 1, 1964, and thereafter, which reflect the respective applicable increases provided by title II of this part in corresponding rates of compensation for officers and employees subject to the Classification Act of 1949, as amended [chapter 51 and subchapter III of chapter 53 of Title 5, Government Organization and Employees]."

### 1960 Increase in Compensation Rates

Pub. L. 86-568, title I, § 116(a), July 1, 1960, 74 Stat. 303, provided that: "The rates of basic compensation of officers and employees in or under the judicial branch of the Government whose rates of compensation are fixed by or pursuant to paragraph (2) of subdivision a of section 62 of the Bankruptcy Act (11 U.S.C. 102(a)(2)), section 3656 of title 18 of the United States Code, the third sentence of section 603, section 604(a)(5), or sections 672 to 675, inclusive, of title 28 of the United States Code, or section 107(a)(6) of the Act of July 31, 1956, as amended (5 U.S.C. 2206(a)(6)), are hereby increased by amounts equal to the increases provided by section 612 [112] of this part [amending former section 1113(b) of Title 5] in corresponding rates of compensation paid to officers and employees subject to the Classification Act of 1949, as amended [chapter 51 and subchapter III of chapter 53 of Title 5, Government Organization and Employees]."

### 1960 Increase in Compensation Rates Inapplicable to Deputy Director

Pub. L. 87-367, title III, § 302(d), Oct. 4, 1961, 75 Stat. 793, provided that: "On and after the effective date of this subsection, section 116(a) of the Federal Employees Salary Increase Act of 1960 (Part B of the Act of July 1, 1960; 74 Stat. 303; Public Law 86-568) [set out as a note above] shall not be applicable with respect to the Deputy Director of the Administrative Office of the United States Courts."

### 1958 Increase in Compensation Rates

Pub. L. 85-462, § 3(a), June 20, 1958, 72 Stat. 207, provided that: "The rates of basic compensation of officers and employees in or under the judicial branch of the Government whose rates of compensation are fixed pursuant to paragraph (2) of subdivision a of section 62 of the Bankruptcy Act (11 U.S.C. (a)(2)), section 3656 of title 18 of the United States Code, the third sentence of section 603, section 604(a)(5), or sections 672 to 675 inclusive, of title 28 of the United States Code are hereby increased by amounts equal to the increases provided by section 2 of this Act in corresponding rates of compensation paid to officers and employees subject to the Classification Act of 1949, as amended [chapter 51 and subchapter III of chapter 53 of Title 5, Government Organization and Employees]."

Section 2 of this Act, referred to above, amended section 1113(b) of former Title 5, Executive Departments and Government Officers and Employees, to increase compensation rates.

### 1955 Increase in Compensation Rates

Act June 28, 1955, ch. 189, § 3(a), 69 Stat. 175, provided that: "The rates of basic compensation of officers and employees in or under the judicial branch of the Government whose rates of compensation are fixed pursuant to paragraph (2) of subdivision a of section 62 of the Bankruptcy Act (11 U.S.C., sec. 102(a)(2)), section 3656 of title 18 of the United States Code, the second and third sentences of section 603, section 604(a)(5), or sections 672 to 675, inclusive, of title 28 of the United States Code are hereby increased by amounts equal to the increases provided by section 2 of this Act in corresponding rates of compensation paid to officers and employees subject to the Classification Act of 1949, as amended [chapter 51 and subchapter III of chapter 53 of Title 5, Government Organization and Employees]."

### 1951 Increase in Compensation Rates

Act Oct. 24, 1951, ch. 554, § 1(c), 65 Stat. 613, provided that: "The rates of basic compensation of officers and employees in or under the judicial branch of the Government whose rates of compensation are fixed pursuant to section 62(2) of the Bankruptcy Act (11 U.S.C. § 102(a)(2)), section 3656 of title 18 of the United States Code the second and third sentences of section 603, section 604(5), or sections 672 to 675, inclusive, of title 28 of the United States Code, or who are appointed pursuant to section 792(b) of title 28 of the United States Code, are hereby increased by amounts equal to the increases provided by subsections (a) and (b) in corresponding rates of compensation paid to officers and employees subject to the Classification Act of 1949 [chapter 51 and subchapter III of chapter 53 of Title 5, Government Organization and Employees]."

### Reference to Assistant Director Deemed Reference to Deputy Director

References in any other law to Assistant Director of the Administrative Office of the United States Courts deemed to be reference to the Deputy Director of the Administrative Office of the United States Courts, see note set out under section 601 of this title.

## § 604. Duties of Director generally

(a) The Director shall be the administrative officer of the courts, and under the supervision and direction of the Judicial Conference of the United States, shall:

(1) Supervise all administrative matters relating to the offices of clerks and other clerical and administrative personnel of the courts;

(2) Examine the state of the dockets of the courts; secure information as to the courts' need of assistance; prepare and transmit quarterly to the chief judges of the circuits, statistical data and reports as to the business of the courts;

(3) Submit to the annual meeting of the Judicial Conference of the United States, at least two weeks prior thereto, a report of the activities of the Administrative Office and the state of the business of the courts, together with the statistical data submitted to the chief judges of the circuits under paragraph (a)(2) of this section, and the Director's

recommendations, which report, data and recommendations shall be public documents.

(4) Submit to Congress and the Attorney General copies of the report, data and recommendations required by paragraph (a)(3) of this section;

(5) Fix the compensation of clerks of court, deputies, librarians, criers, messengers, law clerks, secretaries, stenographers, clerical assistants, and other employees of the courts whose compensation is not otherwise fixed by law;

(6) Determine and pay necessary office expenses of courts, judges, and those court officials whose expenses are by law allowable, and the lawful fees of United States Commissioners;

(7) Regulate and pay annuities to widows and surviving dependent children of justices and judges of the United States, Directors of the Federal Judicial Center, and Directors of the Administrative Office, and necessary travel and subsistence expenses incurred by judges, court officers and employees, and officers and employees of the Administrative Office, and the Federal Judicial Center, while absent from their official stations on official business.

(8) Disburse, directly or through the several United States marshals, moneys appropriated for the maintenance and operation of the courts;

(9) Establish pretrial services agencies pursuant to section 3152 of title 18, United States Code;

(10) Purchase, exchange, transfer, distribute, and assign the custody of lawbooks, equipment, and supplies needed for the maintenance and operation of the courts, the Federal Judicial Center, the offices of the United States magistrates and commissioners, and the offices of pretrial services agencies;

(11) Audit vouchers and accounts of the courts, the Federal Judicial Center, the pretrial service agencies, and their clerical and administrative personnel;

(12) Provide accommodations for the courts, the Federal Judicial Center, the pretrial services agencies and their clerical and administrative personnel;

(13) Perform such other duties as may be assigned to him by the Supreme Court or the Judicial Conference of the United States.

(b) The clerical and administrative personnel of the courts shall comply with all requests by the Director for information or statistical data as to the state of court dockets.

(c) Inspection of court dockets outside the continental United States may be made through United States officials residing within the jurisdiction where the inspection is made.

(d) The Director, under the supervision and director of the conference, shall:

(1) supervise all administrative matters relating to the offices of the United States magistrates;

(2) gather, compile, and evaluate all statistical and other information required for the performance of his duties and the duties of the conference with respect to such officers;

(3) lay before Congress annually statistical tables and other information which will accurately reflect the business which has come before the various United States magistrates;

(4) prepare and distribute a manual, with annual supplements and periodic revisions, for the use of such officers, which shall set forth their powers and duties, describe all categories of proceedings that may arise before them, and contain such other information as may be required to enable them to discharge their powers and duties promptly, effectively, and impartially.

(e) The Director may promulgate appropriate rules and regulations approved by the conference and not inconsistent with any provision of law, to assist him in the performance of the duties conferred upon him by subsection (d) of this section. Magistrates shall keep such records and make such reports as are specified in such rules and regulations.

(June 25, 1948, ch. 646, 62 Stat. 914; Aug. 3, 1956, ch. 944, § 3, 70 Stat. 1026; Dec. 20, 1967, Pub. L. 90-219, title II, § 203(a)-(c), 81 Stat. 669; Oct. 17, 1968, Pub. L. 90-578, title II, § 201, 82 Stat. 1114; Aug. 22, 1972, Pub. L. 92-397, § 4, 86 Stat. 580; Jan. 3, 1975, Pub. L. 93-619, title II, § 204, 88 Stat. 2089.)

### HISTORICAL AND REVISION NOTES

Based on sections 726-1 and 726a of title 18, U.S.C., 1940 ed., Criminal Code and Criminal Procedure, and sections 1130(a)(b) and 1131 of title 26, U.S.C., 1940 ed., Internal Revenue Code, title 28, U.S.C., 1940 ed., §§ 9, 128, 222a, 245, 268a, 278a, 302-306, 374b, 446, 447, 450, 544, 545, 547, 557, 558, 560, 561, 561a, 562, 563, 565, 566, 595, and 596 and sections 11-204 and 11-403, District of Columbia Code, 1940 ed. (R.S. §§ 1075, 1085; Mar. 3, 1891, ch. 517, §§ 2, 9, 26 Stat. 826, 829; Feb. 9, 1893, ch. 74, § 4, 27 Stat. 435; July 30, 1894, ch. 172, § 1, 28 Stat. 160; Mar. 3, 1901, ch. 854, § 224, 31 Stat. 1224; June 30, 1902, ch. 1329, 32 Stat. 528; Mar. 3, 1905, ch. 1487, 33 Stat. 1259; Mar. 3, 1911, ch. 231, § 5, 36 Stat. 1088; Mar. 3, 1911, ch. 231, § 118a, as added June 17, 1930, ch. 509, 46 Stat. 774; Mar. 3, 1911, ch. 231, § 118b, as added Feb. 17, 1936, ch. 75, 49 Stat. 1140; Mar. 3, 1911, ch. 231, §§ 140, 163, 171, 189-193, 291, 36 Stat. 1136, 1140, 1141, 1143, 1167; Mar. 3, 1911, ch. 231, §§ 304, 305, 308, as added Aug. 7, 1939, ch. 501, § 1, 53 Stat. 1223; Aug. 23, 1912, ch. 350, 37 Stat. 412; Feb. 26, 1919, ch. 49, §§ 1, 2, 3, 4, 5, 7, 8, 40 Stat. 1182; July 19, 1919, ch. 24, § 1, 41 Stat. 210; Nov. 4, 1919, ch. 93, § 1, 41 Stat. 338; Feb. 11, 1921, ch. 46, 41 Stat. 1099; Feb. 22, 1921, ch. 70, § 7, 41 Stat. 1144; Mar. 4, 1921, ch. 161, 41 Stat. 1412; June 1, 1922, ch. 204, title II, 42 Stat. 616; Jan. 3, 1923, ch. 21, title II, 42 Stat. 1084; Mar. 4, 1923, ch. 265, 42 Stat. 1488; May 28, 1924, ch. 204, title II, 43 Stat. 221; Feb. 27, 1925, ch. 364, title II, 43 Stat. 1030; Apr. 29, 1926, ch. 195, title II, 44 Stat. 346, 347; May 21, 1928, ch. 659, 45 Stat. 645; Mar. 2, 1929, ch. 488, § 1, 45 Stat. 1475; June 16, 1930, ch. 494, 46 Stat. 589; May 17, 1932, ch. 190, 47 Stat. 158; June 25, 1936, ch. 804, 49 Stat. 1921; Apr. 27, 1938, ch. 180, title II, § 1, 52 Stat. 264; Feb. 10, 1939, ch. 2, §§ 1130(a)(b), 1131, 53 Stat. 162, 163; June 29, 1939, ch. 248, title II, 53 Stat. 902; May 14, 1940, ch. 189, titles III, IV, 54 Stat. 204, 209, 210; June 28, 1941, ch. 258, title IV, 55 Stat. 300-302; July 2, 1942, ch. 472, title IV, 56 Stat. 503, 504; June 28, 1943, ch. 173, title II, § 201, 57 Stat. 242, 243; June 26, 1944, ch. 277, title II, § 201, 58 Stat. 357; Dec. 7, 1944, ch. 522, § 1, 58 Stat. 796; May 21, 1945, ch. 129, titles II, IV, 59 Stat. 184, 199; July 5, 1946, ch. 541, title IV, 60 Stat. 478, 479).

For purposes of uniformity, all provisions of law governing the regulation and allowance of office, travel, and subsistence expenses of all officers and employees of the courts, except those provisions relating to Supreme Court officers and employees, are incorporated in subsection (a)(6)(7) of this section. Likewise the provisions respecting the compensation of court officers and employees, except those of the Supreme Court, are incorporated in subsection (a)(5). In each instance the power to fix and determine such salaries and expenses is transferred to the Director of the Administrative Office of the United States Courts. This change is in conformity with the Administrative Office Act 1939 included in this chapter.

Compensation of bailiffs however is provided by sections 713 and 755 of this title and that of court reporters by section 753 of this title.

Salaries and travel expenses of Court of Claims Commissioners are covered by section 792 of this title.

The language "and the lawful fees of United States Commissioners" in subsection (a)(6) and "the offices of the United States Commissioners" in subsection (a)(9) is new. It conforms with sections 633, 636 and 639 of this title.

Subsection (a)(5)(7) covers the provisions of section 726-1 and 726a of title 18, U.S.C., 1940 ed., which provided that probation officers' salaries should not be less than $1,800 nor more than $3,600 per annum and their traveling expenses should not exceed more than 4 cents per mile.

Words "and officers and employees of the Administrative Office" were added in subsection (a)(7) to expressly authorize travel and subsistence expenses of such officers and employees.

The power to fix such pay and allowances is transferred to the Director as above indicated, and conforms with the Administrative Office Act of 1939. For further explanation of the general supervision of probation officers, see reviser's note under section 3654, H. Rept. to accompany H.R. 3190 for revision of title 18, U.S.C.

Subsection (a)(8) covers the provisions of section 1131 of title 26, U.S.C. 1940 ed. Such section 1131 authorized the Tax Court, successor to the Board of Tax Appeals, to make expenditures for personal services, rent, law books, reference books, periodicals, and provided that all expenditures should be paid out of appropriations for the Tax Court, on itemized vouchers approved by the court.

Two references to "officials and employees covered by this chapter" were changed to "clerical and administrative personnel," following the language of paragraph (a)(1), conferring general power to supervise such personnel as respects administrative matters.

Similar language was used in paragraph (b) instead of "The clerks of the district courts, their deputies and assistants, and all other employees of said courts."

The provisions of section 374b of title 28, U.S.C., 1940 ed., based on successive acts relating to classification and compensation of secretaries and law clerks were omitted as temporary and unnecessary in revision, in view of subsection (a)(5) of this section under which the salaries of all personnel are necessarily limited by current appropriation acts.

For increases in basic rates of compensation for other judicial officers and employees see, also, section 521 of Act June 30, 1945, ch. 212.

The designation "senior circuit judges" was changed to "chief judges of the circuits" in conformity with section 45 of this title.

Provisions of section 11-204 of District of Columbia Code, 1940 ed., relating to appointment of clerk of the United States Court of Appeals for the District of Columbia, and deputy clerk, crier, and messenger thereof, and the provisions relating to accounting for fees, are incorporated in sections 711 and 713 of this title. Provisions of said section, requiring the clerk of such court to give bond, were omitted as covered by section 952 of this title. Provisions of said section, relating to regulation of clerk's fees by such court were omitted so as to render uniform the method of such regulation as prescribed by section 1913 of this title, and the provisions of said section, placing a maximum of five hundred dollars per year on the office expenditures of the clerk of such court, were omitted as inconsistent with this consolidated section.

For distribution of other provisions of sections on which this section is based, see Distribution Table.

Changes were made in phraseology and arrangement.

### SENATE REVISION AMENDMENTS

By Senate amendment, all provisions relating to the Tax Court were eliminated, therefore, as finally enacted, sections 1130(a)(b) and 1131 of Title 26, U.S.C., Internal Revenue Code [1940 ed.], did not constitute part of the source of this section. However, no change in the text of the section was necessary. See 80th Congress Senate Report No. 1559.

As finally enacted, part of act July 9, 1947, ch. 211, title IV, 61 Stat. 304, 305, which was classified to title 28, U.S.C., 1946 ed., § 374b, became one of the sources of this section and was accordingly included in the schedule of repeals by Senate amendment. See 80th Congress Senate Report No. 1559.

### AMENDMENTS

1975—Subsec. (a)(9). Pub. L. 93-619 added subsec. (a)(9). Former subsec. (a)(9) redesignated (a)(10).

Subsec. (a)(10). Pub. L. 93-619 redesignated former subsec. (a)(9) as (a)(10), and in subsec. (a)(10) as so redesignated, substituted "the offices of the United States magistrates and commissioners, and the offices of pretrial services agencies" for and the Administrative Office and the offices of the United States magistrates". Former subsec. (a)(10) redesignated (a)(11).

Subsec. (a)(11). Pub. L. 93-619 redesignated former subsec. (a)(10) as (a)(11), and in subsec. (a)(11) as so redesignated, added reference to pretrial service agencies. Former subsec. (a)(11) redesignated (a)(12).

Subsec. (a)(12). Pub. L. 93-619 redesignated former subsec. (a)(11) as (a)(12), and in subsec. (a)(12) as so redesignated, added reference to pretrial service agencies. Former subsec. (a)(12) redesignated (a)(13).

Subsec. (a)(13). Pub. L. 93-619 redesignated former subsec. (a)(12) as (a)(13).

1972—Subsec. (a)(7). Pub. L. 92-397 substituted "children of justices and judges of the United States" for "children of judges".

1968—Subsec. (a)(9). Pub. L. 90-578, § 201(a), substituted "United States magistrates" for "United States Commissioners".

Subsecs. (d), (e). Pub. L. 90-578 § 201(b), added subsecs. (d) and (e).

1967—Subsec. (a)(7). Pub. L. 90-219, § 203(a), inserted ", Directors of the Federal Judicial Center, and Directors of the Administrative Office," following "judges" and "and the Federal Judicial Center," following "Administrative Office".

Subsec. (a)(9). Pub. L. 90-219, § 203(b), inserted ", the Federal Judicial Center," following "courts".

Subsec. (a)(10). Pub. L. 90-219, § 203(c), inserted ", the Federal Judicial Center," following "courts".

Subsec. (a)(11). Pub. L. 90-219, § 203(c), inserted", the Federal Judicial Center," following "courts".

1956—Subsec. (a)(7). Act Aug. 3, 1956, inserted the words "annuities to widows and surviving dependent children of judges and" following the words "Regulate and pay".

### EFFECTIVE DATE OF 1968 AMENDMENT

Amendment by Pub. L. 90-578 effective Oct. 17, 1968, except when a later effective date is applicable, which is the earlier of date when implementation of amendment by appointment by magistrates and assumption of office takes place or third anniversary of enactment of Pub. L. 90-578 on Oct. 17, 1968, see section 403 of Pub. L. 90-578, set out as an Effective Date of 1968 Amendment note under section 631 of this title.

### 1970 INCREASE IN PAY RATES OF JUDICIAL BRANCH EMPLOYEES WHOSE RATES OF PAY ARE FIXED BY ADMINISTRATIVE ACTION

Adjustment of rates of pay of judicial branch employees who rates of pay are fixed by administrative action by not to exceed the amounts of the adjustment for corresponding rates for employees subject to the section 2(a) of Pub. L. 91-231, which raised such corresponding rates by 6 percent, effective on the first day of the first pay period which begins on or after Dec. 27, 1969, see Pub. L. 91-231, set out as a note under section 5332 of Title 5, Government Organization and Employees.

### COMPENSATION OF SECRETARIES AND LAW CLERKS

Pub. L. 94-362, title IV, § 401, July 14, 1976, 90 Stat. 953, provided in part: "That the salaries of secretaries to circuit and district judges shall not exceed the compensation established in chapter 51 of title 5, United States Code, for General Schedule grade (GS) 5, 6, 7, 8, 9, or 10, and that the salaries of law clerks to circuit and district judges shall not exceed the compensation established in chapter 51 of title 5, United States Code, for General Schedule grade (GS) 7, 8, 9, 10, 11, or 12: *Provided further*, That (exclusive of step increases corresponding with those provided for by chapter 53 of title 5 of the United States Code, post differential and allowances for employees stationed outside the continental United States and in Alaska and of compensation paid for temporary assistance needed because of an emergency) the aggregate salaries paid to secretaries and law clerks appointed by each of the circuit and district judges shall not exceed $63,947 and $38,767 per annum, respectively, except in the case of the chief judge of each circuit and the chief judge of each district court having five or more district judges, in which case the aggregate salaries shall not exceed $78,771 and $49,813 per annum, respectively: *Provided further*, That the chief judge of each circuit may appoint a senior law clerk to the court at not more than $31,500 per annum, without regard to the limitations referred to above."

Similar provisions were contained in the following acts—

Oct. 21, 1975, Pub. L. 94-121, title IV, § 401, 89 Stat. 630
Oct. 5, 1974, Pub. L. 93-433, title IV, § 401, 88 Stat. 1202
Nov. 27, 1973, Pub. L. 93-162, title IV, § 401, 87 Stat. 651
Oct. 25, 1972, Pub. L. 92-544, title IV, § 401, 86 Stat. 1126
Aug. 10, 1971, Pub. L. 92-77, title IV, § 401, 85 Stat. 262
Oct. 21, 1970, Pub. L. 91-472, title IV, § 401, 84 Stat. 1056
Dec. 24, 1969, Pub. L. 91-153, title IV, § 401, 83 Stat. 419
Aug. 9, 1968, Pub. L. 90-470, title IV, § 401, 82 Stat. 685
Nov. 8, 1967, Pub. L. 90-133, title IV, § 401, 81 Stat. 427
Nov. 8, 1966, Pub. L. 89-797, title IV, § 401, 80 Stat. 1499
Sept. 2, 1965, Pub. L. 89-164, title IV, § 401, 79 Stat. 638
Aug. 31, 1964, Pub. L. 88-527, title IV, § 401, 78 Stat. 729
Dec. 30, 1963, Pub. L. 88-245, title IV, § 401, 77 Stat. 795
Oct. 18, 1962, Pub. L. 87-843, title IV, § 401, 76 Stat. 1099
Sept. 21, 1961, Pub. L. 87-264, title III, § 301, 75 Stat. 555
Aug. 31, 1960, Pub. L. 86-678, title III, § 301, 74 Stat. 566
July 13, 1959, Pub. L. 86-84, title III, § 301, 73 Stat. 192
June 30, 1958, Pub. L. 85-474, title III, § 301, 72 Stat. 254
June 11, 1957, Pub. L. 85-40, title III, § 301, 70 Stat. 65
June 20, 1956, ch. 414, title III, § 301, 70 Stat. 310
July 7, 1955, ch. 279, title III, § 301, 69 Stat. 276
July 2, 1954, ch. 455, title II, § 201, 68 Stat. 410
Aug. 1, 1953, ch. 304, title II, § 201, 67 Stat. 334
July 10, 1952, ch. 651, title IV, § 401, 66 Stat. 569
Oct. 22, 1951, ch. 533, title IV, § 401, 65 Stat. 596
Sept. 6, 1950, ch. 896, ch. III, title IV, § 401, 64 Stat. 631

### 1967 INCREASE IN LIMITATION ON AGGREGATE SALARIES OF SECRETARIES AND LAW CLERKS

Pub. L. 90-206, title II, § 213(b), Dec. 16, 1967, 81 Stat. 635, provided that: "The limitations provided by applicable law on the effective date of this section [see Effective Date of 1967 Amendment Note under section 5332 of Title 5, Government Organization and Employees] with respect to the aggregate salaries payable to secretaries and law clerks of circuit and district judges are hereby increased by amounts which reflect the respective applicable increases provided by section 202(a) of this title [amending section 5332(a) of Title 5] in corresponding rates of compensation for officers and employees subject to section 5332 of Title 5, United States Code".

Section 213(b) of Pub. L. 90-206 effective as of the beginning of the first pay period which begins on or after Oct. 1, 1967, see section 220(a)(2) of Pub. L. 90-206, set out as a note under section 5332 of Title 5.

### 1966 INCREASE IN LIMITATION ON AGGREGATE SALARIES OF SECRETARIES AND LAW CLERKS

Pub. L. 89-504, title II, § 202(b), July 18, 1966, 80 Stat. 294, provided that: "The limitations provided by applicable law on the effective date of this section [see note below] with respect to the aggregate salaries payable to secretaries and law clerks of circuit and district judges are hereby increased by amounts which reflect the respective applicable increases provided by section 102(a) of title I of this Act [amending section 1113(b) of former Title 5, Executive Departments and Government Officers and Employees] in corresponding rates of compensation for officers and employees subject to the Classification Act of 1949, as amended [chapter 51 and subchapter III of chapter 53 of Title 5, Government Organization and Employees]."

Provision effective the first day of the first pay period which begins on or after July 1, 1966, see section 203 of Pub. L. 89-504, set out as a note under section 603 of this title.

### 1965 INCREASE IN LIMITATION ON AGGREGATE SALARIES OF SECRETARIES AND LAW CLERKS

Pub. L. 89-301, § 12(b), Oct. 29, 1965, 79 Stat. 1122, provided that: "The limitations provided by applicable law on the effective date of this section with respect to the aggregate salaries payable to secretaries and law clerks of circuit and district judges are hereby increased by amounts which reflect the respective applicable increases provided by section 2(a) of this Act [amending section 1113(b) of former Title 5, Executive Departments and Government Officers and Employees] in corresponding rates of compensation for officers and employees subject to the Classification Act of 1949, as amended [chapter 51 and subchapter III of chapter 53 of Title 5, Government Organization and Employees]."

### 1964 INCREASE IN LIMITATIONS ON AGGREGATE SALARIES OF SECRETARIES AND LAW CLERKS

Pub. L. 88-426, title IV, § 402(b), Aug. 14, 1964, 78 Stat. 433, provided that: "The limitation provided by applicable law on the effective date of this section with respect to the aggregate salaries payable to secretaries and law clerks of circuit and district judges are hereby increased by amounts which reflect the respective applicable increases provided by the title I of this Act in corresponding rates of compensation for officers and employees subject to the Classification Act of 1949, as amended [chapter 51 and subchapter III of chapter 53 of Title 5, Government Organization and Employees]."

### 1962 INCREASE IN LIMITATIONS ON AGGREGATE SALARIES OF SECRETARIES AND LAW CLERKS

Pub. L. 87-793, § 1004(b), Oct. 11, 1962, 76 Stat. 866, provided that: "The limitations provided by applicable law on the effective date of this section with respect to the aggregate salaries payable to secretaries and law clerks of circuit and district judges are hereby increased by two amounts, the first amount to be effective for the period beginning as of the first day of the first pay period which begins on or after the date of enactment of this Act [Oct. 11, 1962], and ending immediately prior to the first day of the first pay period which begins on or after January 1, 1964, and the second amount to be effective on the first day of the first pay period which begins on or after January 1, 1964, and thereafter, which reflect the respective applicable increases provided by title II of this part in corresponding rates of compensation for officers and employees subject to the Classification Act of 1949, as amended [chapter 51 and subchapter III of chapter 53 of Title 5, Government Organization and Employees]."

### 1960 Increase in Limitations on Aggregate Salaries of Secretaries and Law Clerks

Pub. L. 86-568, title I, § 116(b), July 1, 1960, 74 Stat. 303, provided that: "The limitations provided by applicable law on the effective date of this section with respect to the aggregate salaries payable to secretaries and law clerks of circuit and district judges are hereby increased by the amounts necessary to pay the additional basic compensation provided by this part."

Words "this part", referred to above, means Part B of Pub. L. 86-568, which enacted section 932e of former Title 5, Executive Departments and Government Officers and Employees, amended section 753 of this title, sections 1113, 2091, 2252 and 3002 of former title 5, sections 867 and 870 of Title 22, Foreign Relations and Intercourse, and sections 4103, 4107 and 4108 of Title 38, Veterans' Benefits, and enacted notes set out under sections 603 and 604 of this title, sections 60a and 60f of Title 2, The Congress, sections 1113, and 2252 of former title 5, section 590h of Title 16, Conservation, and section 867 of Title 22.

### 1958 Increase in Limitations on Aggregate Salaries of Secretaries and Law Clerks

Pub. L. 85-462, § 3(b), June 20, 1958, 72 Stat. 207, provided that: "The limitations of $13,485 and $18,010 with respect to the aggregate salaries payable to secretaries and law clerks of circuit and district judges, contained in the paragraph designated "Salaries of supporting personnel" in the Judiciary Appropriation Act, 1958 (71 Stat. 65; Public Law 85-49), or any subsequent appropriation Act, shall be increased by the amounts necessary to pay the additional basic compensation provided by this Act."

### 1955 Increase in Limitations of Aggregate Salaries of Secretaries and Law Clerks

Act June 28, 1955, ch. 189, § 3(b), 69 Stat. 175, provided that: "The limitations of $10,560 and $14,355 with respect to the aggregate salaries payable to secretaries and law clerks of circuit and district judges, contained in the paragraph under the heading 'SALARIES OF SUPPORTING PERSONNEL' in the Judiciary Appropriation Act, 1955 (Public Law 470, Eighty-third Congress), or in any subsequent appropriation Act, shall be increased by the amounts necessary to pay the additional basic compensation provided by this Act."

### 1951 Increase in Limitations and Aggregate Salaries of Secretaries and Law Clerks

Act Oct. 24, 1951, ch. 554, § 1(d), 65 Stat. 613, provided that: "The limitations of $9,600 and $13,050 with respect to the aggregate salaries payable to secretaries and law clerks of circuit and district judges, contained in the sixteenth paragraph under the head 'Miscellaneous salaries' in the Judiciary Appropriation Act, 1951 (Public Law 759, Eighty-first Congress), or in any subsequent appropriation Act, shall be increased by the amounts necessary to pay the additional basic compensation provided by this Act."

The particular paragraph of the "Judiciary Appropriation Act, 1951 (Public Law 759, Eighty-first Congress)", referred to above, is act Sept. 6, 1950, ch. 896, ch. III, title IV, § 401 (part), 64 Stat. 631. The salary limitations therein, also referred to above, were identical with those in the Judiciary Appropriation Act, 1952 (act Oct. 22, 1951, ch. 533, title IV, § 401 (part), 65 Stat. 596).

### Increases in Compensation Rates

Increases in rates of basic compensation fixed pursuant to subsec. (a)(5) of this section, see notes under section 603 of this title.

### Travel and Subsistence Expenses

Pub. L. 87-139, § 6, Aug. 14, 1961, 75 Stat. 340, provided that: "The Director of the Administrative Office of the United States Courts shall promulgate, in accordance with section 604(a)(7) and section 456 of title 28 of the United States Code, such regulations as he may deem necessary to effectuate the increases provided by this Act [amending section 553 of this title, former Title 5, Executive Departments and Government Officers and Employees, and sections 237o, 287q, and 1471 of Title 22, Foreign Relations and Intercourse]."

### Change of Name

Reference to United States Commissioners deemed to be reference to United States Magistrates pursuant to Pub. L. 90-578, title IV, § 402(b)(2), Oct. 17, 1968, 82 Stat. 1108. See chapter 43 (§ 631 et seq.) of this title.

### Cross References

Compensation for overtime, see section 8331 of Title 5, Government Organization and Employees.

Disbursement of salaries and expenses by marshals, see section 571 of this title.

Duties of Supreme Court Marshal, see section 672 of this title.

Expenses of judges, United States attorneys and marshals, see sections 456, 460, 549 and 567 of this title.

Office expenses of clerks of court, see section 961 and 963 of this title.

Supreme Court officers and employees, compensation and disbursement, see section 671 et seq. of this title.

## § 605. Budget estimates

The Director, under the supervision of the Judicial Conference of the United States, shall submit to the Bureau of the Budget annual estimates of the expenditures and appropriations necessary for the maintenance and operation of the courts and the Administrative Office and the operation of the judicial survivors annuity fund, and such supplemental and deficiency estimates as may be required from time to time for the same purposes, according to law. The Director shall cause periodic examinations of the judicial survivors annuity fund to be made by an actuary, who may be an actuary employed by another department of the Government temporarily assigned for the purpose, and whose findings and recommendations shall be transmitted by the Director to the Judicial Conference.

Such estimates shall be approved, before presentation to the Bureau of the Budget, by the Judicial Conference of the United States, except that the estimate with respect to the Customs Court shall be approved by such court.

All such estimates shall be included in the budget without revision, but subject to the recommendations of the Bureau of the Budget, as provided by section 11 of Title 31 for the estimates of the Supreme Court.

(June 25, 1948, ch. 646, 62 Stat. 915; July 9, 1956, ch. 517, § 1(e), 70 Stat. 497; Aug. 3, 1956, ch. 944, § 4, 70 Stat. 1026; Sept. 19, 1961, Pub. L. 87-253, § 3, 75 Stat. 521.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 447 (Mar. 3, 1911, ch. 231, § 305, as added Aug. 7, 1939, ch. 501, § 1, 53 Stat. 1223).

This section contains provisions of section 447 of title 28, U.S.C., 1940 ed., relating to budget estimates. The remainder of said section 447 is incorporated in section 604 of this title.

The designation "senior circuit judges" was changed to "chief judges of the circuits" in conformity with section 45 of this title.

Changes were made in phraseology.

SENATE REVISION AMENDMENT

Those provisions of this section which related to the Tax Court were eliminated by Senate amendment. See 80th Congress Senate Report No. 1559.

AMENDMENTS

1961—Pub. L. 87-253 deleted from the second paragraph the requirement that the estimate with respect to the Court of Customs and Patent Appeals be approved by such court.

1956—Act Aug. 3, 1956, inserted provision to authorize the Director to include in the budget estimates of the courts the expenditures and appropriations necessary for the operation of the judicial survivors annuity fund, and added provision that Director shall cause periodic actuarial examinations to be made of the judicial survivors annuity fund and shall report the actuary's findings and recommendations to the Judicial Conference.

Act July 9, 1956, eliminated the language "and the Court of Claims" following the words "the Customs Court" and substituted "and" for the comma following "the Court of Customs and Patents Appeals" in the second paragraph.

OFFICE OF MANAGEMENT AND BUDGET

All functions vested by law (including reorganization plan) in the Bureau of the Budget or the Director of the Bureau of the Budget were transferred to the President of the United States by section 101 of 1970 Reorg. Plan No. 2, eff. July 1, 1970, 35 F.R. 7959, 84 Stat. 2085, set out in the Appendix to Title 5, Government Organization and Employees. Section 102 of 1970 Reorg. Plan No. 2 redesignated the Bureau of the Budget as the Office of Management and Budget.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 18 section 3006A.

### § 606. Duties of Deputy Director

The Deputy Director shall perform the duties assigned to him by the Director, and shall act as Director during the absence or incapacity of the Director or when the Director's office is vacant.

(June 25, 1948, ch. 646, 62 Stat. 915; Sept. 23, 1959, Pub. L. 86-370, § 5(a)(1), 73 Stat. 652.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 444 (Mar. 3, 1911, ch. 231, § 302, as added Aug. 7, 1939, ch. 501, § 1, 53 Stat. 1223).

This section contains provisions as to duties of Assistant Director in section 444 of title 28, U.S.C., 1940 ed. The remainder of said section 444 is incorporated in sections 601, 603 and 608 of this title.

AMENDMENTS

1959—Pub. L. 86-370 substituted "Deputy Director" for "Assistant Director".

EFFECTIVE DATE OF 1959 AMENDMENT

Amendment by Pub. L. 86-370 was effective Sept. 23, 1959.

REFERENCE TO ASSISTANT DIRECTOR DEEMED REFERENCE TO DEPUTY DIRECTOR

References in any other law to Assistant Director of the Administrative Office of the United States Courts deemed to be reference to the Deputy Director of the Administrative Office of the United States Courts, see note set out under section 601 of this title.

### § 607. Practice of law prohibited

An officer or employee of the Administrative Office shall not engage directly or indirectly in the practice of law in any court of the United States.

(June 25, 1948, ch. 646, 62 Stat. 915.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 445 (Mar. 3, 1911, ch. 231, § 303, as added Aug. 7, 1939, ch. 501, § 1, 53 Stat. 1223).

This section contains the last paragraph of title 28, U.S.C., 1940 ed., § 445. The remainder of said section is incorporated in sections 602 and 603 of this title.

Changes were made in phraseology.

### § 608. Seal

The Director shall use a seal approved by the Supreme Court. Judicial notice shall be taken of such seal.

(June 25, 1948, ch. 646, 62 Stat. 915.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 444 (Mar. 3, 1911, ch. 231, § 302, as added Aug. 7, 1939, ch. 501, § 1, 53 Stat. 1223).

This section contains a part of section 444 of title 28, U.S.C., 1940 ed. The remainder of said section 444 is incorporated in sections 601, 603 and 606 of this title.

Changes were made in phraseology.

### § 609. Courts' appointive power unaffected

The authority of the courts to appoint their own administrative or clerical personnel shall not be limited by any provisions of this chapter.

(June 25, 1948, ch. 646, 62 Stat. 915.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed. § 446 (Mar. 3, 1911, ch. 231, § 304, as added Aug. 7, 1939, ch. 501, § 1, 53 Stat. 1223).

This section contains the last clause of section 446(1) of title 28, U.S.C., 1940 ed.

A similar provision with respect to the Attorney General's authority over United States attorneys and their assistants, and United States marshals and their deputies was omitted as unnecessary since there is nothing in this chapter that could affect such authority of the Attorney General.

For other provisions of section 446 of title 28, U.S.C., 1940 ed., see section 604 of this title.

Minor changes were made in phraseology.

### § 610. Courts defined

As used in this chapter the word "courts" includes the courts of appeals and district courts of the United States, the United States District Court for the District of the Canal Zone, the

District Court of Guam, the District Court of the Virgin Islands, the Court of Claims, the Court of Customs and Patent Appeals, and the Customs Court.

(June 25, 1948, ch. 646, 62 Stat. 915; Oct. 31, 1951, ch. 655, § 44, 65 Stat. 725; July 7, 1958, Pub. L. 85-508, § 12(e), 72 Stat. 348.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 450 (Mar. 3, 1911, ch. 231, § 308, as added Aug. 7, 1939, ch. 501, § 1, 53 Stat. 1223).

Words "and the United States Court for China" were omitted. See reviser's note under section 411 of this title.

Provisions making this chapter and sections 332 and 333 of this title expressly applicable to the Court of Appeals for the District of Columbia were omitted as covered by "courts of appeals." (See section 41 of this title and reviser's notes under such section and section 44 of this title.)

A definition of "continental United States" as "the States of the Union and the District of Columbia" is omitted as unnecessary. (See reviser's note under section 333 of this title.)

The term "district courts in the United States" in this section includes the District Court for the District of Columbia. (See section 88 of this title.)

Other provisions of section 450 of title 28, U.S.C., 1940 ed., are incorporated in sections 333 and 604 of this title.

The phrase "all other courts of the United States established by Act of Congress" was added to provide for future growth of the Federal judicial system.

Changes in arrangement and phraseology were made.

### Senate Revision Amendment

Those provisions of this section which related to the Tax Court were eliminated by Senate amendment. See 80th Congress Senate Report No. 1559.

### Amendments

1958—Pub. L. 85-508 eliminated provisions which included the District Court for the Territory of Alaska within the definition of court. See section 81A of this title which establishes a United States District Court for the State of Alaska.

1951—Act Oct. 31, 1951, inserted reference to the District Court of Guam.

### Effective Date of 1958 Amendment

Amendment by Pub. L. 85-508 effective Jan. 3, 1959, upon admission of Alaska into the Union pursuant to Proc. No. 3269, Jan. 3, 1959, 24 F.R. 81, 73 Stat. c16, as required by sections 1 and 8(c) of Pub. L. 85-508, see notes set out under section 81A of this title and preceding section 21 of Title 48, Territories and Insular Possessions.

### Section Referred to in Other Sections

This section is referred to in title 5 section 8331.

## § 611. Retirement of Director

(a) The Director may, by written election filed with the Chief Justice of the United States within six months after the date on which he takes office, waive coverage under subchapter III (relating to civil service retirement) of chapter 83, Title 5, United States Code, and bring himself within the purview of this section. Such waiver and election shall not operate to foreclose to the Director, upon separation from service other than by retirement, such opportunity as the law may provide to secure civil service retirement credit for service as Director by depositing with interest the amount required by section 8334 of title 5, United States Code.

(b) Upon the retirement of a Director who has elected coverage under this section and who has served at least fifteen years and attained the age of sixty-five years the Administrative Office of the United States Courts shall pay him an annuity for life equal to 80 per centum of the salary of the office at the time of his retirement.

Upon the retirement of a Director who has elected coverage under this section and who has served at least ten years, but who is not eligible to receive an annuity under the first paragraph of this subsection, the Administrative Office of the United States Courts shall pay him an annuity for life equal to that proportion of 80 per centum of the salary of the office at the time of his retirement that the number of years of his service bears to fifteen, reduced by one-quarter of 1 per centum for each full month, if any, he is under the age of sixty-five at the time of separation from service.

(c) A Director who has elected coverage under this section and who becomes permanently disabled to perform the duties of his office shall be retired and shall receive an annuity for life equal to 80 per centum of the salary of the office at the time of his retirement if he has served at least fifteen years, or equal to that proportion of 80 percentum of such salary that the aggregate number of years of his service bears to fifteen if he has served less than fifteen years, but in no event less than 50 per centum of such salary.

(d) For the purpose of this section, "service" means service, whether or not continuous, as Director of the Administrative Office of the United States Courts, and any service, not to exceed five years, as a judge of the United States, a Senator or Representative in Congress, or a civilian official appointed by the President, by and with the advice and consent of the Senate.

(Added Pub. L. 90-219, title II, § 201(a), Dec. 20, 1967, 81 Stat. 668.)

### Retroactive Effect

Section 205 of Pub. L. 90-219 provided that:

"(a) Except as provided in subsection (b), the amendments made by this title [enacting this section and amending sections 376 and 604 of this title], insofar as they relate to retirement and survivorship benefits of the Director of the Administrative Office of the United States Courts, shall be applicable only with respect to persons first appointed to such office after the date of enactment of this Act [Dec. 20, 1967].

"(b) The provisions of section 611(a), the first paragraph of section 611(b), and section 376(s), of title 28, United States Code, as added by such amendments, shall be applicable to a Director or former Director of the Administrative Office of the United States Courts who was first appointed prior to the date of enactment of this Act [Dec. 20, 1967] if at the time such Director or former Director left or leaves such office he had, or shall have, attained the age of sixty-five years and completed fifteen years of service as Director of the Administrative Office of the United States Courts and if, on or before the expiration of six months following the date of enactment of this Act [Dec. 20, 1967], he makes the election referred to in section 611(a) or section 376(s), or both, as the case may be."

Section Referred to in Other Sections

This section is referred to in sections 376, 677 of this title.

## CHAPTER 42—FEDERAL JUDICIAL CENTER

Sec.
620. Federal Judicial Center.
621. Board; composition, tenure of members, compensation.
622. Meetings; conduct of business.
623. Duties of the Board.
624. Powers of the Board.
625. Director and staff.
626. Compensation of the Director.
627. Retirement; employee benefits.
628. Appropriations and accounting.
629. Organizational provisions.

Amendments

1967—Pub. L. 90-219, title I, § 101, Dec. 20, 1967, 81 Stat. 664, added chapter 42 and items 620 to 629.

### § 620. Federal Judicial Center

(a) There is established within the judicial branch of the Government a Federal Judicial Center, whose purpose it shall be to further the development and adoption of improved judicial administration in the courts of the United States.

(b) The Center shall have the following functions:

(1) to conduct research and study of the operation of the courts of the United States, and to stimulate and coordinate such research and study on the part of other public and private persons and agencies;

(2) to develop and present for consideration by the Judicial Conference of the United States recommendations for improvement of the administration and management of the courts of the United States;

(3) to stimulate, create, develop, and conduct programs of continuing education and training for personnel of the judicial branch of the Government, including, but not limited to, judges, referees, clerks of court, probation officers, and United States commissioners; and

(4) insofar as may be consistent with the performance of the other functions set forth in this section, to provide staff, research, and planning assistance to the Judicial Conference of the United States and its committees.

(Added Pub. L. 90-219, title I, § 101, Dec. 20, 1967, 81 Stat. 664.)

Change of Name

Reference to United States commissioners deemed to be reference to United States Magistrates pursuant to Pub. L. 90-578, title IV, § 402(b)(2), Oct. 17, 1968, 82 Stat. 1108. See chapter 43 (§ 631 et seq.) of this title.

### § 621. Board; composition, tenure of members, compensation

(a) The activities of the Center shall be supervised by a Board to be composed of—

(1) the Chief Justice of the United States, who shall be the permanent Chairman of the Board;

(2) two active judges of the courts of appeals of the United States and three active judges of the district courts of the United States elected by vote of the members of the Judicial Conference of the United States: *Provided, however,* That the judges so elected shall not be members of the Judicial Conference of the United States; and

(3) the Director of the Administrative Office of the United States Courts, who shall be a permanent member of the Board.

(b) The term of office of each elected member of the Board shall be four years: *Provided, however,* That section 629 of this chapter shall govern the terms of office of the first members elected to the Board: *And provided further,* That a member elected to serve for an unexpired term arising by virtue of the death, disability, retirement, or resignation of a member shall be elected only for such unexpired term.

(c) No member elected for a four-year term shall be eligible for reelection to the Board.

(d) Members of the Board shall serve without additional compensation, but shall be reimbursed for actual and necessary expenses incurred in the performance of their official duties.

(Added Pub. L. 90-219, title I, § 101, Dec. 20, 1967, 81 Stat. 664.)

### § 622. Meetings; conduct of business

(a) Regular meetings of the Board shall be held quarterly. Special meetings shall be held from time to time upon the call of the Chairman, acting at his own discretion or pursuant to the petition of any four members.

(b) Each member of the Board shall be entitled to one vote. A simple majority of the membership shall constitute a quorum for the conduct of business. The Board shall act upon the concurrence of a simple majority of the members present and voting.

(Added Pub. L. 90-219, title I, § 101, Dec. 20, 1967, 81 Stat. 665.)

### § 623. Duties of the Board

(a) In its direction and supervision of the activities of the Federal Judicial Center, the Board shall—

(1) establish such policies and develop such programs for the Federal Judicial Center as will further achievement of its purpose and performance of its functions;

(2) formulate recommendations for improvements in the administration of the courts of the United States, in the training of the personnel of those courts, and in the management of their resources;

(3) submit to the Judicial Conference of the United States, at least one month in advance of its annual meeting, a report of the activities of the Center and such recommendations as the Board may propose for the consideration of the Conference;

(4) present to other government departments agencies, and instrumentalities whose programs or activities relate to the administration of justice in the courts of the United States the recommendations of the Center for the improvement of such programs or activities;

(5) study and determine ways in which automatic data processing and systems procedures may be applied to the administration of

the courts of the United States, and include in the annual report required by paragraph (3) of this subsection details of the results of the studies and determinations made pursuant to this paragraph; and

(6) consider and recommend to both public and private agencies aspects of the operation of the courts of the United States deemed worthy of special study.

(b) The Board shall transmit to Congress and to the Attorney General of the United States copies of all reports and recommendations submitted to the Judicial Conference of the United States. The Board shall also keep the Committees on the Judiciary of the United States Senate and House of Representatives fully and currently informed with respect to the activities of the Center.

(Added Pub. L. 90–219, title I, § 101, Dec. 20, 1967, 81 Stat. 665.)

### § 624. Powers of the Board

The Board is authorized—

(1) to appoint and fix the duties of the Director of the Federal Judicial Center, who shall serve at the pleasure of the Board;

(2) to request from any department, agency, or independent instrumentality of the Government any information it deems necessary to the performance of the functions of the Federal Judicial Center set forth in this chapter, and each such department, agency, or instrumentality is directed to cooperate with the Board and, to the extent permitted by law, to furnish such information to the Center upon request of the Chairman or upon request of the Director when the Board has delegated this authority to him;

(3) to contract with and compensate government and private agencies or persons for research projects and other services, without regard to section 3709 of the Revised Statutes, as amended (41 U.S.C. 5), and to delegate such contract authority to the Director of the Federal Judicial Center, who is hereby empowered to exercise such delegated authority.

(Added Pub. L. 90–219, title I, § 101, Dec. 20, 1967, 81 Stat. 666.)

### § 625. Director and staff

(a) The Director shall supervise the activities of persons employed by the Center and perform other duties assigned to him by the Board.

(b) The Director shall appoint and fix the compensation of such additional professional personnel as the Board may deem necessary, without regard to the provisions of title 5, United States Code, governing appointments in competitive service, or the provisions of chapter 51 and subchapter III of chapter 53 of such title, relating to classification and General Schedule pay rates: *Provided, however,* That the compensation of any person appointed under this subsection shall not exceed the annual rate of basic pay of level V of the Executive Schedule pay rates, section 5316, title 5, United States Code: *And provided further,* That the salary of a reemployed annuitant under the Civil Servive[1] Retirement Act shall be adjusted pursuant to the provisions of section 8344, title 5, United States Code.

(c) The Director shall appoint and fix the compensation of such secretarial and clerical personnel as he may deem necessary, subject to the provisions of title 5, United States Code, governing appointments in competitive service and the provisions of chapter 51 and subchapter III of chapter 53 of such title, relating to classification and General Schedule pay rates.

(d) The Director may procure personal services as authorized by section 3109 of title 5, United States Code, at rates not to exceed the daily equivalent of the highest rate payable under General Schedule pay rates, section 5332, title 5, United States Code. (e) The Director is authorized to incur necessary travel and other miscellaneous expenses incident to the operation of the Center.

(Added Pub. L. 90–219, title I, § 101, Dec. 20, 1967, 81 Stat. 666.)

#### REFERENCES IN TEXT

The General Schedule, referred to in subsec. (b), is set out under section 5332 of Title 5, Government Organization and Employees.

The Civil Service Retirement Act, referred to in subsec. (a), is act May 29, 1930, ch. 349, 46 Stat. 468, as amended by act July 31, 1956, ch. 804, § 401, 70 Stat. 743, which was repealed by Pub. L. 89–554, § 8(a), Sept. 6, 1966, 80 Stat. 632, and reenacted by the first section thereof as subchapter III (§ 8331 et seq.) of chapter 83 of Title 5, Government Organization and Employees.

### § 626. Compensation of the Director

The compensation of the Director of the Federal Judicial Center shall be the same as that of the Director of the Administrative Office of the United States Courts, and his appointment and salary shall not be subject to the provisions of title 5, United States Code, governing appointments in competitive service, or the provisions of chapter 51 and subchapter III of chapter 53 of such title, relating to classification and General Schedule pay rates: *Provided, however,* That any Director who is a justice or judge of the United States inactive or retired status shall serve without additional compensation.

(Added Pub. L. 90–219, title I, § 101, Dec. 20, 1967, 81 Stat. 666.)

#### REFERENCES IN TEXT

The General Schedule, referred to in text, is set out under section 5332 of Title 5, Government Organization and Employees.

### § 627. Retirement; employee benefits

(a) A Director of the Federal Judicial Center who attains the age of seventy years shall be retired from that office.

(b) The Director, the professional staff, and the clerical and secretarial employees of the Federal Judicial Center shall be deemed to be officers and employees of the judicial branch of the United States Government within the meaning of subchapter III of chapter 83 (relating to civil service retirement), chapter 87 (relating to Federal employees' life insurance program), and chapter 89 (relating to Federal employees' health benefits program) of title 5, United States Code: *Provided, however,* That the Director, upon written notice filed with the Director of the Administrative Office of the United States Courts within six months after the date on which he takes office, may waive coverage under subchapter III of chapter 83 of title 5, United States Code (relating to civil service retirement), and elect coverage under the retirement and disability provisions of this section: *And provided further,* That upon his nonretirement separation from the Federal Judicial Center, such waiver and election shall not operate to foreclose to the Director such opportunity as the law may provide to secure civil service retirement credit for service as Director by depositing with interest the amount required by section 8334 of title 5, United States Code.

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[1] So in original. Should be "Service".

(c) Upon the retirement of a Director who has elected coverage under this section and who has served at least fifteen years and attained the age of sixty-five years the Director of the Administrative Office of the United States Courts shall pay him an annuity for life equal to 80 per centum of the salary of the office at the time of his retirement.

Upon the retirement of a Director who has elected coverage under this section and who has served at least ten years, but who is not eligible to receive an annuity under the first paragraph of this subsection, the Administrative Office of the United States Courts shall pay him an annuity for life equal to that proportion of 80 per centum of the salary of the office at the time of his retirement that the number of years of his service bears to fifteen, reduced by one-quarter of 1 per centum for each full month, if any, he is under the age of sixty-five at the time of separation from service.

(d) A director who has elected coverage under this section and who becomes permanently disabled to perform the duties of his office shall be retired and shall receive an annuity for life equal to 80 per centum of the salary of the office at the time of his retirement if he has served at least fifteen years, or equal to that proportion of 80 per centum of such salary that the aggregate number of years of his service bears to fifteen if he has served less than fifteen years, but in no event less than 50 per centum of such salary.

(e) For the purpose of this section, "service" means service, whether or not continuous, as Director of the Federal Judicial Center, and any service, not to exceed five years, as a judge of the United States, a Senator or Representative in Congress, or a civilian official appointed by the President, by and with the advice and consent of the Senate.

(Added Pub. L. 90-219, title I, § 101, Dec. 20, 1967, 81 Stat. 666.)

#### Section Referred to in Other Sections

This section is referred to in section 376 of this title.

### § 628. Appropriations and accounting

There are hereby authorized to be appropriated such sums as may be necessary to carry out the provisions of this chapter. The Administrative Office of the United States Courts shall provide accounting, disbursing, auditing, and other fiscal services for the Federal Judicial Center.

(Added Pub. L. 90-219, title I, § 101, Dec. 20, 1967, 81 Stat. 667.)

### § 629. Organizational provisions

(a) The terms of office of the members first elected to the Board shall commence on the thirtieth day after the first meeting of the Judicial Conference after the date on which this chapter shall take effect.

(b) The members first elected to the Board shall continue in office for terms of one, two, three, and four years, respectively, the term of each to be designated by the Judicial Conference of the United States at the time of his election.

(c) Members first elected to the Board who are designated by the Judicial Conference of the United States to serve terms of office of less than four years shall be eligible for reelection to one full term of office.

(Added Pub. L. 90-219, title I, § 101, Dec. 20, 1967, 81 Stat. 667.)

#### Section Referred to in Other Sections

This section is referred to in section 621 of this title.

## CHAPTER 43—UNITED STATES MAGISTRATES

Sec.

631. Appointment and tenure.
632. Character of service.
633. Determination of number, locations, and salaries of magistrates.
634. Compensation.
635. Expenses.
636. Jurisdiction, powers, and temporary assignment.
637. Training.
638. Dockets and forms; United States Code; seals.
639. Definitions.

#### Amendments

1972—Pub. L. 92-239, § 3, Mar. 1, 1972, 86 Stat. 47, substituted "Jurisdiction, powers, and temporary assignment" for "Jurisdiction and powers" in item 636.

1968—Pub. L. 90-578, title I, § 101, Oct. 17, 1968, 82 Stat. 1108, substituted "Magistrates" for "Commissioners" in the chapter heading, and "Character of service" for "Park commissioners; jurisdiction and powers; procedure" in item 632, "Determination of number, locations, and salaries of magistrates" for "Fees and expenses" in item 633, "Compensation" for "Salaries of park commissioners; disposition of fees" in item 634, "Expenses" for "Park commissioners; residence" in item 635, "Jurisdiction and powers" for "Accounts" in item 636, "Training" for "Oaths, acknowledgments, affidavits and depositions" in item 637, "Dockets and forms; United States Code; seals" for "Seals" in item 638, and "Definitions" for "Dockets and forms; United States Code" in item 639.

1954—Act Aug. 13, 1954, ch. 728, § 1(c), 68 Stat. 704, inserted "and expenses" following "Fees" in item 633.

#### Cross References

District Court of Guam, chapter as applicable, see section 1424b of Title 48, Territories and Insular Possessions.

Petty offenses, trial by magistrates, see section 3401 of Title 18, Crimes and Criminal Procedure.

Rules of procedure and practice for trials of cases before magistrates, and taking of appeals, see section 3402 of Title 18 and rules 1 and 54 of Title 18, Appendix.

#### Chapter Referred to in Other Sections

This chapter is referred to in title 48 section 1424b.

**§ 631. Appointment and tenure**

(a) The judges of each United States district court and the district court of the Virgin Islands shall appoint United States magistrates in such numbers and to serve at such locations within the judicial district as the conference may determine under this chapter. In the case of a magistrate appointed by the district court of the Virgin Islands, this chapter shall apply as though the court appointing such magistrate were a United States district court. Where there is more than one judge of a district court, the appointment, whether an original appointment or a reappointment, shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge. Where an area under the administration of the National Park Service, or the United States Fish and Wildlife Service, or any other Federal agency, extends into two or more judicial districts and it is deemed desirable by the conference that the territorial jurisdiction of a magistrate's appointment include the entirety of such area, the appointment or reappointment shall be made by the concurrence of a majority of all judges of the district courts of the judicial districts involved, and where there is no such concurrence by the concurrence of the chief judges of such district courts.

(b) No individual may be appointed or serve as a magistrate under this chapter unless:

(1) He is a member in good standing of the bar of the highest court of the State in which he is to serve, or, in the case of an individual appointed to serve—

(A) in the District of Columbia, a member in good standing of the bar of the United States district court for the District of Columbia;

(B) in the Commonwealth of Puerto Rico, a member in good standing of the bar of the Supreme Court of Puerto Rico, and in the Virgin Islands of the United States, a member in good standing of the bar of the district court of the Virgin Islands; or

(C) in an area under the administration of the National Park Service, the United States Fish and Wildlife Service, or any other Federal agency that extends into two or more States, a member in good standing of the bar of the highest court of one of those States;

except that an individual who does not meet the bar membership requirements of the first sentence of this paragraph may be appointed and serve as a part-time magistrate if the appointing court or courts and the conference find that no qualified individual who is a member of the bar is available to serve at a specific location;

(2) He is determined by the appointing district court or courts to be competent to perform the duties of the office;

(3) In the case of an individual appointed to serve in a national park, he resides within the exterior boundaries of that park, or at some place reasonably adjacent thereto;

(4) He is not related by blood or marriage to a judge of the appointing court or courts at the time of his initial appointment.

(c) A magistrate may hold no other civil or military office or employment under the United States: *Provided, however,* That, with the approval of the conference, a part-time referee in bankruptcy or a clerk or deputy clerk of a court of the United States may be appointed and serve as a part-time United States magistrate, but the conference shall fix the aggregate amount of compensation to be received for performing the duties of part-time magistrate and part-time referee in bankruptcy, clerk or deputy clerk: *And provided further,* That retired officers and retired enlisted personnel of the Regular and Reserve components of the Army, Navy, Air Force, Marine Corps, and Coast Guard, members of the Reserve components of the Army, Navy, Air Force, Marine Corps, and Coast Guard, and members of the Army National Guard of the United States, the Air National Guard of the United States, and the Naval Militia and of the National Guard of a State, territory, or the District of Columbia, except the National Guard disbursing officers who are on a full-time salary basis, may be appointed and serve as United States magistrates.

(d) No individual may serve under this chapter after having attained the age of seventy years: *Provided, however,* That upon the unanimous vote of all the judges of the appointing court or courts, a magistrate who has attained the age of seventy years may continue to serve and may be reappointed under this chapter.

(e) The appointment of any individual as a full-time magistrate shall be for a term of eight years, and the appointment of any individuals as a part-time magistrate shall be for a term of four years, except that the term of a full-time or part-time magistrate appointed under subsection (j) shall expire upon—

(1) the expiration of the absent magistrate's term,

(2) the reinstatement of the absent magistrate in regular service in office as a magistrate,

(3) the failure of the absent magistrate to make timely application under subsection (i) of this section for reinstatement in regular service in office as a magistrate after discharge or release from military service,

(4) the death or resignation of the absent magistrate, or

(5) the removal from office of the absent magistrate pursuant to subsection (h) of this section,

whichever may first occur.

(f) Each individual appointed as a magistrate under this section shall take the oath or affirmation prescribed by section 453 of this title before performing the duties of his office.

(g) Each appointment made by a judge or judges of a district court shall be entered of record in such court, and notice of such appointment shall be given at once by the clerk of that court to the Director.

(h) Removal of a magistrate during the term for which he is appointed shall be only for incompetency, misconduct, neglect of duty, or physical or mental disability, but a magistrate's office shall be terminated if the conference determines that the services performed by his office are no longer needed. Removal shall be by the judges of the district court for the judicial district in which the magistrate serves; where there is more than one judge of a district court, removal shall not occur unless a majority of all the judges of such court concur in the order of removal; and when there is a tie vote of the judges of the district court on the question of the removal or retention in office of a magistrate, then removal shall be only by a concurrence of a majority of all the judges of the council. In the case of a magistrate appointed under the third sentence of subsection (a) of this section, removal shall not occur unless a majority of all the judges of the appointing district courts concur in the order of removal; and where there is a tie vote on the question of the removal or retention in office of a magistrate, then removal shall be only by a concurrence of a majority of all the judges of the council or councils. Before any order or removal shall be entered, a full specification of the charges shall be furnished to the magistrate, and he shall be accorded by the judge or judges of the removing court, courts, council, or councils an opportunity to be heard on the charges.

(i)(1) A magistrate who is inducted into the Armed Forces of the United States pursuant to the Military Selective Service Act of 1967 (50 U.S.C. App. 451 et seq.), or is otherwise ordered to active duty with such forces for a period of more than thirty days, and who makes application for a leave of absence to the district court or courts which appointed him, shall be granted a leave of absence without compensation for such period as he is required to serve in such forces. Every application for a leave of absence under this subsection shall include a copy of the official orders requiring the magistrate's military service. The granting of a leave of absence under this subsection shall not operate to extend the term of office of any magistrate.

(2) A magistrate granted a leave of absence under this subsection who—

(A) receives a certificate of service under section 9(a) of the Military Selective Service Act of 1967 (50 U.S.C. App. 459(a)), or is released under honorable conditions from the military service,

(B) makes application for reinstatement to regular service in office as a magistrate within ninety days after he is released from such service or training or from hospitalization continuing after discharge for a period of not more than one year, and

(C) is determined by the appointing court or courts in the manner specified in subsection (a) of this section to be still qualified to perform the duties of such position,

shall be reinstated in regular service in such office.

(j) Upon the grant by the appropriate district court or courts of a leave of absence to a magistrate entitled to such relief under the terms of subsection (i) of this section, such court or courts may proceed to appoint, in the manner specified in subsection (a) of this section, another magistrate, qualified for appointment and service under subsections (b), (c), and (d) of this section, who shall serve for the period specified in subsection (e) of this section.

(June 25, 1948, ch. 646, 62 Stat. 915; May 24, 1949, ch. 139, § 73, 63 Stat. 100; July 9, 1952, ch. 609, § 1, 66 Stat. 509; July 25, 1956, ch. 722, 70 Stat. 642; Oct. 17, 1968, Pub. L. 90-578, title I, § 101, 82 Stat. 1108; Oct. 17, 1976, Pub. L. 94-520, § 2, 90 Stat. 2458.)

### HISTORICAL AND REVISION NOTES

### 1948 ACT

Based on title 28, U.S.C., 1940 ed., §§ 526 and 527, sections 27, 66, 80e, 100, 117e, 129, 172, 198e, 204e, 256d, 395e, 403c-5, 403h-5, 404c-5, and 408m of title 16, U.S.C., 1940 ed., Conservation, and section 863 of title 48, U.S.C., 1940 ed., Territories and Insular Possessions (May 27, 1894, ch. 72, § 5, 28 Stat. 74; May 28, 1896, ch. 252, §§ 19, 20, 29 Stat. 184; Apr. 12, 1900, ch. 191, § 34, 31 Stat. 84; Mar. 2, 1901, ch. 814, 31 Stat. 956; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167; Jan. 7, 1913, ch. 6, 37 Stat. 648; Aug. 22, 1914, ch. 264, § 6, 38 Stat. 700; June 30, 1916, ch. 197, § 6, 39 Stat. 245; Aug. 21, 1916, ch. 368, § 6, 39 Stat. 523; Mar. 2, 1917, ch. 145, § 41, 39 Stat. 965; June 2, 1920, ch. 218, §§ 7, 8, 41 Stat. 733; Mar. 4, 1921, ch. 161, § 1, 41 Stat. 1412; Dec. 13, 1926, ch. 6, § 1, 44 Stat. 919; Apr. 25, 1928, ch. 434, § 6, 45 Stat. 460; Apr. 26, 1928, ch. 438, § 6, 45 Stat. 464; Mar. 2, 1929, ch. 583, § 6, 45 Stat. 1538; Apr. 19, 1930, ch. 200, § 6, 46 Stat. 228; June 25, 1935, ch. 309, § 1, 49 Stat. 422; Aug. 19, 1937, ch. 703, § 5, 50 Stat. 702; Mar. 26, 1938, ch. 51, § 2, 52 Stat. 118; June 25, 1938, ch. 684, § 1, 52 Stat. 1164; June 28, 1938, ch. 778, § 1, 52 Stat. 1213; Mar. 4, 1940, ch. 40, § 2, 54 Stat. 43; Mar. 6, 1942, ch. 150, § 5, 56 Stat. 134; Mar. 6, 1942, ch. 151, § 5, 56 Stat. 137; Apr. 29, 1942, ch. 264, § 5, 56 Stat. 260; June 5, 1942, ch. 341, § 5, 56 Stat. 318; Dec. 28, 1945, ch. 592, 59 Stat. 659, 660; Apr. 23, 1946, ch. 202, § 1, 60 Stat. 119, 120).

Section consolidates section 526 and a portion of 527, both of title 28, U.S.C., 1940 ed., with provisions of sections 27, 66, 80e, 100, 117e, 129, 172, 198e, 204e, 256d, 395e, 403c-5, 403h-5, 404c-5 and 408m of title 16, U.S.C., 1940 ed., and provisions of section 863 of title 48, U.S.C., 1940 ed., Territories and Insular Possessions, relating to appointment of United States commissioners. For other provisions of said sections see Distribution Table.

Some of the provisions of section 863 of title 48, U.S.C., 1940 ed., Territories and Insular Possessions were retained in that title.

The provision of sections 395e, 403c-5, 404c-5, and 408m of title 16, U.S.C., 1940 ed., for appointment of the Park Commissioner in the Hawaii National Park, Shenandoah National Park, Great Smoky Mountains National Park, Mammoth Cave National Park and Isle Royale National Park upon "the recommendation of the Secretary of the Interior" was omitted as inconsistent not only with other provisions of this title but with other statutes applicable to other national parks.

All such park commissioners are United States commissioners and the revision of these sections makes possible uniformity and consistency in administrative matters concerning such commissioners. (See, also, sections 604 and 634 of this title.)

Words "the Director of the Administrative Office of the United States Courts" were substituted for "Attorney General" in section 526 of title 28, U.S.C., 1940 ed., in view of the general supervision by the Director over clerks and commissioners under section 601 et seq. of this title.

See, also, section 751 of this title prohibiting clerks from receiving compensation in another capacity.

First sentence of subsection (b) was substituted for the provision in section 527 of title 28, U.S.C., 1940 ed., prohibiting specified persons from acting as commissioners.

Words "at such places in the district as may be designated by the district court," in section 526 of title 28, U.S.C., 1940 ed., were omitted as unnecessary.

A provision in section 526 of title 28, U.S.C., 1940 ed., that commissioners should have the same powers and duties as are conferred and imposed by law, was omitted as superfluous.

The phrase in sections 526 and 527 of title 16, U.S.C., 1940 ed., "except as provided in section 591" and section 591, the effect of which was to except Alaska from this section, were omitted as unnecessary. This revised section by its terms limits the section and chapter 43 of this title to commissioners appointed by a "district court," which includes the courts enumerated in chapter 5 of this title but not those of Alaska, Canal Zone, or Virgin Islands.

Sections from title 16, U.S.C., 1940 ed., contained no tenure provisions.

Changes in phraseology were made.

*Prior residence requirement for national park commissioners in section 635.*—Based on sections 1a and 403c-9 of title 16, U.S.C., 1940 ed., Conservation (Aug. 19, 1937, ch. 703, § 8, 50 Stat. 702; June 28, 1938, ch. 778, § 1, 52 Stat. 1213).

Section consolidates section 1a with part of section 403c-9 of title 16, U.S.C., 1940 ed., relating to residence of a national park commissioner.

The provisions of sections 1a and 403c-9 of title 16, U.S.C., 1940 ed., relating to designation by the Secretary of the Interior of some place of residence reasonably adjacent to the park was modified by making such designation subject to the approval of the appointing court.

### Senate Revision Amendment

By Senate amendment, "Big Bend" and "Crater Lake" were inserted in subsection (a) of this section, and section 158a of title 16, U.S.C., which was derived from act May 15, 1947, ch. 55, § 1, 61 Stat. 91, accordingly became an additional source of this section, such Act being included in the schedule of repeals. See 80th Congress Senate Report No. 1559.

As finally enacted, act May 15, 1947, ch. 57, 61 Stat. 92, which amended section 403c-5 of title 16, U.S.C., became an additional source of this section and was accordingly included in the schedule of repeals by Senate amendment. See 80th Congress Senate Report No. 1559.

### 1949 Act

This amendment conforms the language of section 631(b) to the provisions of section 35 of the Bankruptcy Act, as amended by the act of June 28, 1946 (§ 3, 60 Stat. 324), that full-time referees in bankruptcy may not be appointed United States Commissioners.

This amendment also removes an ambiguity from section 631(b) by making it clear that the Director of the Administrative Office of the United States Courts has power to establish maximum limits of compensation to be received for performing the combined offices of commissioner and clerk or deputy clerk. This was the intent of sections 631 and 751 of title 28. (See the fifteenth paragraph of the reviser's note to the latter section, H. Rept. No. 308, April 25, 1947, p. A90, to accompany H.R. 3214, 80th Cong.)

### References in Text

The Military Selective Service Act of 1967 (50 U.S.C. App. 451 et seq.), referred to in subsec. (i)(1), is act June 24, 1948, ch. 625, 62 Stat. 604, which was formerly called the Universal Military Training and Service Act, and renamed the "Military Selective Service Act of 1967" by Pub. L. 90-40, § 1(1), June 30, 1967, 81 Stat. 100. Such Act is classified principally to section 451 et seq. of Title 50, App., War and National Defense. For complete classification of this Act to the Code, see References in Text note set out under section 451 of Title 50, App., and Tables volume.

### Amendments

1976—Subsec. (a). Pub. L. 94-520, § 2(1), (2), inserted "and the district court of the Virgin Islands" following "United States district court", and provided that in the case of a magistrate appointed by the district court of the Virgin Islands, this chapter was to apply as though the appointing court were a United States District Court.

Subsec. (b). Pub. L. 94-520, § 2(3), provided that a magistrate appointed under this chapter to serve in the Virgin Islands, must be a member in good standing of the bar of the district court of the Virgin Islands.

1968—Pub. L. 90-578 revised provisions of this section generally as described for subsecs. (a) to (j) hereunder, substituting provisions for appointment and tenure of magistrates for appointment and tenure of commissioners.

Subsec. (a). Pub. L. 90-578 provided for determination of number of appointees by the conference, rather than by the district court, authorized the determination of location of service, omitted as superseded by existing provisions prior provisions for appointments for certain specified national parks, required appointments in a district court with more than one judge to be concurred in by majority of all the judges, and by the chief judge in absence of such concurrence, required such concurrence of judges of district courts or concurrence of chief judges in absence of such concurrence by the judges where appointments are for an area under administration of the National Park Service, or the United States Fish and Wildlife Service, or any other Federal agency, which extends into more than one judicial district which should be served in its entirety by one magistrate, and omitted last par. prescribing appointment record and notice, now covered in subsec. (g) of this section.

Subsec. (b). Pub. L. 90-578 added subsec. (b). Prior provisions which were eliminated prohibited holding dual offices when the person held a civil or military office or employment under the United States or was employed by a Federal justice or judge, but such restriction was made inapplicable to a part-time referee in bankruptcy, or to a clerk or deputy clerk of a Federal court when approved by the Director and compensated in an aggregate amount fixed by the Director for performance of dual duties, and are now covered in subsec. (c) of this section.

Subsec. (c). Pub. L. 90-578 incorporated provisions of former subsec. (b) of this section in provisions designated as subsec. (c), omitted express restriction against holding dual offices when employed by a Federal justice or judge, provided for approval of the conference with respect to part-time service as a magistrate of part-time referee in bankruptcy or clerk or deputy clerk of a Federal court, formerly requiring approval of the Director as to service of clerk or deputy clerk of court as a commissioner, made former provisions as to aggregate amount of compensation for service as clerk or deputy clerk of court and commissioner applicable to part-time service as magistrate of part-time referee in bankruptcy, clerk and deputy clerk of court, and authorized appointment of retired military personnel, except National Guard disbursing officers who are on a full-time salary basis, as United States magistrates. Former subsec. (c) which provided for a four year term of office of commissioner unless sooner removed by the district court is now covered in subsecs. (e) and (h) of this section.

Subsec. (d). Pub. L. 90-578 added subsec. (d).

Subsec. (e). Pub. L. 90-578 substituted provisions designated as subsec. (e) for term of office of eight and four years for full-time and part-time officers and for expiration of term of office for provisions of former subsec. (c) of this section for term of four years unless sooner removed by the district court.

Subsec. (f). Pub. L. 90-578 added subsec. (f).

Subsec. (g). Pub. L. 90-578 incorporated provisions of last par. of former subsec. (a) of this section in provisions designated as subsec. (g) and provided expressly for appointment by a judge or judges of a district court.

Subsecs. (h) to (j). Pub. L. 90-578 added subsecs. (h) to (j).

1956—Subsec. (a). Act July 25, 1956, provided for two United States Commissioners for the Cumberland Gap National Historical Park.

1952—Subsec. (a). Act July 9, 1952, provided for two United States Commissioners for the Great Smoky Mountains National Park, in place of one.

1949—Subsec. (b). Act May 24, 1949, amended second sentence which prior thereto provided that "This subsection shall not apply to a referee in bankruptcy nor shall it apply to a clerk or deputy clerk of a court of the United States whose appointment as commissioner is approved by the Director of the Administrative Office of the United States Courts."

### Effective Date of 1968 Amendment

Section 403 of Pub. L. 90-578 provided that: "Except as otherwise provided by sections 401 and 402 of this title [set out as Appointment of Magistrates and Applicable Law notes below], this Act [which amended this chapter and sections 202, 3006A, 3041, 3043, 3035, 3060, 3102, 3116, 3184, 3191, 3195, 3401, 3402, 3569, and 3771 of Title 18, Crimes and Criminal Procedure, and enacted provisions set out as notes under this section] shall take effect on the date of its enactment [Oct. 17, 1968]."

### Short Title

Section 1 of Pub. L. 90-578 provided: "That this Act [which amended this chapter and sections 202, 3006A, 3041, 3043, 3045, 3060, 3102, 3116, 3184, 3191, 3195, 3401, 3402, 3569, and 3771 of Title 18, Crimes and Criminal Procedure, and enacted provisions set out as notes under this section] may be cited as the 'Federal Magistrates Act'."

### Separability of Provisions

Section 501 of Pub. L. 90-578 provided that: "If any provision of this Act [which amended this chapter and sections 202, 3006A, 3041, 3043, 3045, 3060, 3102, 3116, 3184, 3191, 3195, 3401, 3402, 3569, and 3771 of Title 18, Crimes and Criminal Procedure, and enacted provisions set out as notes under this section] or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the Act [such sections] and of its application to other persons and circumstances shall not be affected."

### Appointment of Magistrates

Section 401 of Pub. L. 90-578 provided that:

"(a) No individual may serve as a United States commissioner within any judicial district after the date on which a United States magistrate assumes office in such judicial district.

"(b) An individual serving as a United States commissioner within any judicial district on the date of enactment of this Act [Oct. 17, 1968] who is a member in good standing of the bar of the highest court of any State may be appointed to the office of United States magistrate for an initial term, and may be reappointed to such office for successive terms, notwithstanding his failure to meet the bar membership qualification imposed by section 631(b)(1) of chapter 43, title 28, United States Code [subsec. (b)(1) of this section]: *Provided, however,* That any appointment or reappointment of such an individual must be by unanimous vote of all the judges of the appointing district court or courts."

### Applicable Law

Section 402 of Pub. L. 90-578 provided that:

"(a) All provisions of law relating to the powers, duties, jurisdiction, functions, service, compensation, and facilities of United States commissioners, as such provisions existed on the day preceding the date of enactment of this Act [Oct. 17, 1968], shall continue in effect in each judicial district until but not on or after (1) the date on which the first United States magistrate assumes office within such judicial district pursuant to section 631 of chapter 43, title 28, United States Code, as amended by this Act [this section], or (2) the third anniversary of the date of enactment of this Act [Oct. 17, 1968], whichever date is earlier.

"(b) On and after the date on which the first United States magistrate assumes office within any judicial district pursuant to section 631 of chapter 43, title 28, United States Code, as amended by this Act [this section], or the third anniversary of the date of enactment of this Act [Oct. 17, 1968], whichever date is earlier—

"(1) the provisions of chapter 43, title 28, United State Code, as amended by this Act [this chapter], shall be effective within such judicial district except as otherwise specifically provided by section 401(b) of this title [set out as Appointment of Magistrates note under this section]; and

"(2) within such judicial district every reference to a United States commissioner contained in any previously enacted statute of the United States (other than sections 8331(1)(E), 8332(i), 8701(a)(7), and 8901(1)(G) of title 5), any previously promulgated rule of any court of the United States, or any previously promulgated regulation of any executive department or agency of the United States, shall be deemed to be a reference to a United States magistrate duly appointed under section 631 of chapter 43, title 28, United States Code, as amended by this Act [this section].

"(c) The administrative powers and duties of the Director of the Administrative Office of the United States Courts with respect to United States commissioners under the provisions of chapter 41, title 28, United States Code, as such provisions existed on the day preceding the date of enactment of this Act [Oct. 17, 1968], shall continue in effect until no United States commissioner remains in service."

### Jurisdictional Limitation of Commissioner Holding Office on July 9, 1952

Section 2 of act July 9, 1952, provided that: "The jurisdiction of the United States commissioner holding office as commissioner of the Great Smoky Mountains National Park on the date of enactment of this Act shall be limited to the portion of the park situated in North Carolina."

### Special Commissioner for Grand Canyon National Park; Appointment; Jurisdiction; Compensation

Pub. L. 86-258, Sept. 14, 1959, 73 Stat. 546, provided:

"That the United States District Court for the District of Arizona shall appoint a special commissioner for the Grand Canyon National Park, Arizona. The commissioner shall hold office for four years, unless sooner removed by the district court, and he shall be subject to the general laws and requirements applicable to United States commissioners.

"Sec. 2. The jurisdiction of the commissioner in adjudicating cases brought before him shall be limited to the trial, and sentencing upon conviction, of persons charged with the commission of those misdemeanors classified as petty offenses (18 U.S.C. 1) relating to the violation of Federal laws or regulations applicable within the park: *Provided,* That any person charged with a petty offense may elect to be tried in the district court of the United States; and the commissioner shall apprise the defendant of his right to make such election, but shall not proceed to try the case unless the defendant, after being so apprised, signs a written consent to be tried before the commissioner. The exercise of additional functions by the commissioner shall be consistent with and be carried out in accordance with the authority, laws, and regulations of general application to United States commissioners. The rules of procedure set forth in title 18, section 3402, of the United States Code, shall be followed in the handling of cases by such commissioner. The probation laws shall be applicable to persons tried by the commissioner and he shall have power to grant probation.

"Sec. 3. The commissioner shall receive an annual salary to be fixed by the district court with the approval of the Judicial Conference of the United States and shall account for all fees, fines, and costs collected by him as public moneys. He shall reside within the boundary of the park or at some place reasonably adjacent thereto designated by the Secretary of the Interior with the approval of the district court."

### Section Referred to in Other Sections

This section is referred to in section 751 of this title.

### § 632. Character of service

(a) Full-time United States magistrates may not engage in the practice of law, and may not engage in any other business, occupation, or employment inconsistent with the expeditious, proper, and impartial performance of their duties as judicial officers.

(b) Part-time United States magistrates shall render such service as judicial officers as is required by law. While so serving they may engage in the practice of law, but may not serve as counsel in any criminal action in any court of the United States, nor act in any capacity that is, under such regulations as the conference may establish, inconsistent with the proper discharge of their office. Within such restrictions, they may engage in any other business, occupation, or employment which is not inconsistent with the expeditious, proper, and impartial performance of their duties as judicial officers.

(June 25, 1948, ch. 646, 62 Stat. 916; Oct. 17, 1968, Pub. L. 90-578, title I, § 101, 82 Stat. 1110.)

#### AMENDMENTS

1968—Pub. L. 90-578 substituted provisions as to character of service of full-time and part-time United States magistrates for former provisions prescribing jurisdiction and powers of national park commissioners and practice and procedure before such officers now covered by section 636 of this title.

#### EFFECTIVE DATE OF 1968 AMENDMENT

Amendment by Pub. L. 90-578 effective Oct. 17, 1968, except when a later effective date is applicable, which is the earlier of date when implementation of amendment by appointment of magistrates and assumption of office takes place or third anniversary of enactment of Pub. L. 90-578 on Oct. 17, 1968, see section 403 of Pub. L. 90-578, set out as an Effective Date of 1968 Amendment note under section 631 of this title.

### § 633. Determination of number, locations, and salaries of magistrates

**(a) Surveys by the Director**

(1) The Director shall, within one year immediately following the date of the enactment of the Federal Magistrates Act, make a careful survey of conditions in judicial districts to determine (A) the number of appointments of full-time magistrates and part-time magistrates required to be made under this chapter to provide for the expeditious and effective administration of justice, (B) the locations at which such officers shall serve, and (C) their respective salaries under section 634 of this title. Thereafter, the Director shall, from time to time, make such surveys, general or local, as the conference shall deem expedient.

(2) In the course of any survey, the Director shall take into account local conditions in each judicial district, including the areas and the populations to be served, the transportation and communications facilities available, the amount and distribution of business of the type expected to arise before officers appointed under this chapter (including such matters as may be assigned under section 636(b) of this chapter), and any other material factors. The Director shall give consideration to suggestions from any interested parties, including district judges, United States commissioners or officers appointed under this chapter, United States attorneys, bar associations, and other parties having relevant experience or information.

(3) The surveys shall be made with a view toward creating and maintaining a system of full-time United States magistrates. However, should the Director find, as a result of any such surveys, areas in which the employment of a full-time magistrate would not be feasible or desirable, he shall recommend the appointment of part-time United States magistrates in such numbers and at such locations as may be required to permit prompt and efficient issuance of process and to permit individuals charged with criminal offenses against the United States to be brought before a judicial officer of the United States promptly after arrest.

**(b) Determination by the conference**

Upon the completion of the initial surveys required by subsection (a) of this section, the Director shall report to the district courts, the councils, and the conference his recommendations concerning the number of full-time magistrates and part-time magistrates, their respective locations, and the amount of their respective salaries under section 643 [1] of this title. The district courts shall advise their respective councils, stating their recommendations and the reasons therefor; the councils shall advise the conference, stating their recommendations and the reasons therefor, and shall also report to the conference the recommendations of the district courts. The conference shall determine, in the light of the recommendations of the Director, the district courts, and the councils, the number of full-time United States magistrates and part-time United States magistrates, the locations at which they shall serve, and their respective salaries. Such determinations shall take effect in each judicial district at such time as the district court for such judicial district shall determine, but in no event later than one year after they are promulgated.

**(c) Changes in number, locations, and salaries**

Except as otherwise provided in this chapter, the conference may, from time to time, in the light of the recommendations of the Director, the district courts, and the councils, change the number, locations, and salaries of full-time and part-time magistrates, as the expeditious administration of justice may require. Such determinations shall take effect sixty days after they are promulgated.

(June 25, 1948, ch. 646, 62 Stat. 916; Aug. 13, 1954, ch. 728, § 1(a), (b), 68 Stat. 704; Sept. 2, 1957, Pub. L. 85-276, §§ 1, 2, 71 Stat. 600; Oct. 17, 1968, Pub. L. 90-578, title I, § 101, 82 Stat. 1111.)

#### REFERENCES IN TEXT

Date of the enactment of the Federal Magistrates Act, referred to in subsec. (a)(1), means Oct. 17, 1968, the date of enactment of Pub. L. 90-578.

#### AMENDMENTS

1968—Pub. L. 90-578 substituted provisions for determination of number, locations, and salaries of magistrates, comprising subsecs. (a) to (c) of this section, relating to: surveys by the Director; determination by the conference; and changes in number, locations, and salaries", respectively, for prior provisions for fees and expenses of United States commissioners, prescribing in undesignated introductory provisions a $10,500 limitation for any one calendar year for certain enumerated services rendered, and in former subsec. (c) for actual and necessary office expenses, including compensation of a necessary clerical assistant, of United States commissioners performing full time duty in office and not engaged in practice of law, now covered in sections 634 and 635 of this title.

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[1] So in original. Probably should be 634.

1957—Subsec. (a). Pub. L. 85-276, § 1, placed in subsec. (a) provisions of former subsec. (b) relating to limitation of compensation of commissioners and, among other charges, increased fees and compensation of commissioners.

Subsec. (b). Pub. L. 85-276, § 2, repealed subsec. (b) which limited compensation of commissioners.

1954—Act Aug. 13, 1954, added "and expenses" after "Fees" in the catchline. Subsec. (c). Act Aug. 13, 1954 added subsec. (c).

### Effective Date of 1968 Amendment

Amendment by Pub. L. 90-578 effective Oct. 17, 1968, except when a later effective date is applicable, which is the earlier of date when implementation of amendment by appointment of magistrates and assumption of office takes place or third anniversary of enactment of Pub. L. 90-578 on Oct. 17, 1968, see section 403 of Pub. L. 90-578, set out as an Effective Date of 1968 Amendment note under section 631 of this title.

### Section Referred to in Other Sections

This section is referred to in section 634 of this title.

## § 634. Compensation

(a) Officers appointed under this chapter shall receive as full compensation for their services salaries to be fixed by the conference pursuant to section 633 of this title, at rates for full-time and part-time United States magistrates not to exceed the rates now or hereafter provided for full-time and part-time referees in bankruptcy, respectively, referred to in section 40a of the Bankruptcy Act (11 U.S.C. 68(a)), as amended, except that the salary of a part-time United States magistrate shall not be less than $100 nor more than one-half the maximum salary payable to a full-time magistrate. In fixing the amount of salary to be paid to any officer appointed under this chapter, consideration shall be given to the average number and the nature of matters that have arisen during the immediately preceding period of five years, and that may be expected thereafter to arise, over which such officer would have jurisdiction and to such other factors as may be material. Disbursement of salaries shall be made by or pursuant to the order of the Director.

(b) Except as provided by section 8344, title 5, relating to reductions of the salaries of reemployed annuitants under subchapter III of chapter 83 of such title and unless the office has been terminated as provided in this chapter, the salary of a full-time United States magistrate shall not be reduced, during the term in which he is serving, below the salary fixed for him at the beginning of that term.

(c) All United States magistrates, effective upon their taking the oath or affirmation of office, and all necessary clerical and secretarial assistants employed in the offices of full-time United States magistrates shall be deemed to be officers and employees in the judicial branch of the United States Government within the meaning of subsection III[1] (relating to civil service retirement) of chapter 83, chapter 87 (relating to Federal employees' group life insurance), and chapter 89 (relating to Federal employees' health benefits program) of title 5. Part-time magistrates shall not be excluded from coverage under these chapters solely for lack of a prearranged regular tour of duty.

(June 25, 1948, ch. 646, 62 Stat. 917; Oct. 17, 1968, Pub. L. 90-578, title I, § 101, 82 Stat. 1112; Sept. 21, 1972, Pub. L. 92-428, 86 Stat. 721; Oct. 17, 1976, Pub. L. 94-520, § 1, 90 Stat. 2458.)

### Historical and Revision Notes

Based on sections 29, 72, 74, 80h, 103, 104, 117h, 117j, 132, 132a, 133, 175, 176, 198h, 198j, 204h, 204j, 256f, 256h, 379, 380, 395h, 395j, 403c-9, 403c-11, 403h-7, 403h-9, 404c-7, 404c-9, 408*o*, and 408q of title 16, U.S.C., 1940 ed., Conservation (May 7, 1894, ch. 72, § 7, 28 Stat. 75; Apr. 17, 1900, ch. 192, § 1, 31 Stat. 133; Apr. 20, 1904, ch. 1400, §§ 9, 11, 33 Stat. 189; Mar. 2, 1907, ch. 2516, § 2, 34 Stat. 1218; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167; Aug. 22, 1914, ch. 264, §§ 9, 11, 38 Stat. 701; June 30, 1916, ch. 197, §§ 9, 11, 39 Stat. 246; Aug. 21, 1916, ch. 368, §§ 9, 11, 39 Stat. 523, 524; June 2, 1920, ch. 218, §§ 11, 13, 41 Stat. 734; Mar. 4, 1923, ch. 295, 42 Stat. 1560; Apr. 25, 1928, ch. 434, §§ 9, 11, 45 Stat. 461; Apr. 26, 1928, ch. 438, §§ 9, 11, 45 Stat. 465; Mar. 2, 1929, ch. 583, §§ 9, 11, 45 Stat. 1539; Apr. 19, 1930, ch. 200, §§ 9, 11, 46 Stat. 229; June 25, 1935, ch. 309, §§ 2, 3, 49 Stat. 422; Aug. 19, 1937, ch. 703, §§ 9, 11, 50 Stat. 702, 703; June 25, 1938, ch. 684, § 2, 52 Stat. 1164; June 28, 1938, ch. 778, § 1, 52 Stat. 1213; Mar. 4, 1940, ch. 40, § 2, 54 Stat. 43; Mar. 6, 1942, ch. 150, §§ 7, 9, 56 Stat. 135; Mar. 6, 1942, ch. 151, §§ 7, 9, 56 Stat. 137; Apr. 29, 1942, ch. 264, §§ 7, 9, 56 Stat. 260, 261; June 5, 1942, ch. 341, §§ 7, 9, 56 Stat. 319; Apr. 23, 1946, ch. 202, § 4, 60 Stat. 120; June 24, 1946, ch. 463, § 5, 60 Stat. 303).

Section consolidates provisions of sections 29, 72, 74, 80h, 103, 104, 117h, 117j, 132, 132a, 133, 175, 176, 198h, 198j, 204h, 204j, 256f, 256h, 379, 380, 395h, 395j, 403c-9, 403c-11, 403h-7, 403h-9, 404c-7, 404c-9, 408*o* and 408q of title 16, Conservation, relating to salary and fees of park commissioners with changes in arrangement and phraseology necessary to effect consolidation.

The provisions of some of these sections that the park commissioner should be "paid an annual salary, as appropriated for by Congress, payable quarterly" were rewritten upon advice of the Judicial Conference Committee on the Revision of the Judicial Code appointed by the Chief Justice of the United States, in order to place administration supervision of commissioners upon the district court and the Judicial Conference of the United States.

The provisions of some of these sections for deposit of fees, costs, expenses, fines, and penalties with the clerk of district court were rewritten to provide merely that he shall account for the same as public moneys.

The provisions of some of these sections with reference to salaries of the United States attorney and his assistants and the United States marshal and his deputies were omitted as covered by sections 508 and 552 of this title.

### Senate Revision Amendment

As finally enacted, section 158d of title 16, U.S.C., which was derived from act May 15, 1947, ch. 55, § 4, 61 Stat. 91, 92, was an additional source of this section and was accordingly included by Senate amendment in the schedule of repeals. See 80th Congress Senate Report No. 1559.

### Amendments

1976—Subsec. (a). Pub. L. 94-520 substituted provision fixing the maximum annual salary of a part-time magistrate appointed under this chapter at one-half the maximum salary payable to a full-time magistrate for a former provision that fixed such annual salaries at $15,000 per year and provided that the salary of a full-time magistrate was not to exceed 75% of the annual salary of a United States District Court judge.

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[1] So in original. Should read "subchapter III".

1972—Subsec. (a). Pub. L. 92-428 substituted limits of compensation for full-time and part-time United States magistrates at rates not exceeding those of full-time and part-time referees in bankruptcy, with exceptions that the salary of a part-time United States magistrate shall not be less than $100 nor more than $15,000 per annum and that the salary of a full-time United States magistrate shall not exceed 75 per cent of the salary of a judge of a district court of the United States, for provisions fixing maximum limits for full-time and part-time United States magistrates at $22,500 and $11,000, respectively, and minimum limit for part-time United States magistrates at $100 per annum.

1968—Pub. L. 90-578 substituted provisions for compensation of United States magistrates, comprising subsecs. (a) to (c) of this section and relating to: limitation on amount of compensation and consideration of certain factors for its determination; reduction of salaries of full-time magistrates; and consideration as judicial branch officers and employees of United States magistrates and necessary clerical and secretarial assistants, for prior provisions for salaries of park commissioners and disposition of fees, fines, and costs collected as public moneys.

### Effective Date of 1968 Amendment

Amendment by Pub. L. 90-578 effective Oct. 17, 1968, except when a later effective date is applicable, which is the earlier of date when implementation of amendment by appointment of magistrates and assumption of office takes place or third anniversary of enactment of Pub. L. 90-578 on Oct. 17, 1968, see section 403 of Pub. L. 90-578, set out as an Effective Date of 1968 Amendment note under section 631 of this title.

### Cross References

Compensation for overtime, see section 8331 of Title 5, Government Organization and Employees.

Payment of salaries by marshal, see section 571 of this title.

## § 635. Expenses

(a) Full-time United States magistrates serving under this chapter shall be allowed their actual and necessary expenses incurred in the performance of their duties, including the compensation of necessary clerical and secretarial assistance. Such expenses and compensation shall be determined and paid by the Director under such regulations as the Director shall prescribe with the approval of the conference. The Administrator of General Services shall provide such magistrates with necessary courtrooms, office space, furniture and facilities within United States courthouses or office buildings owned or occupied by departments or agencies of the United States, or should suitable courtroom and office space not be available within any such courthouse or office building, the Administrator of General Services, at the request of the Director, shall procure and pay for suitable courtroom and office space, furniture and facilities for such magistrate in another building, but only if such request has been approved as necessary by the judicial council of the appropriate circuit.

(b) Under such regulations as the Director shall prescribe with the approval of the conference, the Director shall reimburse part-time magistrates for actual expenses necessarily incurred by them in the performance of their duties under this chapter. Such reimbursement may be made, at rates not exceeding those prescribed by such regulations, for expenses incurred by such part-time magistrates for clerical and secretarial assistance, stationery, telephone and other communications services, travel, and such other expenses as may be determined to be necessary for the proper performance of the duties of such officers: *Provided, however,* That no reimbursement shall be made for all or any portion of the expense incurred by such part-time magistrates for the procurement of office space.

(June 25, 1948, ch. 646, 62 Stat. 917; Oct. 17, 1968, Pub. L. 90-578, title I, § 101, 82 Stat. 1112.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., §§ 597, 597a, 597b, 597c (May 28, 1896, ch. 252, §§ 21, 24, 29 Stat. 184, 186; Aug. 1, 1946, ch. 721, §§ 1-4, 60 Stat. 752, 753).

The provision of section 597c of title 28, U.S.C., 1940 ed., excepting commissioners in the Territory of Alaska was omitted as unnecessary since this exception is implicit in the revised section. The words "in each judicial district" limit the section to the commissioners in the districts enumerated in chapter 5 which includes Hawaii, Puerto Rico, and District of Columbia but omits Alaska, Canal Zone, [Guam] and Virgin Islands.

Salaries of park commissioners are provided by section 634 of this title.

Changes were made in phraseology.

### Amendments

1968—Pub. L. 90-578 substituted provisions relating to expenses for prior provisions prescribing residence for park commissioners now covered by section 631 of this title.

### Effective Date of 1968 Amendment

Amendment by Pub. L. 90-578 effective Oct. 17, 1968, except when a later effective date is applicable, which is the earlier of date when implementation of amendment by appointment of magistrates and assumption of office takes place or third anniversary of enactment of Pub. L. 90-578 on Oct. 17, 1968, see section 403 of Pub. L. 90-578, set out as an Effective Date of 1968 Amendment note under section 631 of this title.

### Section Referred to in Other Sections

This section is referred to in section 636 of this title.

## § 636. Jurisdiction, powers, and temporary assignment

(a) Each United States magistrate serving under this chapter shall have within the territorial jurisdiction prescribed by his appointment—

(1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts;

(2) the power to administer oaths and affirmations, impose conditions of release under section 3146 of title 18, and take acknowledgements, affidavits, and depositions; and

(3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section.

(b)(1) Notwithstanding any provision of law to the contrary—

(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for postrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

(2) A judge may designate a magistrate to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure for the United States district courts.

(3) A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

(4) Each district court shall establish rules pursuant to which the magistrates shall discharge their duties.

(c) The practice and procedure for the trial of cases before officers serving under this chapter, and for the taking and hearing of appeals to the district courts, shall conform to rules promulgated by the Supreme Court pursuant to section 3402 of title 18, United States Code.

(d) In a proceeding before a magistrate, any of the following acts or conduct shall constitute a contempt of the district court for the district wherein the magistrate is sitting: (1) disobedience or resistance to any lawful order, process, or writ; (2) misbehavior at a hearing or other proceeding, or so near the place thereof as to obstruct the same; (3) failure to produce, after having been ordered to do so, any pertinent document; (4) refusal to appear after having been subpenaed or, upon appearing, refusal to take the oath or affirmation as a witness, or, having taken the oath or affirmation, refusal to be examined according to law; or (5) any other act or conduct which if committed before a judge of the district court would constitute contempt of such court. Upon the commission of any such act or conduct, the magistrate shall forthwith certify the facts to a judge of the district court and may serve or cause to be served upon any person whose behavior is brought into question under this section an order requiring such person to appear before a judge of that court upon a day certain to show cause why he should not be adjudged in contempt by reason of the facts so certified. A judge of the district court shall thereupon, in a summary manner, hear the evidence as to the act or conduct complained of and, if it is such as to warrant punishment, punish such person in the same manner and to the same extent as for a contempt committed before a judge of the court, or commit such person upon the conditions applicable in the case of defiance of the process of the district court or misconduct in the presence of a judge of that court.

(e) In an emergency and upon the concurrence of the chief judges of the districts involved, a United States magistrate may be temporarily assigned to perform any of the duties specified in subsection (a) or (b) of this section in a judicial district other than the judicial district for which he has been appointed. No magistrate shall perform any of such duties in a district to which he has been temporarily assigned until an order has been issued by the chief judge of such district specifying (1) the emergency by reason of which he has been transferred, (2) the duration of his assignment, and (3) the duties which he is authorized to perform. A magistrate so assigned shall not be entitled to additional compensation but shall be reimbursed for actual and necessary expenses incurred in the performance of his duties in accordance with section 635.

(June 25, 1948, ch. 646, 62 Stat. 917; Oct. 17, 1968, Pub. L. 90-578, title I, § 101, 82 Stat. 1113; Mar. 1, 1972, Pub. L. 92-239, §§ 1, 2, 86 Stat. 47; Oct. 21, 1976, Pub. L. 94-577, § 1, 90 Stat. 2729.)

### HISTORICAL AND REVISION NOTES

*Prior jurisdiction, powers, and procedure provisions in section 632.*—Based on sections 27, 66, 67, 68, 80f, 100, 117e, 129, 172, 181b, 204e, 256d, 376, 395e, 403c-5, 403c-6, 403h-5, 404c-5, and 408m of title 16, U.S.C., 1940 ed., Conservation (May 7, 1894, ch. 72, § 5, 28 Stat. 74; Apr. 20, 1904, ch. 1400, § 6, 33 Stat. 188; Mar. 2, 1907, ch. 2516, §§ 1, 2, 34 Stat. 1218; Mar. 3, 1911, ch. 230, 36 Stat. 1086; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167; Aug. 22, 1914, ch. 264, § 6, 38 Stat. 700; June 30, 1916, ch. 197, § 6, 39 Stat. 245; Aug. 21, 1916, ch. 368, § 6, 39 Stat. 523; June 2, 1920, ch. 218, §§ 7, 8, 41 Stat. 733; Apr. 25, 1928, ch. 434, § 6, 45 Stat. 460; Apr. 26, 1928, ch. 438, § 6, 45 Stat. 464; Apr. 19, 1930, ch. 200, § 6, 4 Stat. 228; May 2, 1932, ch. 155, § 3, 47 Stat. 145; June 25, 1935, ch. 309, § 1, 49 Stat. 422; Aug. 19, 1937, ch. 703, §§ 5, 6, 50 Stat. 702; June 25, 1938, ch. 684, § 1, 52 Stat. 1164; June 28, 1938, ch. 778, § 1, 52 Stat. 1213; Mar. 4, 1940, ch. 40, § 2, 54 Stat. 43; Mar. 6, 1942, ch. 150, § 5, 56 Stat. 134; Mar. 6, 1942, ch. 151, § 5, 56 Stat. 137; Apr. 29, 1942, ch. 264, § 5, 56 Stat. 260; June 5, 1942, ch. 341, § 5, 56 Stat. 318; Apr. 23, 1946, ch. 202,

§ 2, 60 Stat. 120; June 24, 1946, ch. 463, § 2, 60 Stat. 303).

Section consolidates provisions of sections 27, 66, 67, 68, 80f, 100, 117e, 129, 172, 181b, 204e, 256d, 376, 395e, 403c-5, 403c-6, 403h-5, 404c-5 and 408m of title 16, U.S.C., 1940 ed., relating to jurisdiction and powers of park commissioners with necessary changes in arrangement and phraseology. For other provisions of such sections, see Distribution Table.

The provisions of sections 27, 66, 67, 68, 100, 117e, 129, 172, 181b, 204e, 256d, 376, 395e, 403c-5, 403c-6, 403h-5, 404c-5 and 408m of title 16, U.S.C., 1940 ed., relating to the powers of park commissioners respecting issuance of warrants of arrest and other process were omitted and are recommended for repeal as covered by sections 3041 and 3141 of revised title 18 (H.R. 1600, 80th Cong.), and Rules, 4, 5(c), and 9 of the new Federal Rules of Criminal Procedure.

Provisions in sections 27, 66, 67, 68, 100, 117e, 129, 172, 181b, 204e, 256d, 376, 395e, 403c-5, 403c-6, 403h-5, 404c-5 and 408m of title 16, U.S.C., 1940 ed., for arrest without warrant for violation of law or regulation within a national park were also omitted and are recommended for repeal as covered by section 3054 of revised title 18 (H.R. 2200, 79th Cong.), Rule 4 of the Federal Rules of Criminal Procedure and Rule 4 of the Federal Rules of Civil Procedure.

### SENATE REVISION AMENDMENT

As finally enacted, section 158b of Title 16, U.S.C., which was derived from act May 15, 1947, ch. 55, § 2, 61 Stat. 92, was an additional source of this section, and such act was accordingly included by Senate amendment in the schedule of repeals. No change in the text of the section was necessary as the result of inclusion of such section 158b. See 80th Congress Senate Report No. 1559.

As finally enacted, act May 15, 1947, ch. 57, 61 Stat. 92, which amended section 403c-5 of Title 16, U.S.C., was an additional source of this section, and such act was accordingly included by Senate amendment in the schedule of repeals. See 80th Congress Senate Report No. 1559.

*Prior oaths, acknowledgments, affidavits, and despositions provisions in section 637.*—Based on title 28, U.S.C., 1940 ed., §§ 525, 758 (R.S. § 945; May 28, 1896, ch. 252, § 19, 29 Stat. 184; Mar. 2, 1901, ch. 814, 31 Stat. 956; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167).

This section consolidates part of section 525 with section 758 of title 28, U.S.C., 1940 ed. The provision of said section 525 empowering clerks and deputy clerks to administer oaths is incorporated in section 953 of this title. The provision of said section 758 that acknowledgments of bail and affidavits should have the same effect as if taken before judges was omitted as surplusage.

The exception as to Alaska, provided in section 591 of title 28, U.S.C., 1940 ed., and referred to in section 525 of title 28, U.S.C., 1940 ed., was omitted as unnecessary since section 108 of title 48, U.S.C., 1940 ed., Territories and Insular Possessions, and section 1119 of the Compiled Laws of Alaska, 1933, give commissioners all powers of notaries public. See also reviser's notes to sections 631 and 633 of this title.

Word "acknowledgments" was inserted to make it clear that commissioners, like justices of the peace, can take acknowledgments as well as oaths, affidavits, etc.

The authority to take depositions was included to conform to Federal Rules of Civil Procedure, Rule 28.

Changes were made in phraseology.

### REFERENCES IN TEXT

The Rules of Criminal Procedure for the United States District Courts, referred to in subsec. (a)(1), are classified generally to Title 18, App., Crimes and Criminal Procedure.

The Federal Rules of Civil Procedure for the United States district courts, referred to in subsec. (b)(2), are classified generally to the appendix to this title.

### AMENDMENTS

1976—Subsec. (b). Pub. L. 94-577 completely revised the provisions under which additional duties may be assigned to a United States Magistrate by allowing, among other additional duties, the assignment of pretrial matters, dispositive motions, and service as a special master.

1972—Pub. L. 92-239, § 2, substituted "Jurisdiction, powers, and temporary assignment" for "Jurisdiction and powers" as the section catchline.

Subsec. (e). Pub. L. 92-239, § 1, added subsec. (e).

1968—Pub. L. 90-578 substituted provisions declaratory of jurisdiction and powers of United States magistrates for prior provisions respecting rendition of accounts by United States commissioners.

### EFFECTIVE DATE OF 1968 AMENDMENT

Amendment by Pub. L. 90-578 effective Oct. 17, 1968, except when a later effective date is applicable, which is the earlier of date when implementation of amendment by appointment of magistrates and assumption of office takes place or third anniversary of enactment of Pub. L. 90-578 on Oct. 17, 1968, see section 403 of Pub. L. 90-578, set out as an Effective Date of 1968 Amendment note under section 631 of this title.

### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 7 section 2149; title 46 section 1484.

## § 637. Training

The Federal Judicial Center shall conduct periodic training programs and seminars for both full-time and part-time United States magistrates, including an introductory training program for new magistrates, to be held within one year after initial appointment.

(June 25, 1948, ch. 646, 62 Stat. 917; Oct. 17, 1968, Pub. L. 90-578, title I, § 101, 82 Stat. 1114.)

### AMENDMENTS

1968—Pub. L. 90-578 substituted provisions for periodic training programs and seminars for United States magistrates for prior authorization of United States commissioners to administer oaths and take bail, acknowledgements, affidavits, and depositions, now incorporated in section 636(a)(2) of this title.

### EFFECTIVE DATE OF 1968 AMENDMENT

Amendment by Pub. L. 90-578 effective Oct. 17, 1968, except when a later effective date is applicable, which is the earlier of date when implementation of amendment by appointment of magistrates and assumption of office takes place or third anniversary of enactment of Pub. L. 90-578 on Oct. 17, 1968, see section 403 of Pub. L. 90-578, set out as an Effective Date of 1968 Amendment note under section 631 of this title.

## § 638. Dockets and forms; United States Code; seals

(a) The Director shall furnish to United States magistrates adequate docket books and forms prescribed by the Director. The Director shall also furnish to each such officer a copy of the current edition of the United States Code.

(b) All property furnished to any such officer shall remain the property of the United States and, upon the termination of his term of office, shall be transmitted to his successor in office or otherwise disposed of as the Director orders.

(c) The Director shall furnish to each United States magistrate appointed under this chapter an official impression seal in a form prescribed by the conference. Each such officer shall affix his seal to every jurat or certificate of his official acts without fee.

(June 25, 1948, ch. 646, 62 Stat. 917; Oct. 17, 1968, Pub. L. 90-578, title I, § 101, 82 Stat. 1114.)

### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§ 528, 528a (June 28, 1906, ch. 3573, 34 Stat. 546; July 10, 1946, ch. 548, 60 Stat. 525).

Section consolidates section 528 and part of section 528a of title 28, U.S.C., 1940 ed., with changes in phraseology necessary to effect consolidation.

Provisions of section 528a of title 28, U.S.C., 1940 ed., relating to dockets and forms, are incorporated in section 639 of this title.

Words "Director of the Administrative Office of the United States Courts" were substituted for "Attorney General", contained in section 528 of title 28, U.S.C., 1940 ed., in view of Act Aug. 7, 1939, ch. 501, § 6, 53 Stat. 1226, 28 U.S.C., 1940 ed., following § 446, giving the Directors supervision of court administrative matters.

Changes in phraseology were made.

### AMENDMENTS

1968—Subsec. (a). Pub. L. 90-578 incorporated in provisions designated as subsec. (a) provisions of the first par. of former section 639 of this title, substituting "United States magistrates" for prior designation as "United States Commissioners", specifying that the copy of the United States Code be a current edition, and dispensing with approval by the chief judge of the district court for a copy of such Code.

Subsec. (b). Pub. L. 90-578 incorporated in provisions designated as subsec. (b) provisions of the second par. of former section 639 of this title.

Subsec. (c). Pub. L. 90-578 designated existing provisions as subsec. (c), and substituted "United States magistrate" for "United States commissioner", provision for appointment under this chapter rather than after July 10, 1946, provision that the form of the seal be prescribed by the conference rather than the Director, and "without fee" for "without additional fee".

### EFFECTIVE DATE OF 1968 AMENDMENT

Amendment by Pub. L. 90-578 effective Oct. 17, 1968, except when a later effective date is applicable, which is the earlier of date when implementation of amendment by appointment of magistrates and assumption of office takes place or third anniversary of enactment of Pub. L. 90-578 on Oct. 17, 1968, see section 403 of Pub. L. 90-578, set out as an Effective Date of 1968 Amendment note under section 631 of this title.

### § 639. Definitions

As used in this chapter—

(1) "Conference" shall mean the Judicial Conference of the United States;

(2) "Council" shall mean the Judicial Council of the Circuit;

(3) "Director" shall mean the Director of the Administrative Office of the United States Courts;

(4) "Full-time magistrate" shall mean a full-time United States magistrate;

(5) "Part-time magistrate" shall mean a part-time United States magistrate; and

(6) "United States magistrate" and "magistrate" shall mean both full-time and part-time United States magistrates.

(June 25, 1948, ch. 646, 62 Stat. 917; Oct. 17, 1968, Pub. L. 90-578, title I, § 101, 82 Stat. 1114.)

### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 528a (July 10, 1946, ch. 548, 60 Stat. 525).

Provisions of section 528a of title 28, U.S.C., 1940 ed., for furnishing seal is included in section 638 of this title.

Changes were made in phraseology.

### AMENDMENTS

1968—Pub. L. 90-578 substituted definition provisions for prior requirements obligating the Director to furnish docket books and forms to United States commissioners and, with approval of the chief judge of the district court, a copy of the United States Code, declaring such property to remain United States property, and calling for transmission of such property to successors in office or for its disposal as directed by the Director, now incorporated in section 638 (a) and (b) of this title.

### EFFECTIVE DATE OF 1968 AMENDMENT

Amendment by Pub. L. 90-578 effective Oct. 17, 1968, except when a later effective date is applicable, which is the earlier of date when implementation of amendment by appointment of magistrates and assumption of office takes place or third anniversary of enactment of Pub. L. 90-578 on Oct. 17, 1968, see section 403 of Pub. L. 90-578, set out as an Effective Date of 1968 Amendment note under section 631 of this title.

## CHAPTER 45—SUPREME COURT

Sec.
671. Clerk.
672. Marshal.
673. Reporter.
674. Librarian.
675. Law clerks and secretaries.
676. Printing and binding.
677. Administrative Assistant to the Chief Justice.

### AMENDMENTS

1972—Pub. L. 92-238, § 2, Mar. 1, 1972, 86 Stat. 46, added item 677.

### CROSS REFERENCES

General provisions applicable to court officers and employees, see sections 951 et seq. of this title.

### § 671. Clerk

(a) The Supreme Court may appoint and fix the compensation of a clerk and one or more deputy clerks. The clerk shall be subject to removal by the Court. Deputy clerks shall be subject to removal by the clerk with the approval of the Court or the Chief Justice of the United States.

[(b) Repealed. Pub. L. 92-310, title II, § 206(c), June 6, 1972, 86 Stat. 203.]

(c) The clerk may appoint and fix the compensation of necessary assistants and messengers with the approval of the Chief Justice of the United States.

(d) The clerk shall pay into the Treasury all fees, costs, and other moneys collected by him. He shall make annual returns thereof to the Court under regulations prescribed by it.

(June 25, 1948, ch. 646, 62 Stat. 918; Mar. 10, 1964, Pub. L. 88-279, § 1, 78 Stat. 158; June 6, 1972, Pub. L. 92-310, title II, § 206(c), 86 Stat. 203.)

### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§ 325, 326, 327, 541 and 542 (Feb. 22, 1875, ch. 95, §§ 2, 3, 18 Stat. 333;

Mar. 3, 1883, ch. 143, 22 Stat. 631; Mar. 15, 1898, ch. 68, § 8, 30 Stat. 317; Mar. 3, 1911, ch. 231, §§ 219, 220, 221, 291, 36 Stat. 1152, 1153, 1167; June 10, 1921, ch. 18, § 304, 42 Stat. 24).

This section consolidates sections 541 and 542 of title 28, U.S.C., 1940 ed., with parts of sections 325, 326 and 327 of such title.

The provisions in said section 325 relating to appointment of a marshal and reporter are incorporated in sections 672 and 673 of this title.

The provisions in section 327 of title 28, U.S.C., 1940 ed., relating to duties and liabilities of the clerk's deputies are incorporated in section 954 of this title.

The provision of section 326 of title 28, U.S.C., 1940 ed., that a duly certified copy of the clerk's bond should be competent evidence in any court, is incorporated in section 1737 of this title.

The provision that the clerk shall be subject to removal by the Court is new. Section 327 of title 28, U.S.C., 1940 ed., contained a similar provision as to deputies, but fixed no term of office for the clerk and made no provision for his removal. The Supreme Court held, in 1839, that a district judge had power to remove his clerk at pleasure in absence of any law fixing the clerk's tenure. *In re Hennen*, 38 U.S. 230, 13 Pet. 230, 10 L.Ed. 138. (See, also *Myers* v. *U.S.*, 1926, 47 S.Ct. 21, 272 U.S. 52, 71 L.Ed. 160.)

The provision in section 326 of title 28, U.S.C., 1940 ed., that the clerk's bond be not less than $5,000 and not more than $20,000 was omitted. The Supreme Court should have wide discretion in such administrative matters. (See Hearings before Appropriations Committee, House of Representatives, 78th Cong., 2d sess., on Judiciary Appropriation Bill for 1945, page 102.)

A provision of section 326 of title 28, U.S.C., 1940 ed., that a renewed or augmented bond should be required upon the Attorney General's motion and after thirty days' notice was omitted. The manner of requiring such bond is left to the Court's discretion by the revised section.

A further provision of section 326 of title 28, U.S.C., 1940 ed., that the failure to furnish such renewed or augmented bond should vacate the clerk's office was omitted as unnecessary, since the clerk is removable by the Court under this section.

The references in section 541 of title 28, U.S.C., 1940 ed., to return "under oath" to be made "on the 1st day of January of each year, or thirty days thereafter" and "on a form prescribed by the Attorney General", were omitted as fully covered by the revised language "annual returns" under "regulations prescribed by the Court". Verification seems unnecessary especially as clerks of the courts of appeals are not required to submit similar returns under oath (see section 711 of this title). "Court" was substituted for "Attorney General", since the latter's powers and functions in court administrative matters have been transferred to the Director of the Administration Office of the United States Courts. (See sections 604 and 607 of this title.) The Director, however, exercises no authority in Supreme Court matters.

Section 542 of title 28, U.S.C., 1940 ed., provided that the clerk "shall not retain", out of fees received, more than $6,000 annually above clerk hire and expenses; that the surplus should be paid into the Treasury. Such indirect and unusual provision is simplified in this section by providing that his salary shall be fixed by the Court. Such salary limitation is omitted as inconsistent with larger salaries paid other clerks of courts.

The provisions that the Court shall fix the compensation of deputy clerks, and that the clerk shall fix the compensation of assistants and messengers with the approval of the Chief Justice, are new. Current appropriation Acts providing that the compensation of officers and employees of the Supreme Court, other than clerk and reporter shall be fixed by the court, unnecessarily burden the court with administrative details. Provision for allowance and approval of payments of compensation and office expenses by the clerk upon allowance and approval by the Chief Justice, instead of by the Court, was inserted with the approval of the Judicial Conference Committee on Revision of the Judicial Code as not inconsistent with section 542 of title 28, U.S.C., 1940 ed.

References in sections 541 and 542 of title 28, U.S.C., 1940 ed., to certification of expenses by the justices and for audit and allowances by the General Accounting Office, were omitted as unnecessary in view of this section.

Changes were made in phraseology.

### AMENDMENTS

1972—Subsec. (b). Pub. L. 92-310 repealed subsec. (b) which related to the bond of the Clerk of the Supreme Court.

1964—Subsec. (c). Pub. L. 88-279 eliminated provision for disbursement by the clerk of the compensation of the clerk, his deputies, assistants, and messengers and the necessary expenses of the office from the fees collected by the clerk, upon allowance and approval by the Chief Justice of the United States.

Subsec. (d). Pub. L. 88-279 substituted "moneys collected by him" for "emoluments of his office over and above his lawful disbursements".

### EFFECTIVE DATE OF 1964 AMENDMENT

Section 4 of Pub. L. 88-279 provided that: "The amendments proposed in this Act [amending subsecs. (c) and (d) of this section and section 672 of this title] shall become effective only when funds have been appropriated and are available to pay the salaries and other expenses of the clerk's office."

### APPROPRIATIONS

Section 3 of Pub. L. 88-279 provided that: "There are hereby authorized to be appropriated annually such sums as are necessary to carry out the provisions of this Act [amending subsecs. (c) and (d) of this section and section 672 of this title]."

### CROSS REFERENCES

Compensation for overtime, see section 8331 of Title 5, Government Organization and Employees.

Fees of clerk to be fixed by Supreme Court, see section 1911 of this title.

Oath of clerk and deputies, see section 951 of this title.

## § 672. Marshal

(a) The Supreme Court may appoint a marshal, who shall be subject to removal by the Court, and may fix his compensation.

(b) The marshal may, with the approval of the Chief Justice of the United States, appoint and fix the compensation of necessary assistants and other employees to attend the Court, and necessary custodial employees.

(c) The marshal shall:

(1) Attend the Court at its sessions;

(2) Serve and execute all process and orders issued by the Court or a member thereof;

(3) Take charge of all property of the United States used by the Court or its members;

(4) Disburse funds appropriated for work upon the Supreme Court building and grounds under the jurisdiction of the Architect of the Capitol upon certified vouchers submitted by the Architect;

(5) Disburse funds appropriated for the purchase of books, pamphlets, periodicals and other publications, and for their repair, binding, and rebinding, upon vouchers certified by the librarian of the Court;

(6) Pay the salaries of the Chief Justice, associate justices, and all officers and employ-

ees of the Court and disburse other funds appropriated for disbursement, under the direction of the Chief Justice.

(7) Pay the expenses of printing briefs and travel expenses of attorneys in behalf of persons whose motions to appear in forma pauperis in the Supreme Court have been approved and when counsel have been appointed by the Supreme Court, upon vouchers certified by the clerk of the Court.

(June 25, 1948, ch. 646, 62 Stat. 918; Mar. 10, 1964, Pub. L. 88-279, § 2, 78 Stat. 158.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§ 325, 331, and section 13d of title 40, U.S.C., 1940 ed., Public Buildings, Property and Works (Mar. 3, 1911, ch. 231, §§ 219, 224, 36 Stat. 1152, 1153; April 11, 1928, ch. 358, 45 Stat. 424; May 7, 1934, ch. 222, § 4, 48 Stat. 668).

This section consolidates part of section 325 of title 28, U.S.C., 1940 ed., with section 331 of such title and section 13d of title 40, U.S.C., 1940 ed.

Provisions of section 325 of title 28, U.S.C., 1940 ed., relating to appointment of clerk and reporter of the Supreme Court are incorporated in sections 671 and 673 of this title.

Provision of section 331 of title 28, U.S.C., 1940 ed., fixing the marshal's salary at "not to exceed $5,500 per annum" was omitted and the court given authority to fix the salary in conformity with sections 671 and 673 of this title relating to the clerk and the reporter.

Part of subsection (c)(5) is new. It recognizes the propriety of certification by the Court Librarian of vouchers for expenditures for the library. (See reviser's note under section 674 of this title.)

The marshal's duties as superintendent of the Supreme Court building are incorporated in section 13c of title 40, U.S.C., 1940 ed.

Changes were made in phraseology.

#### AMENDMENTS

1964—Subsec. (c)(6). Pub. L. 88-279, § 2(a), deleted "except the clerk, his deputies and employees," following "employees of the Court".

Subsec. (c)(7). Pub. L. 88-279, § 2(b), added par. (7).

#### EFFECTIVE DATE OF 1964 AMENDMENT

Amendment of subsec. (c) by Pub. L. 88-279 effective upon appropriation and availability of funds to pay salaries and other expenses of the clerk's office, see section 4 of Pub. L. 88-279, set out as an Effective Date of 1964 Amendment note under section 671 of this title.

#### APPROPRIATIONS

Annual appropriations to carry out amendment of subsecs. (c)(6) and (7) of this section by Pub. L. 88-279, see section 3 of Pub. L. 88-279, set out as an Appropriations note under section 671 of this title.

#### INCREASE IN COMPENSATION RATES

Increase in rates of basic compensation fixed pursuant to this section, see notes under section 603 of this title.

### § 673. Reporter

(a) The Supreme Court may appoint and fix the compensation of a reporter of its decisions who shall be subject to removal by the Court.

(b) The reporter may appoint and fix the compensation of necessary professional and clerical assistants and other employees, with the approval of the Court or the Chief Justice of the United States.

(c) The reporter shall, under the direction of the Court or the Chief Justice, prepare the decisions of the Court for publication in bound volumes and advance copies in pamphlet installments.

The reporter shall determine the quality and size of the paper, type, format, proofs and binding subject to the approval of the Court or the Chief Justice.

(June 25, 1948, ch. 646, 62 Stat. 919.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§ 325, 332, and 333 (Mar. 3, 1911, ch. 231, §§ 219, 225, 226, 36 Stat. 1152, 1153; July 1, 1922, ch. 267, §§ 1, 2, 42 Stat. 816; May 29, 1926, ch. 425, § 1, 44 Stat. 677).

This section consolidates sections 332 and 333 of title 28, U.S.C., 1940 ed., with part of section 325 of such title.

Provisions of section 325 of title 28, U.S.C., 1940 ed., relating to appointment of clerk and marshal of the Supreme Court are incorporated in sections 671 and 672 of this title.

The provision as to tenure is new and is added to insure consistency with other revised sections relating to tenure of court officers.

The provisions of section 333 of title 28, U.S.C., 1940 ed., fixing the reporter's salary at $8,000 per annum were omitted and the Court given authority to fix the salary in conformity with sections 671 and 672 of this title relating to the clerk and the marshal.

Provisions of section 333 of title 28, U.S.C., 1940 ed., for allowance of stationery, supplies, equipment, and office rent are omitted as obsolete. Offices are now provided in the Supreme Court building and supplies are furnished by the marshal.

The last sentence of section 333 of title 28, U.S.C., 1940 ed., relating to the payment of the reporter's expenses from appropriation for the Supreme Court, was omitted as surplusage.

The revised section makes specific the implied power to fix the compensation of the reporter's assistants.

The provision in section 332 of title 28, U.S.C., 1940 ed., authorizing the Public Printer to do the printing referred to in such section, was omitted as unnecessary. (See section 111 of title 44, U.S.C., 1940 ed., Public Printing and Documents.)

Authority for making an appropriation to carry into effect the provisions of this section relating to compensation and allowances of the reporter, compensation of his assistants, and preparation of the decisions of the Supreme Court for publication, is contained in section 336 of title 28, U.S.C., 1940 ed. (Acts July 1, 1922, ch. 267, § 5, 42 Stat. 818; May 29, 1926, ch. 425, § 3, 44 Stat. 678), which is omitted, but not repealed, as unnecessary in this revision.

#### INCREASE IN COMPENSATION RATES

Increase in compensation rates fixed under this section, see notes under section 603 of this title.

#### CROSS REFERENCES

Compensation for overtime, see section 8331 of Title 5, Government Organization and Employees.

### § 674. Librarian

(a) The Supreme Court may appoint a librarian, whose salary it shall fix, and who shall be subject to removal by the Court.

(b) The librarian shall, with the approval of the Chief Justice, appoint necessary assistants and fix their compensation and make rules governing the use of the library.

(c) He shall select and acquire by purchase, gift, bequest, or exchange, such books, pamphlets, periodicals, microfilm and other processed copy as may be required by the Court for its official use and for the reasonable needs of its bar.

(d) The librarian shall certify to the marshal for payment vouchers covering expenditures for the purchase of such books and other material, and for binding, rebinding and repairing the same.

(June 25, 1948, ch. 646, 62 Stat. 919; June 6, 1972, Pub. L. 92-310, title II, § 206(d), 86 Stat. 203.)

### Historical and Revision Notes

This section gives statutory recognition to the office of librarian. For many years the Court has appointed its librarian directly through the Chief Justice, rather than through the marshal. Other members of the library staff are appointed by the librarian, with the approval of the Chief Justice.

Under this section the marshal will not be required to certify to expenditures for some 2,000 books bought for the library each year but this will be the duty of the librarian.

### Amendments

1972—Subsec. (d). Pub. L. 92-310 eliminated sentence which required the librarian to furnish a bond.

### Increase in Compensation Rates

Increase in compensation rates fixed under this section, see notes under section 603 of this title.

## § 675. Law clerks and secretaries

The Chief Justice of the United States, and the associate justices of the Supreme Court may appoint law clerks and secretaries whose salaries shall be fixed by the Court.

(June 25, 1948, ch. 646, 62 Stat. 919.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1926 ed., § 328 (June 1, 1922, ch. 204, title II, 42 Stat. 614; Jan. 3, 1923, ch. 21, title II, 42 Stat. 1081; May 28, 1924, ch. 204, title II, 43 Stat. 218; Feb. 27, 1925, ch. 364, title II, 43 Stat. 1028).

Section is derived from Appropriation Acts for fiscal years cited in the credits. It was omitted from the 1934 and 1940 editions of the U.S. Code because it was considered to be probably of a temporary nature. This section is consistent with other provisions authorizing the appointment of similar personnel for circuit and district judges.

The 1942 appropriation act (July 2, 1942, ch. 472, title IV, 56 Stat. 501) made provision for "all other officers and employees, whose compensation shall be fixed by the Court, except as otherwise provided by law and who may be assigned by the Chief Justice to any office or work of the Court."

The salary limitation of $3,600 was omitted and the Court authorized to fix law clerks' salaries. Current appropriation acts provide that salaries of the Court's officers and employees, except the clerk and reporter, shall be fixed by the Court.

See section 711 et seq. and section 751 et seq., of this title, relating to appointment of law clerks and secretaries to circuit and district judges.

Changes were made in phraseology.

### Increase in Compensation Rates

Increase in compensation rates fixed under this section, see notes under section 603 of this title.

## § 676. Printing and binding

(a) The printing and binding for the Supreme Court, including the printing and binding of individual copies, advance pamphlet installments, and bound volumes, of its decisions, whether requisitioned or ordered by the Court or any of its officers or by any other office or agency, and whether paid for by, or charged to the appropriation for, the Court or any other office or agency, shall be done by the printer or printers whom the Court or the Chief Justice of the United States may select, unless it shall otherwise order.

(b) Whenever advance pamphlet installments and bound volumes of the Court's decisions are printed by a private printer, an adequate number of copies for distribution in accordance with the requirements of section 411 of this title and for sale to the public shall be provided and made available for these purposes in such manner and at such prices as may be determined from time to time by the Supreme Court or the Chief Justice of the United States, in lieu of compliance by the Public Printer and the Superintendent of Documents with the requirements of sections 411 and 412 of this title with respect to such copies. Pending distribution or sale, such copies shall be the property of the United States and shall be held in the custody of the marshal or such other person, organization, or agency, as the Supreme Court or the Chief Justice of the United States may designate.

(June 25, 1948, ch. 646, 62 Stat. 919; May 24, 1949, ch. 139, § 74, 63 Stat. 100; Oct. 31, 1951, ch. 655, § 45, 65 Stat. 725.)

### Historical and Revision Notes

#### 1948 Act

Based on title 28, U.S.C., 1940 ed., § 354 (Feb. 27, 1925, ch. 364, title II, 43 Stat. 1028; Apr. 29, 1926, ch. 195, title II, 44 Stat. 344; Feb. 24, 1927, ch. 189, title II, 44 Stat. 1194; Feb. 15, 1928, ch. 57, title II, 45 Stat. 79; Jan. 25, 1929, ch. 102, title II, 45 Stat. 1109; Apr. 18, 1930, ch. 184, title II, 46 Stat. 188; Feb. 23, 1931, ch. 280, title II, 46 Stat. 1323; July 1, 1932, ch. 361, title II, 47 Stat. 490; Mar. 1, 1933, ch. 144, title II, 47 Stat. 1382; Apr. 7, 1934, ch. 104, title II, 48 Stat. 539).

The section was expanded to include the printing and binding of the official edition of the court's decisions, thus making possible an economy in the expenditure of Government funds by having the printing and binding done by the same printer.

Subsection (b) of the revised section was supplied to conform to sections 411 and 412 of this title.

#### 1949 Act

This section corrects a grammatical error in subsection (a) of section 676 of title 28, U.S.C.

### Amendments

1951—Subsec. (b). Act Oct. 31, 1951, inserted "of this title" in two places.

1949—Subsec. (a). Act May 24, 1949, inserted "whom" between "printers" and "the Court".

## § 677. Administrative Assistant to the Chief Justice

(a) The Chief Justice of the United States may appoint an Administrative Assistant who shall serve at the pleasure of the Chief Justice and shall perform such duties as may be assigned to him by the Chief Justice. The salary payable to the Administrative Assistant shall be fixed by the Chief Justice at a rate which shall not exceed the salary payable to the Director of the Administrative Office of the United States Courts. The Administrative Assistant may elect to bring himself within the same retirement program available to the Director of the Administrative Office of the United States Courts, as provided by section 611 of this title, by filing a written election with the Chief Justice within the time and in the manner prescribed by section 611.

(b) The Administrative Assistant, with the approval of the Chief Justice, may appoint and fix the compensation of necessary employees. The Administrative Assistant and his employees shall be deemed employees of the Supreme Court.

(Added Pub. L. 92-238, § 1, Mar. 1, 1972, 86 Stat. 46.)

## CHAPTER 47—COURTS OF APPEALS

Sec.

711. Clerks and employees.
712. Law clerks and secretaries.
713. Criers, bailiffs and messengers.

### CROSS REFERENCES

General provisions applicable to court officers and employees, see section 951 et seq. of this title.

United States marshals to be marshals of the courts of appeals, see section 569 of this title.

### § 711. Clerks and employees

(a) Each court of appeals may appoint a clerk who shall be subject to removal by the court.

(b) The clerk, with the approval of the court, may appoint necessary deputies, clerical assistants and employees in such number as may be approved by the Director of the Administrative Office of the United States Courts. Such deputies, clerical assistants and employees shall be subject to removal by the clerk with the approval of the court.

(c) The clerk shall pay into the Treasury all fees, costs and other moneys collected by him and make returns thereof to the Director of the Administrative Office of the United States Courts under regulations prescribed by him.

(June 25, 1948, ch. 646, 62 Stat. 920.)

### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§ 221 and 222, 544 and 546 and District of Columbia Code, 1940 ed., § 11-204 (Mar. 3, 1891, ch. 517, § 2, 26 Stat. 826; Feb. 9, 1893, ch. 74, § 4, 27 Stat. 435; July 30, 1894, ch. 172, § 1, 28 Stat. 160; June 6, 1900, ch. 791, § 1, 31 Stat. 639; Mar. 3, 1901, ch. 854, § 224, 31 Stat. 1224; June 30, 1902, ch. 1329, 32 Stat. 528; Mar. 3, 1911, ch. 231, §§ 124, 125, 36 Stat. 1132; Aug. 23, 1912, ch. 350, 37 Stat. 412; Feb. 22, 1921, ch. 70, § 7, 41 Stat. 1144; June 1, 1922, ch. 204, title II, 42 Stat. 616; Mar. 4, 1923, ch. 265, 42 Stat. 1488; May 21, 1928, ch. 659, 45 Stat. 645).

This section consolidates section 546 of title 28, U.S.C., 1940 ed., with parts of sections 221, 222, and 544 of such title and a part of section 11-204 of the District of Columbia Code, 1940 ed. Other provisions of such sections are incorporated in sections 604, 713, 954, 956, 961, and 962 of this title. Some provisions of section 11-204 of the District of Columbia Code, 1940 ed., were retained in that code. (See reviser's note under section 604 of this title.)

Discrepancies between such section 11-204 of District of Columbia Code, 1940 ed., and the more general provisions of title 28 were eliminated by adopting the more general proviisions.

Words "Director of the Administrative Office of the United States Courts" were substituted for "Attorney General," in view of the act of Aug. 7, 1939, ch. 501, § 6, 53 Stat. 1226, 28 U.S.C., 1940 ed., following § 446.

A provision that the returns should be filed annually was changed to place the times of accounting within the discretion of the Director of the Administrative Office of the United States Courts, who has supervision over such accounts. (See section 604 of this title.)

This section is in harmony with section 671 of this title as to accounting similarly by the Clerk of the Supreme Court.

"Court of appeals" was substituted for "circuit court of appeals" to conform to section 43 of this title.

The provision that each clerk shall be removable by the court is new. Section 222 of title 28, U.S.C., 1940 ed., provided that deputies might be removed at the pleasure of the clerk, subject to the court's approval, and there was no term of office specified for the clerk and no provision for his removal.

The words "and other necessary employees" were added in subsection (b) to supply an omission of existing law and to give statutory authority for the appointment of necessary employees for which compensation is annually appropriated.

Changes were made in phraseology.

### CROSS REFERENCES

Compensation and expenses of clerks of court, their deputies, etc., see section 604 of this title.

Disbursement of salaries and expenses by marshal, see section 571 of this title.

Oath and bond of clerk and deputies, see section 951 of this title.

### § 712. Law clerks and secretaries

Circuit judges may appoint necessary law clerks and secretaries.

(June 25, 1948, ch. 646, 62 Stat. 920.)

### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 222a (Mar. 3, 1911, ch. 231, § 118a, as added June 17, 1930, ch. 509, 46 Stat. 774).

Provision of section 222a of title 28, U.S.C., 1940 ed., relating to compensation of law clerks is incorporated in section 604 of this title. (See reviser's note under such section.)

Words "with the approval of the Attorney General," were omitted to confer on circuit judges the same authority given Supreme Court justices under section 675 of this title.

The provision for appointment of secretaries is new. Existing law fixes compensation of secretaries but makes no provision for their appointment. (See section 604 of this title and reviser's note thereunder.)

Changes were made in phraseology.

### CROSS REFERENCES

Compensation and expenses of court officers and employees, see section 604 of this title.

Disbursement of salaries and expenses by marshal, see section 571 of this title.

### § 713. Criers, bailiffs and messengers

(a) Each court of appeals may appoint a librarian and necessary library assistants who shall be subject to removal by the court.

(b) Each court of appeals, except the Court of Appeals for the District of Columbia, may appoint a crier and such messengers as may be necessary, all of whom shall be subject to removal by the court.

The crier shall also perform the duties of bailiff and messenger.

(c) The Court of Appeals for the District of Columbia may appoint a marshal, who shall attend the court at its sessions, be custodian of its courthouse, have supervision over its custodial employees, take charge of all property of the United States used by the court or its employees, and perform such other duties as the court directs. Such court may also appoint necessary messengers. The marshal and messengers shall be subject to removal by the court.

(d) The United States marshal of the district in which a court of appeals is sitting or in which a circuit judge is present in chambers, may, with the approval of the court or judge, employ necessary bailiffs. Such bailiffs shall attend the court, preserve order, and perform such other necessary duties as the court, judge or marshal may direct. They shall receive the same compensation as bailiffs employed for the district courts.

(June 25, 1948, ch. 646, 62 Stat. 920; May 24, 1949, ch. 139, § 75, 63 Stat. 100.)

### Historical and Revision Notes

#### 1948 Act

Based on title 28, U.S.C., 1940 ed., § 547, and section 11-204 of District of Columbia Code, 1940 ed., (Mar. 3, 1891, ch. 517, § 9, 26 Stat. 829; Feb. 9, 1893, ch. 74, § 4, 27 Stat. 435; July 30, 1894, ch. 172, § 1, 28 Stat. 160; Mar. 3, 1901, ch. 854, § 224, 31 Stat. 1224; June 30, 1902, ch. 1329, 32 Stat. 528; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167; Aug. 23, 1912, ch. 350, 37 Stat. 412; Feb. 22, 1921, ch. 70, § 7, 41 Stat. 1144; Mar. 4, 1923, ch. 265, 42 Stat. 1488; May 21, 1928, ch. 659, 45 Stat. 645).

Section consolidates parts of section 11-204 of the District of Columbia Code, 1940 ed., and section 547 of title 28, U.S.C., 1940 ed.

The Judicial Code provided for the appointment of assistants and messengers in the Supreme Court, criers and "persons to wait upon juries" in the district courts, a messenger in the Court of Customs and Patent Appeals, and a bailiff and a chief messenger in the Court of Claims (see title 28, U.S.C., 1940 ed., §§ 9, 244, 305, 331) and also provided (see same title, § 547) that criers, bailiffs and messengers of the courts of appeals should be allowed the same compensation as allowed for similar services in the district courts, but did not provide for the appointment of said criers, bailiffs and messengers. This section authorizes such appointments.

The provisions of section 224 of title 28, U.S.C., 1940 ed., that the United States marshal shall provide for the expenses of criers, bailiffs and messengers for the circuit courts of appeals are superseded by sections 601-610 of this title vesting such functions in the Administrative Office of the United States Courts.

Provisions of section 11-204 of District of Columbia Code, 1940 ed., relating to appointment and compensation of clerk of the United States Court of Appeals for the District of Columbia are incorporated in sections 711 and 604 of this title, respectively. Other provisions of such section were retained in the District of Columbia Code. (See reviser's note under section 604 of this title.)

Compensation of bailiffs is provided by section 755 of this title. Other provisions of section 547 of title 28, U.S.C., 1940 ed., relating to compensation of criers, clerks, and messengers are incorporated in section 604 of this title.

Marshal for the Court of Appeals for the District of Columbia was authorized by the District of Columbia Appropriation Act of June 29, 1937, 50 Stat. 378.

The duties of criers and bailiffs are made specific consistently with section 755 of this title, and existing administrative practice.

The removal provisions are added to make this section consistent with the same provisions in other sections relating to tenure of court officers.

Changes in phraseology and arrangement were made.

#### 1949 Act

This section corrects typographical errors in section 713 of title 28, U.S.C.

### Amendments

1949—Act May 24, 1949, inserted subsection symbol (b) preceding second par. and renumbered former subsecs. (b) and (c) to be (c) and (d).

### Cross References

Compensation and expenses of court officers and employees, see section 604 of this title.

Disbursement of salaries and expenses by marshal, see section 571 of this title.

## CHAPTER 49—DISTRICT COURTS

Sec.

751. Clerks.
752. Law clerks and secretaries.
753. Reporters.
754. Receivers of property in different districts.
755. Criers and bailiffs.
756. Power to appoint.

### Cross References

Bankruptcy court officers, appointment, duties and compensation, see section 61 et seq. of Title 11, Bankruptcy.

District Court of Guam, chapter as applicable, see section 1424b of Title 48, Territories and Insular Possessions.

General provisions applicable to court officers and employees, see section 951 et seq. of this title.

### Chapter Referred to in Other Sections

This chapter is referred to in title 48 section 1424b.

### § 751. Clerks

(a) Each district court may appoint a clerk who shall be subject to removal by the court.

(b) The clerk may appoint, with the approval of the court, necessary deputies, clerical assistants and employees in such number as may be approved by the Director of the Administrative Office of the United States Courts. Such deputies, clerical assistants and employees shall be subject to removal by the clerk with the approval of the court.

(c) The clerk of each district court shall reside in the district for which he is appointed, except that the clerk of the district court for the District of Columbia and the Southern District of New York may reside within twenty miles thereof. The district court may designate places within the district for the offices of the clerk and his deputies, and their official stations.

(d) A clerk of a district court or his deputy or assistant shall not receive any compensation or emoluments through any office or position to which he is appointed by the court, other than that received as such clerk, deputy or assistant, whether from the United States or from private litigants.

This subsection shall not apply to clerks or deputy clerks appointed as United States commissioners pursuant to section 631 of this title.

(e) The clerk of each district court shall pay into the Treasury all fees, costs and other moneys collected by him, except naturalization fees listed in section 742 of Title 8 and uncollected fees not required by Act of Congress to be prepaid.

He shall make returns thereof to the Director of the Administrative Office of the United States Courts under regulations prescribed by him.

(June 25, 1948, ch. 646, 62 Stat. 920.)

### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§6, 7, 8, 524, 557, 567, 568, and 569, sections 644 and 863 of title 48, U.S.C., 1940 ed., Territories and Insular Possessions, and section 11-401 of the District of Columbia Code, 1940 ed. (R.S. §833; June 20, 1874, ch. 328, §2, 18 Stat. 109; May 28, 1896, ch. 252, §8, 29 Stat.,181; Apr. 12, 1900, ch. 191, §34, 31 Stat. 84; Apr. 30, 1900, ch. 339, §86, 31 Stat. 158; Mar. 3, 1901, ch. 854, §174, 31 Stat. 1218; June 28, 1902, ch. 1301, §1, 32 Stat. 475; June 30, 1902, ch. 1329, 32 Stat. 527; June 30, 1906, ch. 3914, §1, 34 Stat. 754; Mar. 3, 1909, ch. 269, §1, 35 Stat. 838; Mar. 3, 1911, ch. 231, §§3, 4, 291, 36 Stat. 1087, 1167; Jan. 7, 1913, ch. 6, 37 Stat. 648; Mar. 2, 1917, ch. 145, §41, 39 Stat. 965; Feb. 26, 1919, ch. 49, §§1, 4, 9, 40 Stat. 1182, 1183; Feb. 11, 1921, ch. 46, 41 Stat. 1099; Mar. 4, 1921, ch. 161, §1, 41 Stat. 1412, 1413; June 10, 1921, ch. 18, §§301, 310, 42 Stat. 23, 25; June 16, 1921, ch. 23, §1, 42 Stat. 41; July 9, 1921, ch. 42, §313, 42 Stat. 119; June 1, 1922, ch. 204, Title II, 42 Stat. 614, 616; Jan. 3, 1923, ch. 21 title II, 42 Stat. 1084; Feb. 12, 1925, ch. 220, 43 Stat. 890; Dec. 13, 1926, ch. 6, §1, 44 Stat. 919; May 17, 1932, ch. 190, 47 Stat. 158; June 25, 1936, ch. 804, 49 Stat. 1921; Mar. 26, 1938, ch. 51, §2, 52 Stat. 118; June 16, 1938, ch. 465, 52 Stat. 752; June 14, 1941, ch. 203, §§1, 2, 55 Stat. 251).

This section consolidates provisions of section 11-401 of the District of Columbia Code, 1940 ed., sections 644 and 863 of title 48, U.S.C., 1940 ed., Territories and Insular Possessions, and title 28, U.S.C., 1940 ed., sections 6, 7, 8, 524, 557, 567, 568, and 569 relating to district court clerks. Other provisions of such sections 8 and 524 are incorporated in sections 505, 541, and 954 of this title and other provisions of such section 11-401 of the District of Columbia Code have been retained in such Code.

Words "with the approval of the court" were substituted for "Attorney General." The power to approve appointment of court officers is more properly a judicial one. (See section 711 of this title.)

The provision in section 6 of title 28, U.S.C., 1940 ed., that the clerk be appointed by the district judge or senior judge where there was more than one member of the court was changed and the power vested in the court.

The provisions of section 644 of title 48, U.S.C., 1940 ed., Territories and Insular Possessions, relating to compensation of clerks and deputy clerks were omitted as covered by section 604 of this title. Other provisions of said section 644 are incorporated in section 753 of this title.

Provision for similar officers in Alaska, Canal Zone, and the Virgin Islands is made by sections 106, 1349, and 1405y, respectively, of title 48, U.S.C., 1940 ed. A part of section 863 of said title 48, was retained in title 48. For remainder of such section, see Distribution Table.

Words in sections 6 and 7 of title 28, U.S.C., 1940 ed., "Except as otherwise provided for by law," were omitted as obsolete and superfluous.

References in section 7 of title 28, U.S.C., 1940 ed., that the clerk recommend appointment of deputies and clerical assistants were omitted as unnecessary.

The provision that each clerk shall be subject to removal by the court is new. No tenure was provided for by title 28, U.S.C., 1940 ed., but said title contained provisions that other clerks should hold office during the pleasure of the courts which appointed them, and that deputies should hold office during the pleasure of the clerks. The Supreme Court held, in 1839, that a judge of a district court could remove the clerk thereof at pleasure in absence of any law fixing the clerk's tenure. *In re Hennen*, 38 U.S. 230, 13 Pet. 230, 10 L.Ed. 138. (See also, *Meyers* v. *U.S.*, 47 S.Ct. 21, 272 U.S. 52, 71 L.Ed. 160.)

Words "circuit or" after "Every clerk of the" in section 524 of title 28, U.S.C., 1940 ed., were omitted because of the abolition of the circuit courts by act Mar. 3, 1911, ch. 231, §289, 36 Stat. 1167, title 28, U.S.C., 1940 ed., §430.

The provisions in section 524 of title 28, U.S.C., 1940 ed., that the clerk shall give his personal attention to his official duties, and declaring his office vacant upon removal from his district or neglect of duty, were omitted as covered by the removal provision of this section.

The provision permitting the clerk of the district court for the District of Columbia to reside within twenty miles of the District of Columbia was added because of the relatively small and congested area of the District, as a result of which few federal officers are appointed from the District or reside therein.

The provision in subsection (b) of this section authorizing judges to designate the places for maintaining offices by the clerks was added because of many special provisions, in sections 141-196 of title 28, U.S.C., 1940 ed., for the maintenance of offices by the clerks of the district courts at various particular places. These provisions have been omitted, on revision, as covered by the more general provisions of this section. For residence requirements of United States attorneys and marshals, see sections 505 and 541 of this title.

A provision that a breach of section 569 of title 28, U.S.C., 1940 ed., should be deemed a vacation of the offender's appointment, was omitted as covered by the removal provision of this section.

The provision of section 569 of title 28, U.S.C., 1940 ed., limiting the compensation of a clerk who is appointed United States commissioner, to $3,000 a year for both offices was omitted as obsolete. The proper adjustment of the compensation of such clerks is an administrative matter more appropriately regulated by the Director of the Administrative Office under the Supervision of the Judicial Conference of the United States. (See section 604 of this title.)

Reference in sections 557, 567 and 568 of title 28, U.S.C., 1940 ed., to accounting by district court clerks in Alaska, were omitted as covered by sections 106 and 107 of title 48, U.S.C., 1940 ed., Territories and Insular Possessions, relating to duties of those clerks.

References in sections 557 and 567 of title 28, U.S.C., 1940 ed., to the clerk of the district court of the United States for the District of Columbia, were omitted as covered by words "The clerk of each district court of the United States."

As revised, this section is in harmony with the provisions in chapters 45 and 47 of this title relating to accounting by the clerk of the Supreme Court and clerks of the courts of appeals.

Provisions as to time and method of accounting and settlement of accounts were omitted as covered by chapter 41 of this title giving the Director of the Administrative Office of the United States Courts supervision over such accounts, and of chapter 2, Audit and Settlement of Accounts, of title 31, U.S.C., 1940 ed., Money and Finance.

Provisions as to particular fees and moneys to be accounted for were omitted as covered by words "all fees, costs and other moneys." Included in such provisions was a provision as to naturalization fees, but a later act, now appearing in section 742 of title 8, U.S.C., 1940 ed., Aliens and Nationality, provided a different method of accounting and an exception expressly referring to such section was inserted in this section.

Changes were made in phraseology.

### REFERENCES IN TEXT

Section 742 of Title 8, referred to in subsec. (e), was repealed by act June 27, 1952, ch. 477, title IV, §403(a)(42), 66 Stat. 280. See, now, section 1455 of Title 8, Aliens and Nationality.

### CHANGE OF NAME

Reference to United States commissioners deemed to be reference to United States Magistrates pursuant to Pub. L. 90-578, title IV, §402(b)(2), Oct. 17, 1968, 82 Stat. 1108. See chapter 43 (§631 et seq.) of this title.

#### Cross References

Compensation and expenses of clerks, deputies, etc., see section 604 of this title.

Compensation of overtime, see section 8331 of Title 5, Government Organization and Employees.

Disbursement of salaries and expenses by marshal, see section 571 of this title.

Oath and bond of clerks and deputies, see sections 951 and 963 of this title.

Powers and duties of clerks and deputies, see section 956 of this title.

### § 752. Law clerks and secretaries

District judges may appoint necessary law clerks and secretaries subject to any limitation on the aggregate salaries of such employees which may be imposed by law.

(June 25, 1948, ch. 646, 62 Stat. 921; Sept. 1, 1959, Pub. L. 86-221, 73 Stat. 452.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., §§ 5b and 128 (Mar. 3, 1911, ch. 231, § 118b, as added Feb. 17, 1936, ch. 75, 49 Stat. 1140; May 14, 1940, ch. 189, title IV, 54 Stat. 210; June 28, 1941, ch. 258, title IV, 55 Stat. 301; July 2, 1942, ch. 472, title IV, 56 Stat. 504).

This section consolidates provisions of sections 5b and 128 of title 28, U.S.C., 1940 ed., relating to appointment of law clerks for district judges.

Words in section 128 of title 28, U.S.C., 1940 ed., "but there shall not be appointed more than thirty-five of such law clerks during the first fiscal year of the enactment of this section" were omitted as executed and obsolete. Words "Thereafter such number in excess of thirty-five per year shall be limited by necessity of each case as hereinabove provided" were also deleted as superseded by section 5b of said title and obsolete. The Director of the Administrative Office has expressed such views. Chief judge of the circuit was substituted for senior circuit judge to conform to section 44 of this title.

Provisions of section 128 of title 28, U.S.C., 1940 ed., relating to salary, or compensation of such clerks are incorporated in section 604 of this title. (See reviser's note under that section.)

The provisions in section 5b of title 28, U.S.C., 1940 ed., that district judges shall not appoint more than three law clerks in any one circuit was not repeated in the Judiciary Appropriation Acts, 1944, 1945, and 1946, 57 Stat. 242, 58 Stat. 357, 59 Stat. 196, ch. 129. The Director of the Administrative Office for United States Courts advises that as a matter of fact, more than three law clerks are serving district judges in several of the circuits at the present time. Consequently the limitation is omitted from this section.

The provision for appointment of secretaries is new. Existing law fixes compensation of secretaries but makes no provision for their appointment. (See section 604 of this title and reviser's note thereunder.)

Minor changes were made in phraseology.

#### Senate Revision Amendment

As finally enacted, sections 374c and 374d of Title 28, U.S.C., 1946 ed., which were derived from act July 23, 1947, ch. 300, §§ 1, 2, 61 Stat. 409, were an additional source of this section. Hence, by Senate amendment, the section was changed to conform with such sections, and such act was included in the schedule of repeals. See 80th Congress Senate Report No. 1559.

#### Amendments

1959—Pub. L. 86-221 substituted provision permitting district judges to appoint necessary law clerks and secretaries subject to aggregate salary limitations for provisions permitting a district judge to appoint a secretary and also a law clerk upon certification of necessity by the chief judge of the circuit and permitting the chief judge of a district court having five or more district judges to appoint an assistant secretary.

#### Cross References

Compensation and expenses of court officers and employees, see section 604 of this title.

Disbursement of salaries and expenses by marshal, see section 571 of this title.

### § 753. Reporters

(a) Each district court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands shall appoint one or more court reporters.

The number of reporters shall be determined by the Judicial Conference of the United States.

The qualifications of such reporters shall be determined by standards formulated by the Judicial Conference. Each reporter shall take an oath faithfully to perform the duties of his office.

Each such court, with the approval of the Director of the Administrative Office of the United States Courts, may appoint additional reporters for temporary service not exceeding three months, when there is more reporting work in the district than can be performed promptly by the authorized number of reporters and the urgency is so great as to render it impracticable to obtain the approval of the Judicial Conference.

If any such court and the Judicial Conference are of the opinion that it is in the public interest that the duties of reporter should be combined with those of any other employee of the court, the Judicial Conference may authorize such a combination and fix the salary for the performance of the duties combined.

(b) One of the reporters appointed for each such court shall attend at each session of the court and at every other proceeding designated by rule or order of the court or by one of the judges, and shall record verbatim by shorthand or by mechanical means which may be augmented by electronic sound recording subject to regulations promulgated by the Judicial Conference: (1) all proceedings in criminal cases had in open court; (2) all proceedings in other cases had in open court unless the parties with the approval of the judge shall agree specifically to the contrary; and (3) such other proceedings as a judge of the court may direct or as may be required by rule or order of court as may be requested by any party to the proceeding. The Judicial Conference shall prescribe the types of electronic sound recording means which may be used by the reporters.

The reporter shall attach his official certificate to the originial [1] shorthand notes or other original records so taken and promptly file them with the clerk who shall preserve them in the public records of the court for not less than ten years. An electronic sound recording of proceedings on arraignment, plea, and sentence in a criminal case, when properly certified by the court reporter, shall be admissible evidence to establish the record of that part of the proceeding.

The reporter shall transcribe and certify all arraignments, pleas, and proceedings in connection with the imposition of sentence in criminal cases unless they have been recorded by electronic sound recording as provided in this subsection and the original records so taken have been certified by him and filed with the clerk as hereinabove provided in this subsection. He shall also transcribe and certify such other parts of the record of proceedings as may be required by rule or order of court. Upon the request of any party to any proceeding which has been so recorded who has agreed to pay the fee therefor, or of a judge of the court, the reporter shall promptly transcribe the original records of the requested parts of the proceedings and attach to the transcript his official certificate, and deliver the same to the party or judge making the request.

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[1] So in original. Should be "original."

The reporter shall promptly deliver to the clerk for the records of the court a certified copy of any transcript so made.

The transcript in any case certified by the reporter shall be deemed prima facie a correct statement of the testimony taken and proceedings had. No transcripts of the proceedings of the court shall be considered as official except those made from the records taken by the reporter.

The original notes or other original records and the copy of the transcript in the office of the clerk shall be open during office hours to inspection by any person without charge.

(c) The reporters shall be subject to the supervision of the appointing court and the Judicial Conference in the performance of their duties, including dealings with parties requesting transcripts.

(d) The Judicial Conference shall prescribe records which shall be maintained and reports which shall be filed by the reporters. Such records shall be inspected and audited in the same manner as the records and accounts of clerks of the district courts, and may include records showing:

(1) the quantity of transcripts prepared;

(2) the fees charged and the fees collected for transcripts;

(3) any expenses incurred by the reporters in connection with transcripts;

(4) the amount of time the reporters are in attendance upon the courts for the purpose of recording proceedings; and

(5) such other information as the Judicial Conference may require.

(e) Each reporter shall receive an annual salary to be fixed from time to time by the Judicial Conference of the United States. All supplies shall be furnished by the reporter at his own expense.

(f) Each reporter may charge and collect fees for transcripts requested by the parties, including the United States, at rates prescribed by the court subject to the approval of the Judicial Conference. He shall not charge a fee for any copy of a transcript delivered to the clerk for the records of court. Fees for transcripts furnished in criminal proceedings to persons proceeding under the Criminal Justice Act (18 U.S.C. 3006A), or in habeas corpus proceedings to persons allowed to sue, defend, or appeal in forma pauperis, shall be paid by the United States out of moneys appropriated for those purposes. Fees for transcripts furnished in proceedings brought under section 2255 of this title to persons permitted to sue or appeal in forma pauperis shall be paid by the United States out of money appropriated for that purpose if the trial judge or a circuit judge certifies that the suit or appeal is not frivolous and that the transcript is needed to decide the issue presented by the suit or appeal. Fees for transcripts furnished in other proceedings to persons permitted to appeal in forma pauperis shall also be paid by the United States if the trial judge or a circuit judge certifies that the appeal is not frivolous (but presents a substantial question). The reporter may require any party requesting a transcript to prepay the estimated fee in advance except as to transcripts that are to be paid for by the United States.

(g) If, upon the advice of the chief judge of any district court within the circuit, the judicial council of any circuit determines that the number of court reporters provided such district court pursuant to subsection (a) of this section is insufficient to meet temporary demands and needs and that the services of additional court reporters for such district court should be provided the judges of such district-court (including the senior judges thereof when such senior judges are performing substantial judicial services for such court) on a contract basis, rather than by appointment of court reporters as otherwise provided in this section, and such judicial council notifies the Director of the Administrative Office, in writing, of such determination, the Director of the Administrative Office is authorized to and shall contract, without regard to section 3709 of the Revised Statutes of the United States, as amended (41 U.S.C. 5), with any suitable person, firm, association, or corporation for the providing of court reporters to serve such district court under such terms and conditions as the Director of the Administrative Office finds, after consultation with the chief judge of the district court, will best serve the needs of such district court.

(June 25, 1948, ch. 646, 62 Stat. 921; Oct. 31, 1951, ch. 655, § 46, 65 Stat. 726; June 28, 1955, ch. 189, § 3(c), 69 Stat. 176; June 20, 1958, Pub. L. 85-462, § 3(c), 72 Stat. 207; July 7, 1958, Pub. L. 85-508, § 12(e), 72 Stat. 348; July 1, 1960, Pub. L. 86-568, title I, § 116(c), 74 Stat. 303; Sept. 2, 1965, Pub. L. 89-163, 79 Stat. 619; Sept. 2, 1965, Pub. L. 89-167, 79 Stat. 647; June 2, 1970, Pub. L. 91-272, § 14, 84 Stat. 298; Dec. 11, 1970, Pub. L. 91-545, 84 Stat. 1412.)

### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 9a(a), (b), (c), (d), and section 644 of title 48, U.S.C., 1940 ed., Territories and Insular Possessions (Apr. 30, 1900, ch. 339, § 86, 31 Stat. 158; Mar. 3, 1909, ch. 269, § 1, 35 Stat. 838; Mar. 3, 1911, ch. 231, § 5a, as added Jan. 20, 1944, ch. 3, § 1(a), (b), (c), (d), 58 Stat. 5, 6, 7; Mar. 4, 1921, ch. 161, § 1, 41 Stat. 1412; July 9, 1921, ch. 42, § 313, 42 Stat. 119; June 1, 1922, ch. 204, title II, 42 Stat. 614, 616; Jan. 3, 1923, ch. 21, title II, 52 Stat. 1084; Feb. 12, 1925, ch. 220, 43 Stat. 890).

Section consolidates section 9a(a), (b), (c), (d) of title 28, U.S.C., 1940 ed., and part of section 644 of title 48, U.S.C., 1940 ed., relating to reporters.

The provisions of section 644 of title 48, U.S.C., 1940 ed., Territories and Insular Possessions, relating to clerks and deputy clerks, were incorporated in section 751 of this title. The provision of said section 644 fixing the salary of the reporter at $1,200 per annum was omitted as inconsistent with this section. Certain other provisions of said section 644 were also omitted. (See reviser's note under section 751 of this title.)

Words "including the District Court of the United States for the District of Columbia, and the district courts in the territories and insular possessions" were omitted as covered by "Each district court in the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands." (See reviser's note under section 88 of this title.) The courts in Hawaii and Puerto Rico are district courts of the United States under definitive section 451 of this title.

Words "for the performance of the duties combined" were substituted for "therefor, as provided by subsection (c) hereof, any provision of law to the contrary notwithstanding".

Subsections (e) and (f) of this section incorporate part of the provisions of subsection 9a(c) of title 28, U.S.C., 1940 ed. The other provisions of said subsection are incorporated in sections 550 and 1915 of this title.

The last paragraph of subsection (b) of this section was revised to conform with the language of section 556 of title 28, U.S.C., 1940 ed., providing for inspection of books in the offices of clerks of district courts. Such section 556 will be omitted, however, as more properly coverable by rule of court.

### REFERENCES IN TEXT

The Criminal Justice Act, referred to in subsec. (f), probably means Pub. L. 88-455, Aug. 20, 1964, 78 Stat. 552, as amended, known as the Criminal Justice Act of 1964, which is classified to section 3006A of Title 18, Crimes and Criminal Procedure, and provisions set out as notes under section 3006A of Title 18.

### AMENDMENTS

1970—Subsec. (e). Pub. L. 91-272, § 14(1), struck out provisions limiting to the $3,000 to $7,630 range the annual salary paid to reporters.

Subsec. (f). Pub. L. 91-545 restricted authorization of United States to pay fees for transcripts furnished in criminal proceedings to transcripts furnished to persons proceeding under the Criminal Justice Act.

Subsec. (g). Pub. L. 91-272, § 14(2), added subsec. (g)

1965—Subsec. (b). Pub. L. 89-163 made provision for the recording of proceedings in the United States District Courts by means of electronic sound recording devices, made subject to the Judicial Conference the types of electronic sound recording means used by the reporters, made electronic sound recordings of proceedings on arraignment, plea, and sentence in a criminal case when properly certified by the court reporter admissible evidence to establish the record of that part of the proceedings, required the transcribing of arraignments in addition to the criminal proceedings already required to be transcribed, and waived the transcribing requirement for arraignments, pleas, and sentencing proceedings when such proceedings have been electronically recorded and such records certified and filed as provided in this subsection.

Subsec. (f). Pub. L. 89-167 provided for payment by the United States of fees for transcripts furnished in proceedings brought under section 2255 of this title to persons permitted to sue or appeal in forma pauperis if the trial judge or a circuit judge certifies that the suit or appeal is not frivolous and that the transcript is needed to decide the issue presented by the suit or appeal.

1960—Subsec. (e). Pub. L. 86-568 increased the maximum annual salary from $7,095 to $7,630.

1958—Subsec. (a). Pub. L. 85-508 eliminated provisions which related to the District Court for the Territory of Alaska. See section 81A of this title which establishes a United States District Court for the State of Alaska.

Subsec. (e). Pub. L. 85-462 increased maximum annual salary from $6,450 to $7,095.

1955—Subsec. (e). Act June 28, 1955, increased the maximum annual salary from $6,000 to $6,450.

1951—Subsec. (a). Act Oct. 31, 1951, in first paragraph, inserted reference to the District Court of Guam.

### EFFECTIVE DATE OF 1960 AMENDMENT

Amendment by Pub. L. 86-568 effective on the first day of the first pay period which begins on or after July 1, 1960.

### EFFECTIVE DATE OF 1958 AMENDMENT

Amendment by Pub. L. 85-508 effective Jan. 3, 1959, upon admission of Alaska into the Union pursuant to Proc. No. 3269, Jan. 3, 1959, 24 F.R. 81, 73 Stat. c16, as required by sections 1 and 8(c) of Pub. L. 85-508, see Pub. L. 85-508, set out as a note preceding section 21 of Title 48, Territories and Insular Possessions.

### 1967 INCREASE IN SALARY LIMITATION FOR COURT REPORTERS

Pub. L. 90-206, title II, § 213(c), Dec. 16, 1967, 81 Stat. 635, inserted a new salary limitation for court reporters effective the first pay period which begins on or after Oct. 1, 1967, which reflected the respective applicable pay increases provided by section 202(a) of Pub. L. 90-206 in corresponding rates of compensation for particular officers and employees of the government.

### 1966 INCREASE IN SALARY LIMITATION FOR COURT REPORTERS

Pub. L. 89-504, title II, § 202(c), July 18, 1966, 80 Stat. 294 inserted a new salary limitation for court reporters effective the first pay period which begins on or after July 1, 1966, which reflected the respective applicable pay increases provided by section 102(a) of title I of Pub. L. 89-504 in corresponding rates of compensation for particular officers and employees of the government.

### 1965 INCREASE IN SALARY LIMITATION FOR COURT REPORTERS

Pub. L. 89-301, § 12(c), Oct. 29, 1965, 79 Stat. 1122, inserted a new salary limitation for court reporters which reflected the applicable pay increases provided by section 2(a) of Pub. L. 89-301 in corresponding rates of compensation for particular government officers and employees.

### 1964 INCREASE IN SALARY LIMITATION FOR COURT REPORTERS

Pub. L. 88-426, title IV, § 402(c), Aug. 14, 1964, 78 Stat. 434, inserted a new salary limitation for court reporters which reflected the applicable pay increases provided by title I of Pub. L. 88-426 in corresponding rates of compensation for particular government officers and employees.

### 1962 INCREASE IN SALARY LIMITATION FOR COURT REPORTERS

Pub. L. 87-793, title I, § 1004(c), Oct. 11, 1962, 76 Stat. 866, inserted a new salary limitation for court reporters effective for the pay period beginning on or after Oct. 11, 1962, and ending immediately prior to the first pay period beginning on or after Jan. 1, 1964, and provided for a second salary limitation effective for the first pay period beginning on or after Jan. 1, 1964, which reflected applicable pay increases provided by title II of Pub. L. 87-793 in corresponding rates of compensation for particular government officers and employees.

### CROSS REFERENCES

Compensation and expenses of court officers and employees, see section 604 of this title.

Disbursement of salaries and expenses by marshal, see section 571 of this title.

### § 754. Receivers of property in different districts

A receiver appointed in any civil action or proceeding involving property, real, personal or mixed, situated in different districts shall, upon giving bond as required by the court, be vested with complete jurisdiction and control of all such property with the right to take possession thereof.

He shall have capacity to sue in any district without ancillary appointment, and may be sued with respect thereto as provided in section 959 of this title.

Such receiver shall, within ten days after the entry of his order of appointment, file copies of the complaint and such order of appointment in the district court for each district in which property is located. The failure to file such copies in any district shall divest the receiver of jurisdiction and control over all such property in that district.

(June 25, 1948, ch. 646, 62 Stat. 922.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 117 (Mar. 3, 1911, ch. 231, § 56, 36 Stat. 1102).

Word "action" was substituted for "suit", in view of Rule 2 of the Federal Rules of Civil Procedure.

Section 117 of title 28, U.S.C., 1940 ed., applied to land or other property of a fixed character lying in different States within the same circuit. Words "property, real, personal or mixed, situated in different districts", were inserted to broaden the scope of this section to cover all property in different districts without respect to situs "within different states within same judicial circuit".

The revised section permits the receiver appointed by any district court to control all property of the defendant in whatever district the property is situated. The provisions of section 117 of title 28, U.S.C., 1940 ed., for divesting the receiver's jurisdiction and control of property in other districts upon disapproval by the circuit court of appeals or a judge thereof of the circuit embracing the district of appointment was omitted as unnecessary in view of sections 1292 and 2107 of this title. Said section 1292 provides for review of the order of appointment and the directions of the reviewing court will control the receiver.

Provisions of section 117 of title 28, U.S.C., 1940 ed., relating to process are the basis of section 1692 of this title.

Under section 117 of title 28, U.S.C., 1940 ed., failure to file copies of the complaint and order of appointment in any district where part of the property was located divested the receiver of jurisdiction over all the property except that part located in the State where the suit was brought. This has been changed by limiting the exception to the district where the copies are not filed. Obviously the election of the receiver not to take control of property in one district ought not to preclude his control in those districts in which he did file such copies.

Changes were made in phraseology.

#### Cross References

Mismanagement of property by receiver, criminal penalty, see section 1911 of Title 18, Crimes and Criminal Procedure.

Process and orders affecting property in different districts, see section 1692 of this title.

#### Federal Rules of Civil Procedure

Capacity to sue or be sued, see rule 17, Appendix to this title.

### § 755. Criers and bailiffs

Each district judge may appoint a crier for the court in which he presides who shall perform also the duties of bailiff and messenger. A crier may perform also the duties of law clerk if he is qualified to do so and the district judge who appointed him designates him to serve as a crier-law clerk. A crier designated to serve as a crier-law clerk shall receive the compensation of a law clerk, but only so much of that compensation as is in excess of the compensation to which he would be entitled as a crier shall be deemed the compensation of a law clerk for the purposes of any limitation imposed by law upon the aggregate salaries of law clerks and secretaries appointed by a district judge.

Each United States marshal may employ, with the approval of the judge, not exceeding four bailiffs as the district judge may determine, to attend the court, maintain order, wait upon the grand and petit juries, and perform such other necessary duties as the judge or marshal may direct.

Each bailiff shall be allowed for his services $6 a day to be paid only for actual attendance on days when the court is in session or the judge or jury is present.

If the position of crier or bailiff is to be filled by the appointment of a person who has not previously served as either crier or bailiff, preference in the appointment shall be given to a person who has served in the military or naval forces of the United States in time of war and who has been honorably discharged therefrom, if in the opinion of the appointing officer such person is as well qualified as any other available person to perform to the satisfaction of the appointing officer all the duties of the position.

(June 25, 1948, ch. 646, 62 Stat. 923; Oct. 21, 1965, Pub. L. 89-281, 79 Stat. 1012.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., §§ 9, 595, 596 (R.S. § 715; Mar. 3, 1905, ch. 1487, 33 Stat. 1259; Mar. 3, 1911, ch. 231, § 5, 36 Stat. 1088; June 1, 1922, ch. 204, title II, 42 Stat. 617; Jan. 3, 1923, ch. 21, title II, 42 Stat. 1084; May 28, 1924, ch. 204, title II, 43 Stat. 221; May 14, 1940, ch. 189, title III, 54 Stat. 204; June 28, 1941, ch. 258, title III, 55 Stat. 295; July 2, 1942, ch. 472, title III, 56 Stat. 486; July 1, 1943, ch. 182, title II, 57 Stat. 286; June 28, 1944, ch. 294, title II, 58 Stat. 410; Dec. 7, 1944, ch. 522, §§ 1, 2, 58 Stat. 796; May 21, 1945, ch. 129, title II, 59 Stat. 184).

Section consolidates parts of sections 9, 595, and 596 of title 28, U.S.C., 1940 ed. The other provisions of such sections appear in section 604 of this title.

Compensation of criers and other court attendants, except bailiffs under section 604 of this title, will be fixed by the Director of the Administrative Office of the United States Courts.

#### Amendments

1965—Pub. L. 89-281 added provisions to the first par. permitting a crier to perform the duties of law clerk if he is qualified to do so and the district judge who appointed him designates him to serve as a crier-law clerk, specifying that a crier-law clerk shall receive the compensation of a law clerk, and requiring that only so much of that compensation as is in excess of the compensation to which he would be entitled as a crier shall be deemed the compensation of a law clerk for the purposes of any limitation imposed by law upon the aggregate salaries of law clerks and secretaries appointed by a district judge.

#### CROSS REFERENCES

Compensation and expenses of court officers and employees, see section 604 of this title.

Disbursement of salaries and expenses by marshal, see section 571 of this title.

### § 756. Power to appoint

Whenever a majority of the district judges of any district court cannot agree upon the appointment of any officer of such court, the chief judge shall make such appointment.

(June 25, 1948, ch. 646, 62 Stat. 923.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 375 (Mar. 3, 1911, ch. 231, § 260, 36 Stat. 1161; Feb. 25, 1919, ch.29, § 6, 40 Stat. 1157; Mar. 1, 1929, ch. 419, 45 Stat. 1422; May 11, 1944, ch. 192, §§ 1, 3, 58 Stat. 218, 219).

Only part of section 375 of title 28, U.S.C., 1940 ed., appears in this section. The remainder is incorporated in sections 136, 294 and 371 of this title.

The term "chief judge" was substituted for "senior district judge". (See reviser's note under section 136 of this title.)

Minor changes in phraseology were made.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 48 section 1614.

## CHAPTER 51—COURT OF CLAIMS

Sec.
791. Clerk.
792. Commissioners.
[793. Repealed.]
794. Stenographers and clerical employees.
795. Bailiff and messenger.
796. Reporting of court proceedings.
797. Recall of retired commissioners.

#### AMENDMENTS

1972—Pub. L. 92-375, § 1, Aug. 10, 1972, 86 Stat. 529, added item 797.

1970—Pub. L. 91-272, § 15(b), June 2, 1970, 84 Stat. 298, added item 796.

1954—Act Sept. 3, 1954, ch. 1263, § 40, 68 Stat. 1240, struck out item 793.

#### CROSS REFERENCES

General provisions applicable to court officers and employees, see section 951 et seq. of this title.

### § 791. Clerk

(a) The Court of Claims may appoint a clerk and an assistant clerk, each of whom shall be subject to removal by the court. The court shall report any such removal and the cause thereof to Congress as soon as possible.

(b) The clerk shall pay into the Treasury all fees, costs and other moneys collected by him. He shall make returns thereof to the Director of the Administrative Office of the United States Courts under regulations prescribed by him.

(c) On the first day of every regular session of Congress, the clerk shall transmit to Congress a full and complete statement of all the judgments rendered by the court during the previous year, showing the dates and amounts thereof and the parties in whose favor they were rendered, together with a brief synopsis of the nature of the claims upon which they were rendered, and a statement of the costs taxed in each case.

(June 25, 1948, ch. 646, 62 Stat. 923.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§ 244, 248, 283a and 289 (Mar. 3, 1911, ch. 231, §§ 139, 143, 183, 36 Stat. 1136, 1142; June 10, 1921, ch. 18, §§ 301, 302, 310, 42 Stat. 23, 25, Mar. 3, 1933, ch. 212, title II, § 19, 47 Stat. 1519; May 10, 1934, ch. 277, § 512(b), 48 Stat. 759).

This section consolidates a part of sections 244 and 248 with sections 283a and 289, all of title 28, U.S.C., 1940 ed.

Provisions in section 248 of title 28, U.S.C., 1940 ed., for distribution by the clerk of copies of the court's decisions is incorporated in section 415 of this title.

Certain provisions of section 244 of title 28, U.S.C., 1940 ed., relating to the bailiff and the chief messenger of the Court of Claims, and powers and duties of the clerk, his deputies and assistants, are incorporated in sections 795 and 956 of this title.

A provision in section 244 of title 28, U.S.C., 1940 ed., relating to the oath of the clerk of such court was omitted as covered by section 951 of this title.

Word "clerk" was substituted for "chief clerk" to harmonize with such designation of clerks of all other courts.

Provision that such officers shall be under the direction of the court in the performance of their duties was omitted as superfluous.

Provision in section 244 of title 28, U.S.C., 1940 ed., that the clerk and assistant shall be subject to removal by the Court was substituted for the grounds of misconduct or incapacity. This change is in harmony with like provisions as to the clerks of other courts.

Section 289 of title 28, U.S.C., 1940 ed., required the Attorney General to duplicate the reporting to Congress of judgments which are furnished by the clerk. The revised section eliminates such duplication by requiring the clerk to transmit the information to Congress.

Words "Director of the Administrative Office of the United States Courts" were substituted for "Attorney General," in view of the act of August 7, 1939, ch. 501, § 6, 53 Stat. 1226, 28 U.S.C., 1940 ed., following § 446.

As revised, this section is consistent with similar provisions as to clerks of district courts and the courts of appeals in chapters 47 and 49 of this title.

Changes in phraseology were made.

#### CROSS REFERENCES

Compensation and expenses of clerks of court, their deputies, etc., see section 604 of this title.

Oath and bond of clerks and deputies, see section 951 of this title.

### § 792. Commissioners

(a) The Court of Claims may appoint fifteen commissioners who shall be subject to removal by the court and shall devote all of their time to the duties of the office. The Court shall designate one of the commissioners to serve at the will of the court as chief commissioner.

(b) Each commissioner shall receive pay at an annual rate determined under section 225 of the Federal Salary Act of 1967 (2 U.S.C. 351-361), as adjusted by section 461 of this title, and also all necessary traveling expenses and a per diem allowance as provided in the Travel Expense Act of 1949, as amended, while traveling on official business and away from Washington, District of Columbia.

(June 25, 1948, ch. 646, 62 Stat. 923; July 28, 1953, ch. 253, § 4(a), 67 Stat. 226; Sept. 3, 1954, ch. 1263, § 41, 68 Stat. 1240; Aug. 14, 1964, Pub. L. 88-426, title IV, § 403(h), 78 Stat. 434; Oct. 15, 1966, Pub. L. 89-681, § 3, 80 Stat. 959; Dec. 16, 1967, Pub. L. 90-206, title II, § 213(e), 81 Stat. 635; Aug. 9, 1975, Pub. L. 94-82, title II, § 205(b)(7), 89 Stat. 423.)

### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§ 263, 269, 270 (Mar. 3, 1911, ch. 231, § 157, 36 Stat. 1139; Feb. 24, 1925, ch. 301, §§ 1, 2, 43 Stat. 964, 965; May 29, 1928, ch. 852, § 711, 45 Stat. 882; June 23, 1930, ch. 573, §§ 1, 2, 46 Stat. 799; Oct. 16, 1941, ch. 443, 55 Stat. 741).

This section consolidates section 269 with parts of sections 263 and 270, all of title 28, U.S.C., 1940 ed.

Other provisions of section 263 of title 28, U.S.C., 1940 ed., are incorporated in section 2071 of this title.

Provisions of section 270 of title 28, U.S.C., 1940 ed., relating to judges' and stenographers' expenses are the basis of section 456 of this title. Other provisions of said section 270 are incorporated in section 794 of this title. (See, also, section 604 of this title.)

A provision for payment of salaries in monthly installments was deleted, since time of payment is a matter of administrative convenience. (See 20 Comp. Gen. 834.)

The appointment of not more than 20 commissioners, in addition to those authorized by section 269 of title 28, U.S.C., 1940 ed., is provided by section 114 of title 41, U.S.C., 1940 ed., Public Contracts.

Changes were made in phraseology.

### SENATE REVISION AMENDMENT

See amendment No. 22 in 80th Congress Senate Report No. 1559.

### REFERENCES IN TEXT

The Travel Expense Act of 1949, as amended, referred to in subsec. (b), was repealed and the provisions thereof were reenacted as subchapter I (§ 5701 et seq.) of chapter 57 of Title 5, Government Organization and Employees, by Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 378.

### AMENDMENTS

1975—Subsec. (b). Pub. L. 94-82 substituted provision that each commissioner shall receive pay at an annual rate determined under section 225 of the Federal Salary Act of 1967, as adjusted by section 461 of this title, for provision that each commissioner shall receive basic compensation at the rate of $29,000 a year.

1967—Subsec. (b). Pub. L. 90-206 substituted "$29,000" for "$26,000".

1966—Subsec. (a). Pub. L. 89-681 provided that the Court shall designate one of the commissioners to serve at the will of the court as chief commissioner.

1964—Subsec. (b). Pub. L. 88-426 substituted "$26,000" for "$14,800".

1954—Act Sept. 3, 1954, eliminated "United States" from name of Court of Claims in subsec. (a), conformed salary and maintenance provisions with subsequent acts, and repealed subsec. (c) and last par. which followed subsec. (c) requiring each commissioner to devote all his time to the duties of his office.

1953—Subsec. (a). Act July 28, 1953, substituted "United States Court of Claims" for "Court of Claims", and substituted "fifteen" for "seven".

### EFFECTIVE DATE OF 1967 AMENDMENT

Amendment by Pub. L. 90-206 effective at the beginning of the first pay period which begins on or after Dec. 16, 1967, see section 220(a)(3) of Pub. L. 90-206, set out as an Effective Date of 1967 Amendment note under section 603 of this title.

### EFFECTIVE DATE OF 1964 AMENDMENT

Amendment by Pub. L. 88-426 effective on the first day of the first pay period which begins on or after July 1, 1964, except to the extent provided in section 501(c) of Pub. L. 88-426, see section 501 of Pub. L. 88-426.

### COMPENSATION OF COMMISSIONERS

Salaries of commissioners increased to $48,500, upon recommendation of the President of the United States, see Salary Recommendations for 1977 Increases note set out under section 358 of Title 2, The Congress.

Salaries of commissioners increased to $39,600 effective on the first day of the first pay period beginning on or after Oct. 1, 1976, by Ex. Ord. No. 11941, Oct. 1, 1976, 41 F.R. 43889, set out as a note under section 5332 of Title 5, Government Organization and Employees. Ex. Ord. No. 11941, further provided that pursuant to the Legislative Branch Appropriation Act, 1977 (see Tables volume for distribution of Pub. L. 94-440, Oct. 1, 1976, 90 Stat. 1439), funds are not available to pay a salary at a rate which exceeds the rate in effect on Sept. 30, 1976, which was $37,800.

Salaries of commissioners increased from $29,000 to $36,000 per annum, commencing February 14, 1969, upon recommendation of the President of the United States, see Salary Recommendations for 1969 Increases note set out under section 358 of Title 2, The Congress.

Act Oct. 24, 1951, ch. 554, § 1(c), 65 Stat. 613, increased the rate of basic compensation of the commissioners. See section 1(c) of act Oct. 24, 1951, set out as a 1951 Increase in Compensation Rates note under section 603 of this title.

Act Oct. 15, 1949, ch. 695, § 6(a), 63 Stat. 881, which established the rate of basic compensation at $14,000, was repealed by Pub. L. 89-554, § 8(a), Sept. 6, 1966, 80 Stat. 655.

Section 2(c) of act June 25, 1948 provided in part that the sum of $7,500 was to be the salary of each appointed commissioner and was to serve as the basic compensation for computation of additional increases.

### CONTRACT SETTLEMENT ACT OF 1944; APPOINTMENT OF AUDITORS

Contract Settlement Act of 1944 (section 101 et seq. of Title 41, Public Contracts), appointment of auditors by Court of Claims, see section 114 of title 41.

### CROSS REFERENCES

Expenses of court officers and employees, see section 604 of this title.

### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 797 of this title.

**[§ 793. Repealed. July 28, 1953, ch. 253, § 6, 67 Stat. 226]**

Section, act June 25, 1948, ch. 646, 62 Stat. 924, related to the appointment of reporter-commissioners by the Court of Claims and the employment of stenographers therefor.

## § 794. Stenographers and clerical employees

The Court of Claims shall appoint stenographers and other clerical employees in such numbers as may be necessary each of whom shall be subject to removal by the court.

(June 25, 1948, ch. 646, 62 Stat. 924.)

### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 270 (Feb. 24, 1925, ch. 301, § 2, 43 Stat. 965; May 29, 1928, ch. 852, § 711, 45 Stat. 882; June 23, 1930, ch. 573, § 1, 46 Stat. 799; Oct. 16, 1941, ch. 443, 55 Stat. 741).

The first sentence of the revised section makes express provision for appointment of stenographers and necessary clerical employees.

Other provisions of section 270 of title 28, U.S.C., 1940 ed., are incorporated in sections 456 and 792 of this title.

Specific provision for $5 per diem for stenographers is omitted as unnecessary and inconsistent with section 962 of this title. Travel and subsistence allowances of Government employees are governed by sections 822-833 of title 5, U.S.C., 1940 ed., Executive

Departments and Government Officers and Employees.

Changes were made in phraseology.

#### Cross References

Compensation and expenses of court officers and employees, see section 604 of this title.

### § 795. Bailiff and messenger

The Court of Claims may appoint a bailiff and a messenger who shall be subject to removal by the court.

The bailiff shall attend the court, preserve order, and perform such other necessary duties as the court directs.

(June 25, 1948, ch. 646, 62 Stat. 924.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 244 (Mar. 3, 1911, ch. 231, § 139, 36 Stat. 1136).

The provision in section 244 of title 28, U.S.C., 1940 ed., that the bailiff should serve 4 years unless sooner removed by the court for cause, was changed by omitting the 4-year tenure and removal "for cause" requirement. As revised this section conforms with sections relating to the similar court officers.

Term "chief messenger" in section 244 of title 28, U.S.C., 1940 ed., was changed to "messenger" as the court has but one messenger.

A provision of section 244 of title 28, U.S.C., 1940 ed., providing for appointment of a clerk and assistant is incorporated in section 791 of this title, and a provision thereof, relating to powers and duties of the clerk, his deputies and assistants, is incorporated in section 956 of this title.

The second paragraph was added to conform with sections 713, 755, and 834 of this title.

Changes were made in phraseology.

#### Cross References

Compensation and expenses of court officers and employees, see section 604 of this title.

### § 796. Reporting of court proceedings

The Court of Claims is authorized to contract for the reporting of all proceedings had in open court, and in such contract to fix the terms and conditions under which such reporting services shall be performed, including the terms and conditions under which transcripts shall be supplied by the contractor to the court and to other persons, departments, and agencies.

(Added Pub. L. 91-272, § 15(a), June 2, 1970, 84 Stat. 298.)

### § 797. Recall of retired commissioners

(a) Any commissioner who has retired from regular active service under the Civil Service Retirement Act shall be known and designated as a senior commissioner and may perform duties as a commissioner when recalled pursuant to subsection (b) of this section.

(b) The United States Court of Claims, whenever it deems such action advisable, may recall any senior commissioner, with the latter's acquiescence, to perform such duties as a commissioner and for such period of time as the court may specify.

(c) Any senior commissioner performing duties pursuant to this section shall not be counted as a commissioner for purposes of the number of commissioner positions authorized by section 792 of this title.

(d) Any senior commissioner, while performing duties pursuant to this section, shall be paid the same allowances for travel and other expenses as a commissioner in active service. He shall also receive from the Court of Claims supplemental pay in an amount sufficient, when added to his civil service retirement annuity, to equal the salary of a commissioner in active service for the same period or periods of time. Such supplemental pay shall be paid in the same manner as the salary of a commissioner.

(Added Pub. L. 92-375, § 2, Aug. 10, 1972, 86 Stat. 529.)

#### References in Text

The Civil Service Retirement Act, referred to in subsec. (a), is act May 29, 1930, ch. 349, 46 Stat. 468, as amended by act July 31, 1956, ch. 804, § 401, 70 Stat. 743, which was repealed by Pub. L. 89-554, § 8(a), Sept. 6, 1966, 80 Stat. 632, and reenacted by the first section thereof as subchapter III (§ 8331 et seq.) of chapter 83 of Title 5, Government Organization and Employees.

## CHAPTER 53—COURT OF CUSTOMS AND PATENT APPEALS

Sec.

831. Clerk and employees.
832. Marshal.
833. Reporter.
834. Bailiffs and messengers.

#### Cross References

General provisions applicable to court officers and employees, see section 951 et seq. of this title.

### § 831. Clerk and employees

The Court of Customs and Patent Appeals may appoint a clerk and such assistant clerks, stenographic law clerks, clerical assistants and other employees as may be necessary, all of whom shall be subject to removal by the court.

The clerk shall pay into the Treasury all fees, costs and other moneys collected by him. He shall maintain an office at the seat of government.

(June 25, 1948, ch. 646, 62 Stat. 924.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., §§ 304 and 305 (Mar. 3, 1911, ch. 231, §§ 191, 192, 36 Stat. 1144; June 16, 1930, ch. 494, 46 Stat. 589).

This section consolidates parts of sections 304 and 305 of title 28, U.S.C., 1940 ed. The remaining provisions of said sections are incorporated in sections 604, 833, 834, 956, 957 and 1926 of this title.

A provision of section 305 of title 28, U.S.C., 1940 ed., that the assistant clerk and stenographic clerks should perform the duties assigned them by the court, was omitted as unnecessary and covered by rule of court.

Words "seat of government" were substituted for "city of Washington, District of Columbia," for purposes of uniformity. Other sections of this title relating to offices now kept in Washington, D.C., have been similarly revised.

Changes in phraseology were made.

#### Cross References

Compensation and expenses of clerks of court, their deputies, etc., see section 604 of this title.

Oath and bond of clerks and deputies, see section 951 of this title.

### § 832. Marshal

The Court of Customs and Patent Appeals may appoint a marshal who shall serve within the District of Columbia and shall be subject to removal by the court.

He shall attend the court at its sessions, and shall serve and execute all process and orders issuing from it. He shall purchase books and supplies, supervise the library and perform such other duties as the court may direct. Under regulations prescribed by the Director of the Administrative Office of the United States Courts, he shall pay the salaries of judges, officers, and employees of the court and disburse funds appropriated for the expenses of the court.

United States marshals for other districts where sessions of the court are held shall serve as marshals of the court.

(June 25, 1948, ch. 646, 62 Stat. 924; May 24, 1949, ch. 139, § 76, 63 Stat. 101.)

#### Historical and Revision Notes

#### 1948 Act

Based on title 28, U.S.C., 1940 ed., § 303 (Mar. 3, 1911, ch. 231, § 190, 36 Stat. 1144).

This section relates only to provisions in section 303 of title 28, U.S.C., 1940 ed., relating to duties of the marshal. Provisions relating to salary are incorporated in section 604 of this title.

The specific language of this section is substituted for the requirement in section 303 of title 28, U.S.C., 1940 ed., that the marshal should have the same duties as the Supreme Court marshal as provided on March 3, 1911. Such duties were contained in section 331 of title 28, U.S.C., 1940 ed. Provisions for the duty of taking charge of property used by the court referred to in said section 331, as well as that in said section 303 for purchasing books and supplies and for payment thereof, are retained and the section rewritten to reflect existing administrative procedure.

Changes were made in phraseology.

#### 1949 Act

This section corrects a typographical error in section 832 of title 28, U.S.C.

#### Amendments

1949—Act May 24, 1949, substituted "Administrative" for "Administration".

#### Cross References

Compensation and expenses of court officers and employees, see section 604 of this title.

### § 833. Reporter

(a) The Court of Customs and Patent Appeals may appoint a reporter who shall be subject to removal by the court.

(b) The reporter shall prepare and transmit:

(1) To the Secretary of the Treasury, weekly, for publication, copies of all opinions relating to customs rendered by the court;

(2) To the Commissioner of Patents, weekly, for publication, copies of all opinions relating to patent and trade-mark appeals rendered by the court.

(c) The reporter also shall compile and publish, at least once a year, in such manner as the court directs, all opinions rendered by the court during the year, together with necessary digests and indexes as the court directs.

(June 25, 1948, ch. 646, 62 Stat. 925.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 305 (Mar. 3, 1911, ch. 231, § 192, 36 Stat. 1144; June 16, 1930, ch. 494, 46 Stat. 589).

Other provisions of section 305 of title 28, U.S.C., 1940 ed., are incorporated in sections 604, 831, 834 and 956 of this title.

Specific reference to "Treasury Decision" and "Official Gazette" were deleted as unnecessary.

Changes were made in phraseology.

#### Change of Name

"Commissioner of Patents" redesignated "Commissioner of Patents and Trademarks", pursuant to Pub. L. 93-596, § 3, Jan. 2, 1975, 88 Stat. 1949, set out as a Change of Name note under section 1 of Title 35, Patents.

#### Cross References

Compensation and expenses of court officers and employees, see section 604 of this title.

### § 834. Bailiffs and messengers

The Court of Customs and Patent Appeals may appoint necessary bailiffs and messengers who shall be subject to removal by the court.

Each bailiff shall attend the court, preserve order, and perform such other necessary duties as the court directs.

(June 25, 1948, ch. 646, 62 Stat. 925.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., §§ 305 and 306 (Mar. 3, 1911, ch. 231, §§ 192, 193, 36 Stat. 1144; Mar. 2, 1929, ch. 488, § 1, 45 Stat. 1475; June 16, 1930, ch. 494, 46 Stat. 589).

Section consolidates parts of sections 305 and 306 of title 28, U.S.C., 1940 ed.

Other provisions of sections 305 and 306 of title 28, U.S.C., 1940 ed., are incorporated in sections 604, 831, 833, and 956 of this title.

The tenure provision of section 305 of title 28, U.S.C., 1940 ed., that all officers, including the clerk, should "hold office during the pleasure" of the court, was revised to read "who shall be subject to removal by the court." For similar tenure provision as to clerks, see pertinent sections in this chapter and chapters 47 and 49 of this title.

The second paragraph was added to conform with sections 713, 755, and 795 of this title as declaratory of existing administrative practice.

Changes were made in phraseology.

#### Cross References

Compensation and expenses of court officers and employees, see section 604 of this title.

## CHAPTER 55—CUSTOMS COURT

Sec.

871. Clerk, chief deputy clerk, assistant clerk, deputies, assistants, and other employees.

872. Marshal and deputy marshals.

873. Criers, bailiffs, and messengers.

#### Amendments

1959—Pub. L. 86-243, § 1, Sept. 9, 1959, 73 Stat. 474, included chief deputy clerk and assistant clerk in item 871, substituted "Marshal and deputy marshals" for "Marshal; appointment" in item 872, and added item 873.

1949—Act May 24, 1949, ch. 139, § 77, 63 Stat. 101, added "; appointment" in item 872.

#### Cross References

General provisions applicable to court officers and employees, see section 951 et seq. of this title.

### § 871. Clerk, chief deputy clerk, assistant clerk, deputies, assistants, and other employees

The Customs Court may appoint a clerk, a chief deputy clerk, an assistant clerk, deputy clerks, and such deputies, assistants, and other employees as may be necessary for the effective dispatch of the business of the court, who shall be subject to removal by the court.

(June 25, 1948, ch. 646, 62 Stat. 925; Sept. 9, 1959, Pub. L. 86-243, § 1, 73 Stat. 474.)

#### Historical and Revision Notes

Based on section 6 of title 19, U.S.C., 1940 ed., Customs Duties (May 4, 1923, ch. 251, § 2, 42 Stat. 1453; Jan. 13, 1925, ch. 76, 43 Stat. 748; May 28, 1926, ch. 411, § 1, 44 Stat. 669; June 17, 1930, ch. 497, title IV, §§ 518, 649, 46 Stat. 737, 762).

Section is based on the last two sentences of section 6 of title 19, U.S.C., 1940 ed., which provided for appointment by the Attorney General in conformity with the civil service laws. This and other administrative powers of the Department of Justice with respect to the courts were transferred to the Administrative Office of the United States Courts by section 446 of title 28, U.S.C., 1940 ed., which is section 604 of this title. The revised section vests the power of appointment in the chief judge to conform with section 253 of this title and rules 5 and 22 of the Rules of the Customs Court adopted May 29, 1936.

Changes were made in phraseology.

#### Amendments

1959—Pub. L. 86-243 included chief deputy clerk and assistant clerk in the catchline, transferred the appointing authority from the chief judge to the Customs Court, provided for appointment of a chief deputy clerk, an assistant clerk and deputy clerks and for power of removal and deleted reference to the civil service laws with respect to appointments.

#### Savings Provisions

Section 4 of Pub. L. 86-243 provided that: "Nothing contained in the amendments made by this Act [enacting section 873 and amending sections 253, 550, 871 and 872 of this title] shall be construed to deprive any person serving on the date of enactment of this Act [Sept. 9, 1959] as an officer or employee of the Customs Court of any rights, privileges, or civil service status, if any, to which such person is entitled under the laws of the United States or regulations thereunder."

#### Cross References

Compensation and expenses of clerks of court, their deputies, etc., see section 604 of this title.

Disbursement of salaries and expenses by marshal, see section 571 of this title.

Oath and bond of clerks and deputies, see section 951 of this title.

### § 872. Marshal and deputy marshals

The Customs Court may appoint a marshal and deputy marshals, who shall be subject to removal by the courts.

The marshal and his deputies shall attend court at its sessions, serve and execute all process and orders issued by it, and exercise the powers and perform the duties concerning all matters within such court's jurisdiction assigned to them by the court.

Under regulations prescribed by the Director of the Administrative Office of the United States Courts, the marshal shall pay the salaries, office expenses, and travel and subsistence allowances of the judges, officers, and employees of the court, and shall disburse funds appropriated for all expenses of the court.

On all disbursements made by the marshal of the Customs Court for official salaries or expenses, the certificate of the payee shall be sufficient without verification on oath.

(June 25, 1948, ch. 646, 62 Stat. 925; May 24, 1949, ch. 139, § 78, 63 Stat. 101; Sept. 9, 1959, Pub. L. 86-243, § 1, 73 Stat. 474.)

#### Historical and Revision Notes

##### 1948 Act

Based on section 6 of title 19, U.S.C., 1940 ed., Customs Duties (May 4, 1923, ch. 251, § 2, 42 Stat. 1453; Jan. 13, 1925, ch. 76, 43 Stat. 748; May 28, 1926, ch. 411, § 1, 44 Stat. 669; June 17, 1930, ch. 497, title IV, §§ 518, 649, 46 Stat. 737, 762).

Section is based on the last two sentences of section 6 of title 19, U.S.C., 1940 ed., which made no express mention of a marshal but provided "The Attorney General shall likewise appoint and fix the compensation of the clerks and other employees of the United States Customs Court in conformity with the civil service laws." This and other administrative powers of the Department of Justice with respect to the courts were transferred to the Administrative Office of the United States Courts by section 604 of this title (section 446 of title 28, U.S.C., 1940 ed.). The revised section rests the power of appointment in the chief judge in conformity with section 253 of this title and rules 5 and 22 of the Rules of the Customs Court adopted May 29, 1936.

Existing law does not prescribe the powers and duties of the marshal of the Customs Court. The revised section is similar to section 956 of this title relating to the duties of the clerks of courts and is consistent with the rules of Customs Court.

In districts other than the southern District of New York the United States marshal performs such duties. (See section 547 of this title.)

Changes were made in phraseology.

##### 1949 Act

This amendment harmonizes the catch line to section 872 of title 28, U.S.C., with the text of such section.

#### Amendments

1959—Pub. L. 86-243 substituted "Marshal and deputy marshals" for "Marshal; appointment" in the catchline, transferred the appointing authority from the chief judge to the Customs Court, deleted references to appointment of assistants and to the civil service laws, provided for power of removal and added the provisions for making disbursements under prescribed regulations and without the requirement of payee's verification under oath.

1949—Act May 24, 1949, struck out "and tenure" from the catchline.

#### Savings Provisions

Amendment of section by Pub. L. 86-243 not to deprive Customs Court officers or employees of any rights, privileges, or civil service status, see section 4 of Pub. L. 86-243, set out as a Savings Provisions note under section 871 of this title.

#### Cross References

Compensation and expenses of court officers and employees, see section 604 of this title.

Disbursement of salaries and expenses by United States marshal, see section 571 of this title.

United States marshal to be marshal of Customs Court elsewhere than in Southern and Eastern Districts of New York, see section 569 of this title.

### § 873. Criers, bailiffs, and messengers

The Customs Court may appoint such criers as it may require for said court, which criers shall also perform the duties of bailiffs and messengers and such other duties as the court directs and shall be subject to removal by the court.

(Added Pub. L. 86-243, § 1, Sept. 9, 1959, 73 Stat. 474.)

#### Savings Provisions

Enactment of section by Pub. L. 86-243 not to deprive Customs Court officers or employees of any rights, privileges, or civil service status, see section 4 of Pub. L. 86-243, set out as a Savings Provisions note under section 871 of this title.

## CHAPTER 57—GENERAL PROVISIONS APPLICABLE TO COURT OFFICERS AND EMPLOYEES

Sec.
951. Oath of office of clerks and deputies.
[952. Repealed.]
953. Administration of oaths and acknowledgments.
954. Death of clerk; duties of deputies.
955. Practice of law restricted.
956. Powers and duties of clerks and deputies.
957. Clerks ineligible for certain offices.
958. Persons ineligible as receivers.
959. Trustees and receivers suable; management; State laws.
960. Tax liability.
961. Office expenses of clerks.
[962. Repealed.]
963. Courts defined.

#### Senate Revision Amendment

This chapter was renumbered "57", but without change in its section numbers, by Senate amendment. See 80th Congress Senate Report No. 1559.

#### Amendments

1972—Pub. L. 92-310, title II, § 206(e)(2), (f)(2), June 6, 1972, 86 Stat. 203, struck out item 952, and eliminated words "and remedies against" which preceded "deputies" in item 954.

1968—Pub. L. 90-623, § 4, Oct. 22, 1968, 82 Stat. 1315, struck out item 962 "Traveling expenses".

1949—Act May 24, 1949, ch. 139, § 78a, 63 Stat. 101, struck out "by clerks" following "law" in items 955.

#### Cross References

General provisions applicable to court officers and employees, see section 951 et seq. of this title.

### § 951. Oath of office of clerks and deputies

Each clerk of court and his deputies shall take the following oath or affirmation before entering upon their duties: "I, —— ——, having been appointed ——, do solemnly swear (or affirm) that I will truly and faithfully enter and record all orders, decrees, judgments and proceedings of such court, and will faithfully and impartially discharge all other duties of my office according to the best of my abilities and understanding. So help me God."

(June 25, 1948, ch. 646, 62 Stat. 925.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 512 (R.S., § 794; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167).

Section 512 of title 28, U.S.C., 1940 ed., applied only to the Clerk of the Supreme Court and clerks and deputies of the district courts.

This section is applicable to the Supreme Court and to all courts established by act of Congress.

The last sentence of section 512 of title 28, U.S.C., 1940 ed., reading "The words 'So help me God.' shall be omitted in all cases where an affirmation is admitted instead of an oath," was omitted as unnecessary because on affirmation such words would not be included. As revised, the section conforms with section 453 of this title providing for the form of judicial oath.

Minor changes were made in phraseology.

### [§ 952. Repealed. Pub. L. 92-310, title II, § 206(e)(1), June 6, 1972, 86 Stat. 203]

Section, act June 25, 1948, ch. 646, 62 Stat. 926, related to bonds of clerks and deputies.

### § 953. Administration of oaths and acknowledgments

Each clerk of court and his deputies may administer oaths and affirmations and take acknowledgments.

(June 25, 1948, ch. 646, 62 Stat. 926.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., §§ 264, 523 and 525, section 1114(a) of title 26, U.S.C., 1940 ed., Internal Revenue Code, and District of Columbia Code, 1940 ed., § 11-402 (R.S. § 799; May 28, 1896, ch. 252, § 19, 29 Stat. 184; Mar. 2, 1901, ch. 814, 31 Stat. 956; Mar. 3, 1901, ch. 854, § 178, 31 Stat. 1219; June 30, 1902, ch. 1329, 32 Stat. 527; Mar. 3, 1911, ch. 231, §§ 158, 291, 36 Stat. 1139, 1167; Feb. 10, 1939, ch. 2, § 1114(a), 53 Stat. 160; Oct. 21, 1942, ch. 619, title V, § 504(a)(c), 56 Stat. 957; Feb. 25, 1944, ch. 63, title V, § 503, 58 Stat. 72).

This section consolidates a part of section 525, sections 264 and 523 of title 28, U.S.C., 1940 ed., part of section 1114(a) of title 26, U.S.C., 1940 ed., section 11-402 of the District of Columbia Code, 1940 ed.,

As respects acknowledgments, sections 264, 523 and 525 of title 28, U.S.C., 1940 ed., and section 11-402 of District of Columbia Code, 1940 ed., referred only to the Court of Claims and the District Court for the District of Columbia. However, section 555 of said title 28, before amendment in 1944, provided for the collection of a fee by district court clerks for taking acknowledgments. The 1944 amendment provided for the fixing of fees by the Judicial Conference of the United States. If notaries and other minor officials may take acknowledgments there seems to be no reason why clerks of Federal courts and their deputies should not have such power.

Words "Except as provided in section 591 of this title," in section 525 of title 28, U.S.C., 1940 ed., were omitted. Under such section 591, the provisions of such section 525 were inapplicable to the Territory of Alaska, but a later act of June 6, 1900, ch. 786, § 7, 31 Stat. 324, section 106 of title 48, U.S.C., 1940 ed., Territories and Insular Possessions, provided that clerks of the District Court for Alaska should perform the duties required or authorized to be performed by clerks of United States courts in other districts.

Provisions of section 525 of title 28, U.S.C., 1940 ed., relating to United States commissioners are incorporated in section 637 of this title.

Provisions of section 264 of title 28, U.S.C., 1940 ed., and section 1114(a) of title 26, U.S.C., 1940 ed., relating to administration of oaths and acknowledgments by judges, are incorporated in section 459 of this title. For distribution of other provisions of such section 1114(a) of title 26, see Distribution Table.

Changes in phraseology were made.

#### Senate Revision Amendment

Those provisions of this section which related to the Tax Court were eliminated by Senate amendment, therefore section 1114(a) of Title 26, U.S.C., Internal Revenue Code, was not a part of the source of this section upon final enactment. The Senate amendments also eliminated section 1114(a) of the Internal Revenue Code from the schedule of repeals. See 80th Congress Senate Report No. 1559.

### § 954. Death of clerk; duties of deputies

Upon the death of any clerk of court, his deputy or deputies shall execute the duties of the deceased clerk in his name until his successor is appointed and qualifies.

The compensation of a deceased clerk of the Supreme Court may be paid to his personal representatives until his successor is appointed and qualifies.

(June 25, 1948, ch. 646, 62 Stat. 926; June 6, 1972, Pub. L. 92-310, title II, § 206(f), 86 Stat. 203.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§ 8, 222 and 327 (Mar. 3, 1911, ch. 231, §§ 4, 125, 221, 36 Stat. 1087, 1132, 1153).

Section consolidates parts of sections 8, 222 and 327 of title 28, U.S.C., 1940 ed.

Sections 8, 222 and 327 of title 28, U.S.C., 1940 ed., related only to district courts, courts of appeals and the Supreme Court, respectively. This section applies to all Federal courts and is in conformity with section 548 of this title relating to death of a United States marshal.

The provision for continuance of the salary of the clerk of the Supreme Court until his successor is appointed and qualifies was inserted to preserve existing law as declared in the unpublished opinion of Chief Justice Taft, March 23, 1932 (filed in the Department of Justice), with respect to a deceased clerk of the Supreme Court. Other provisions of sections 8, 222 and 327 of title 28, U.S.C., 1940 ed., are incorporated in sections 671, 711, and 751 of this title.

#### AMENDMENTS

1972—Pub. L. 92-310 eliminated words "and remedies against" which preceded "deputies" in the section catchline, and repealed provisions which related to the default or misfeasance of a deputy in connection with the bond of a deceased clerk of a Federal court.

### § 955. Practice of law restricted

The clerk of each court and his deputies and assistants shall not practice law in any court of the United States.

(June 25, 1948, ch. 646, 62 Stat. 926.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§ 395 and 396 (Mar. 3, 1911, ch. 231, §§ 273, 274, 36 Stat. 1164).

Section consolidates parts of sections 395 and 396 of title 28, U.S.C., 1940 ed. The remainder, relating to United States marshals and their deputies, is incorporated in section 556 of this title.

Sections 395 and 396 of title 28, U.S.C., 1940 ed., have been extended to include all clerks, deputies, and assistants.

The revised section substitutes as simpler and more appropriate, the prohibition against practice of law "in any court of the United States." (See reviser's note under section 556 of this title.)

For explanation of provisions omitted from sections 395 and 396 of title 28, U.S.C., 1940 ed., also see reviser's note under section 556 of this title.

Changes in phraseology were made.

### § 956. Powers and duties of clerks and deputies

The clerk of each court and his deputies and assistants shall exercise the powers and perform the duties assigned to them by the court.

(June 25, 1948, ch. 646, 62 Stat. 926.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§ 221, 244, 304 and 305 (Mar. 3, 1911, ch. 231, §§ 124, 139, 191, 192, 36 Stat. 1132, 1136, 1144; June 16, 1930, ch. 494, 46 Stat. 589).

This section contains only a part of sections 221, 244, 304 and 305 of title 28, U.S.C., 1940 ed. The other provisions of such sections are incorporated in sections 604, 711, 831, 833, 834, 957 and 1926 of this title.

Sections 221, 244, 304 and 305 of title 28, U.S.C., 1940 ed., related to the clerks of the circuit courts of appeals, the Court of Claims and the Court of Customs and Patent Appeals.

The phrase "assigned to them by the court" was substituted for the indefinite provision of section 221 of title 28, U.S.C., 1940 ed., that the clerk of each circuit court of appeals "shall exercise the same powers and perform the same duties * * * as are exercised and performed by the clerk of the Supreme Court, so far as the same may be applicable."

This section is new insofar as it affects the Clerk of the Supreme Court and clerks of the district courts and the Customs Court. Existing law does not prescribe the powers and duties of those clerks. The duties of the clerk of the Customs Court have been prescribed by the rules of such court adopted May 29, 1936.

Changes were made in phraseology.

### § 957. Clerks ineligible for certain offices

(a) A clerk of a district court or any of his deputies shall not be appointed a commissioner, master, referee or receiver in any case, unless there are special reasons requiring such appointment which are recited in the order of appointment.

(b) The clerk or assistant clerks of the Court of Customs and Patent Appeals shall not be appointed a commissioner, master or referee in any case.

(June 25, 1948, ch. 646, 62 Stat. 926.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§ 127, 304 (Mar. 3, 1911, ch. 231, §§ 68, 191, 36 Stat. 1105, 1144).

Section consolidates section 127 with part of 304 of title 28, U.S.C., 1940 ed.

Provisions of section 304 of title 28, U.S.C., 1940 ed., relating to appointment, powers, duties, and compensation of the clerk of the Court of Customs and Patent Appeals, and table of fees are incorporated in sections 604, 831, 956 and 1926 of this title.

Appointment and compensation of masters for district courts, see Rule 53(a) of the Federal Rules of Civil Procedure.

The words "commissioner" and "referee" did not appear in section 127 of title 28, U.S.C., 1940 ed. They were added to subsection (a) to remove possible ambiguity.

Words "by the court or any judge thereof" in section 304 of title 28, U.S.C., 1940 ed., were omitted as surplusage.

Words "or assistant clerks" and "in any case" were added in subsection (b) to make the section applicable to that officer and consistent with the prohibition in this section against deputies of district court clerks.

Minor changes were made in phraseology.

#### CROSS REFERENCES

For provision against the appointment of certain officers as receivers, see section 958 of this title.

### § 958. Persons ineligible as receivers

A person holding any civil or military office or employment under the United States or employed by any justice or judge of the United States shall not at the same time be appointed a receiver in any case in any court of the United States.

(June 25, 1948, ch. 646, 62 Stat. 926.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 527 (May 28, 1896, ch. 252, § 20, 29 Stat. 184; Dec. 28, 1945, ch. 592, 59 Stat. 659).

Provisions of section 527 of title 28, U.S.C., 1940 ed., relating to ineligibility of various persons as United States commissioner appear as section 631 of this title. Words "janitor of any Government building" were omitted as covered by words "person holding any civil or military employment under the United States" used in the revised section.

The general language of the revised section was substituted for the provisions of section 527 of title 28, U.S.C., 1940 ed., enumerating certain officers and employees.

The exception of Alaska by reference to "section 591 of this title" in section 527 of title 28, U.S.C., 1940 ed., was omitted as surplusage. Alaska is excluded by reason of the words "any court of the United States" which are limited by definitive section 451 of this title.

Changes in phraseology were made.

### § 959. Trustees and receivers suable; management; State laws

(a) Trustees, receivers or managers of any property, including debtors in possession, may be sued, without leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property. Such actions shall be subject to the general equity power of such court so far as the same may be necessary to the ends of justice, but this shall not deprive a litigant of his right to trial by jury.

(b) A trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.

(June 25, 1948, ch. 646, 62 Stat. 926.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., §§ 124, 125 (Mar. 3, 1911, ch. 231, §§ 65, 66, 36 Stat. 1104).

Section consolidates part of section 124 of title 28, U.S.C., 1940 ed., with section 125 of the same title. The criminal penalty for violation of said section 124 is incorporated in section 1911 of Title 18, Crimes and Criminal Procedure.

Section was extended and made applicable to trustees and debtors in possession. The provision at the end of subsection (a) for preserving the right to a jury trial was added to clarify the intent of section 125 of title 28, U.S.C., 1940 ed., as construed in *Vany* v. *Receiver of Toledo, St. L. and K.C. R.R. Co.*, C.C. 1895, 67 F. 379.

Changes in phraseology were made.

#### Cross References

Mismanagement of property by receiver, criminal penalty, see section 1911 of Title 18, Crimes and Criminal Procedure.

Process and orders affecting property in different districts, see section 1692 of this title.

Receivers of property in different districts, jurisdiction, see section 754 of this title.

#### Federal Rules of Civil Procedure

Capacity to sue or be sued, see rule 17, Appendix to this title.

#### Section Referred to in Other Sections

This section is referred to in section 754 of this title.

### § 960. Tax liability

Any officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation.

(June 25, 1948, ch. 646, 62 Stat. 927.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 124a (June 18, 1934, ch. 585, 48 Stat. 993).

A proviso in section 124a of title 28, U.S.C., 1940 ed., relating to taxes accruing prior to the effective date of the 1934 act, was omitted as obsolete.

References in section 124a of title 28, U.S.C., 1940 ed., to specific officers was omitted as covered by the words "Any officers."

Word "Federal" was added before "State" in recognition of the liability of such officers for Federal taxes under the revenue laws.

Changes in phraseology were made.

### § 961. Office expenses of clerks

Each clerk of court shall be allowed his necessary office expenses when authorized by the Director of the Administrative Office of the United States Courts.

(June 25, 1948, ch. 646, 62 Stat. 927.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., §§ 544, 563 (Mar. 3, 1891, ch. 517, § 2, 26 Stat. 826; Feb. 26, 1919, ch. 49, § 5, 40 Stat. 1182; Mar. 4, 1921, ch. 161, § 1, 41 Stat. 1412; June 1, 1922, ch. 204, title II, 42 Stat. 616; May 17, 1932, ch. 190, 47 Stat. 158; June 25, 1936, ch. 804, 49 Stat. 1921).

Section consolidates parts of sections 544 and 563 of title 28, U.S.C., 1940 ed. For remainder of such sections, see Distribution Table.

Changes were made in phraseology.

### [§ 962. Repealed. Pub. L. 89–554, § 8(a), Sept. 6, 1966, 80 Stat. 663]

Section, act June 25, 1948, ch. 646, 62 Stat. 927, related to traveling expenses and subsistence for officers and employees of the courts of the United States and of the Administrative Office of the United States Courts.

### § 963. Courts defined

As used in this chapter, unless the context indicates otherwise, the words "court" and "courts" include the Supreme Court of the United States and the courts enumerated in section 610 of this title.

(June 25, 1948, ch. 646, 62 Stat. 927.)

#### Historical and Revision Notes

This section was included to embrace the Supreme Court and all courts under the supervision of the Administrative Office of the United States Courts. See section 610 of this title and reviser's note thereunder.

## PART IV—JURISDICTION AND VENUE

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### Amendments

1976—Pub.L. 94-583, § 4(b), Oct. 21, 1976, 90 Stat. 2897, added item 97.

### Cross References

District of Columbia courts, jurisdiction, see Title 11 of District of Columbia Code.

Judicial power of the United States, see U.S. Const. Art. 3, §§ 1, 2, and U.S. Const. Amend. 11.

Tax Court jurisdiction, see section 7441 et seq. of Title 26, Internal Revenue Code.

## CHAPTER 81—SUPREME COURT

Sec.
1251. Original jurisdiction.
1252. Direct appeals from decisions invalidating Acts of Congress.
1253. Direct appeals from decisions of three-judge courts.
1254. Courts of appeals; certiorari; appeal; certified questions.
1255. Court of Claims; certiorari; certified questions.
1256. Court of Customs and Patent Appeals; certiorari.
1257. State courts; appeal; certiorari.
1258. Supreme Court of Puerto Rico; appeal; certiorari.

### Amendments

1961—Pub.L. 87-189, § 2, Aug. 30, 1961, 75 Stat. 417, added item 1258.

### Definitions of Courts and Judges

Section 32 of act June 25, 1948, as amended by act May 24, 1949, ch. 139, § 127, 63 Stat. 107, provided:

"(a) All laws of the United States in force on September 1, 1948, in which reference is made to a 'circuit court of appeals'; 'senior circuit judge'; 'senior district judge'; 'presiding judge'; 'chief justice', except when reference to the Chief Justice of the United States is intended; or 'justice', except when used with respect to a justice of the Supreme Court of the United States in his capacity as such or as a circuit justice, are hereby amended by substituting 'court of appeals' for 'circuit court of appeals'; 'chief judge of the circuit' for 'senior circuit judge'; 'chief judge of the district court' for 'senior district judge'; 'chief judge' for 'presiding judge'; 'chief judge' for 'chief justice', except when reference to the Chief Justice of the United States is intended; and 'judge' for 'justice', except when the latter term is used with respect to a justice of the Supreme Court of the United States in his capacity as such or as a circuit justice.

"(b) All laws of the United States in force on September 1, 1948, in which reference is made to the Supreme Court of the District of Columbia or to the District Court of the United States for the District of Columbia are amended by substituting 'United States District Court for the District of Columbia' for such designations.

"(c) All laws of the United States in force on September 1, 1948, in which reference is made to the 'Conference of Senior Circuit Judges', or to the 'Judicial Conference of Senior Circuit Judges' are amended by substituting 'Judicial Conference of the United States' for such designations.

"(d) This section shall not be construed to amend historical references to courts or judicial offices which have no present or future application to such courts or offices."

### Cross References

Procedure and particular proceedings, generally, see sections 1651 et seq. and 2201 et seq. of this title.

### Rules of the Supreme Court

Procedure generally, on appeal to or in Supreme Court, see Appendix to this title.

### Federal Rules of Criminal Procedure

Bail upon review, see rule 46, Title 18, Appendix, Crimes and Criminal Procedure.

Stay of execution, and relief pending review, see rule 38.

### § 1251. Original jurisdiction

(a) The Supreme Court shall have original and exclusive jurisdiction of:

(1) All controversies between two or more States;

(2) All actions or proceedings against ambassadors or other public ministers of foreign states or their domestics or domestic servants, not inconsistent with the law of nations.

(b) The Supreme Court shall have original but not exclusive jurisdiction of:

(1) All actions or proceedings brought by ambassadors or other public ministers of foreign states or to which consuls or vice consuls of foreign states are parties;

(2) All controversies between the United States and a State;

(3) All actions or proceedings by a State against the citizens of another State or against aliens.

(June 25, 1948, ch. 646, 62 Stat. 927.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., §§ 341, 371(7), (8) (Mar. 3, 1911, ch. 231, §§ 233, 256, 36 Stat. 1156, 1160; Oct. 6, 1917, ch. 97, § 2, 40 Stat. 395; June 10, 1922, ch. 216, § 2, 42 Stat. 635).

This section reconciles provisions of sections 341 and 371(7), (8) of title 28, U.S.C., 1940 ed., with Article 3, section 2 and Amendment 11 of the Constitution.

Sections 341 and 371 of title 28, U.S.C., 1940 ed., were not wholly consistent with such constitutional provisions. Said section 341 provided that the Supreme Court should have original jurisdiction of controversies between a State and citizens of other States or aliens, whereas the 11th Amendment prohibits an action in any Federal Court against a State by citizens of another State or aliens.

The original jurisdiction conferred on the Supreme Court by Article 3, section 2, of the Constitution is not exclusive by virtue of that provision alone. Congress may provide for or deny exclusiveness. *Ames* v. *Kansas*, 1884, 4 S.Ct. 437, 111 U.S. 449, 28 L.Ed. 442; *U.S.* v. *4,450.72 Acres of Land, Clearwater County, State of Minnesota*, D.C. Minn., 1939, 27 F.Supp. 167, affirmed 125 F.2d 636.

Sections 341 and 371 of title 28, U.S.C., 1940 ed., did not confer expressly exclusive jurisdiction on the Supreme Court in civil cases between States, *Louisiana* v. *Texas*, 1899, 20 S.Ct. 251, 176 U.S. 1, 44 L.Ed. 347, as has been provided in subsection (a)(1) of the revised section. The language at the beginning of said section 341, for which said subsection has been substituted, was ambiguous and made it appear that an action by a

State against the United States would be within the exclusive jurisdiction of the Supreme Court. However, in *U.S.* v. *Louisiana*, 1887, 8 S.Ct. 17, 123 U.S. 32, 31 L.Ed. 69, the Supreme Court, in a case appealed from the Court of Claims, held to the contrary.

So, also, in actions by the United States to condemn lands of a State or to enforce penalties for violation of a Federal statute against a State-owned, utility, the United States district courts have jurisdiction. See *United States* v. *State of Utah*, 1931, 51 S.Ct. 438, 283 U.S. 64, 75 L.Ed. 844; *United States* v. *4,450.72 Acres of Land, Clearwater County, State of Minnesota*, D.C.Minn. 1939, 27 F.Supp. 167, affirmed 125 F.2d 636; *United States* v. *State of California*, 1936, 56 S.Ct. 421, 297 U.S. 175, 80 L.Ed. 567.

The intent of section 371(7), (8) of title 28, U.S.C., 1940 ed., that the jurisdiction of the courts of the United States should be exclusive of the courts of the States in controversies to which a State is a party, and suits against ambassadors, public ministers, consuls and vice consuls, is preserved and clarified by this section and section 1351 of this title.

The revised section preserves existing law with reference to foreign ambassadors, other public ministers and consuls. Under subsection (a)(2) the Supreme Court has exclusive jurisdiction of actions or proceedings against the ambassadors or public ministers of other nations.

Under subsection (b)(1) the Supreme Court has original but not exclusive jurisdiction of actions or proceedings brought by such ambassadors or other public ministers or to which consuls or vice consuls of other nations are parties.

Section 1351 of this title gives to United States district courts, exclusive of the courts of the States, jurisdiction of civil actions against such consuls and vice consuls.

This section and said section 1351 of this title have no application to ambassadors, public ministers, consuls or vice consuls representing the United States. See *Milward* v. *McSaul*, D.C.S.D.N.Y. 1846, 17 Fed.Cas.No. 9,623 and *State of Ohio ex rel. Popovici* v. *Alger*, 1930, 50 S.Ct. 154, 280 U.S. 379, 74 L.Ed. 489.

Changes were made in phraseology.

#### Statutes Governing Writs of Error To Apply to Appeals

Act Jan. 31, 1928, ch. 14, § 2, 45 Stat. 54, amended Apr. 26, 1928, ch. 440, 45 Stat. 466; June 25, 1948, ch. 646, § 23, 62 Stat. 990, provided that "All Acts of Congress referring to writs of error shall be construed as amended to the extent necessary to substitute appeal for writ of error." See also, notes preceding section 1 of this title.

#### Cross References

Controversies involving pollution of waters, jurisdiction of actions by States, see section 466g-1 of Title 33, Navigation and Navigable Waters.

Jury trial in original actions at law in Supreme Court against citizens of the United States, see section 1872 of this title.

Original jurisdiction—
  District Court of all suits against consuls and vice-consuls, see section 1351 of this title.
  Supreme Court, see, also, U.S. Const. Art. 3, § 2, Cl. 2.

Writs, see section 1651 of this title.

#### Rules of the Supreme Court

Procedure in original actions, see rule 9, Appendix to this title.

### § 1252. Direct appeals from decisions invalidating Acts of Congress

Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam and the District Court of the Virgin Islands and any court of record of Puerto Rico, holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.

A party who has received notice of appeal under this section shall take any subsequent appeal or cross appeal to the Supreme Court. All appeals or cross appeals taken to other courts prior to such notice shall be treated as taken directly to the Supreme Court.

(June 25, 1948, ch. 646, 62 Stat. 928; Oct. 31, 1951, ch. 655, § 47, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, § 12(e), (f), 72 Stat. 348; Mar. 18, 1959, Pub. L. 86-3, § 14(a), 73 Stat. 10.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 349a (Aug. 24, 1937, ch. 754, §§ 2, 5, 50 Stat. 752, 753).

Provisions relating to procedure on appeals taken under this section are incorporated in section 2101 of this title.

Words "civil action" were inserted before "suit or proceeding," in view of Rule 2 of the Federal Rules of Civil Procedure, providing for but one form of action, to be known as "civil action." However, such Rules apply only to the district courts, and hence "suit" was not deleted.

Words "or in which the United States has intervened and become a party" were omitted as surplusage.

Words "This section shall not be construed to be in derogation of any right of direct appeal to the Supreme Court of the United States under existing provisions of law" were omitted as unnecessary.

The term "any court of the United States" includes the courts of appeals, the district courts enumerated in chapter 5 of this title including those for the districts of Hawaii and Puerto Rico, the Court of Claims, the Court of Customs and Patent Appeals, the Customs Court, and The Tax Court. The revised section conforms with section 5 of act Aug. 24, 1937, ch. 754, 50 Stat. 753, defining the term "court of the United States." (See also definitive section 451 of this title.)

Appeals in cases in the courts of appeals holding a State statute invalid as repugnant to the Constitution, treaties or laws of the United States, are governed by section 1254(2) of this title.

The Tax Court is included as there seems no more reason for intermediate review of Tax Court decisions holding an act of Congress unconstitutional than in the case of decisions of the Customs Court or Court of Customs and Patent Appeals.

Changes were made in phraseology.

Section 345 of title 28, U.S.C., 1940 ed., provided for direct appeals to the Supreme Court from interlocutory or final judgments of district courts in five instances under sections of the Code enumerated therein "and not otherwise."

Section 345 of title 28, U.S.C., 1940 ed., purports to list the only provisions for such direct appeals, but, in fact does not. For example, it omits sections 349a and 380a of title 28. It omits any reference to the act of May 22, 1936, ch. 444, 49 Stat. 1369, which authorizes direct review in suits pending under chapter 21 of title 43, U.S.C., 1940 ed., Public Lands (see section 927, note, of said title 43).

Section 345 of title 28, U.S.C., 1940 ed., should be repealed as unnecessary and misleading. Such repeal, in view of this revised section, section 1253 of this title and section 3731 of revised title 18 (Criminal Code, H.R. 1600, 80th Cong.), will remove doubt and uncertainty. (See reviser's note under section 1253 of this title. See also, *U.S.* v. *Belt*, 1943, 63 S.Ct. 1278, 319 U.S. 521, 87 L.Ed. 1559, holding that act April 27, 1912, ch.

96, § 5, 37 Stat. 94, authorizing such direct appeal from final decree of court in the District of Columbia in a suit by the United States to establish title to land, was repealed by said section 345 because it permitted direct appeal in only the five categories specified therein.)

Proceedings in Supreme Court to review decisions of the district court for, and the Supreme Court of, Puerto Rico, to be conducted in the English language (see section 866 of title 48, U.S.C., 1940 ed., Territories and Insular Possessions.)

### Amendments

1959—Pub. L. 86-3 eliminated a reference to courts of record of Hawaii. See section 91 of this title and notes thereunder.

1958—Pub. L. 85-508 eliminated references to the District Court for the Territory of Alaska and to courts of record of Alaska. See section 81A of this title which establishes a United States District Court for the State of Alaska.

1951—Act Oct. 31, 1951, inserted a reference to the District Court of Guam in first par.

### Effective Date of 1959 Amendment

Section 14 of Pub. L. 86-3 provided in part that the amendments of sections 91, 373, 1292, 1293, and 1294 of this title, sections 3771 and 3772 of Title 18, Crimes and Criminal Procedure, and section 644a of Title 48, Territories and Insular Possessions, the repeal of sections 536, 539, 634, 634a and 645 of title 48, and notes set out under sections 371 and 373 of this title, shall be effective upon the admission of the State of Hawaii into the Union. Admission of Hawaii into the Union was accomplished Aug. 21, 1959, upon issuance of Proc. No. 3309, Aug. 21, 1959, 25 F.R. 6868, 73 Stat. c74, as required by sections 1 and 7(c) of Pub. L. 86-3, Mar. 18, 1959, 73 Stat. 4, set out as notes preceding section 491 of title 48.

### Effective Date of 1958 Amendment

Amendment by Pub. L. 85-508 effective Jan. 3, 1959 upon admission of Alaska into the Union pursuant to Proc. No. 3269, Jan. 3, 1959, 24 F.R. 81, 73 Stat. c16, as required by sections 1 and 8(c) of Pub. L. 85-508, see notes set out under section 81A of this title and preceding section 21 of Title 48, Territories and Insular Possessions.

### Cross References

"Court of the United States," definition, see section 451 of this title.

Criminal cases, direct appeals to Supreme Court, see section 3731 of Title 18, Crimes and Criminal Procedure.

Quorum of Supreme Court justices absent, see section 2109 of this title.

Time for appeal or certiorari, see section 2101 of this title.

Vesting and liquidation of Bulgarian, Hungarian, and Rumanian property, final orders or decrees of district courts of the United States reviewable as provided in this section, see section 1631e of Title 22, Foreign Relations and Intercourse.

Writs, see section 1651 of this title.

### Rules of the Supreme Court

Procedure on appeal, see Appendix to this title.

Supersedeas on appeal, see rule 18.

### Federal Rules of Civil Procedure

Stay of proceedings to enforce judgment, see rule 62, Appendix to this title.

### Section Referred to in Other Sections

This section is referred to in section 2101 of this title; title 22 section 1631e.

## § 1253. Direct appeals from decisions of three-judge courts

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

(June 25, 1948, ch. 646, 62 Stat. 928.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., §§ 47, 47a, 380 and 380a (Mar. 3, 1911, ch. 231, §§ 210, 266, 36 Stat. 1150, 1162; Mar. 4, 1913, ch. 160, 37 Stat. 1013; Oct. 22, 1913, ch. 32, 38, Stat. 220; Feb. 13, 1925, ch. 229, § 1, 43 Stat. 938; Aug. 24, 1937, ch. 754, § 3, 50 Stat. 752).

This section consolidates the provisions of sections 47, 47a, 380, and 380a of title 28, U.S.C., 1940 ed., relating to direct appeals from decisions of three-judge courts involving orders of the Interstate Commerce Commission or holding State or Federal laws repugnant to the Constitution of the United States.

For distribution of other provisions of the sections on which this revised section is based, see Distribution Table.

The language in section 380 of title 28, U.S.C., 1940 ed., referring to restraining the enforcement or execution of an order made by an administrative board or a State officer was omitted as covered by this revised section and section 2281 of this title.

Words in section 380a of title 28, U.S.C., 1940 ed., "This section shall not be construed to be in derogation of any right of direct appeal to the Supreme Court of the United States under existing provisions of law," were omitted as unnecessary.

Section 217 of title 7, U.S.C., 1940 ed., Agriculture, provides for a three-judge court in proceedings to suspend or restrain the enforcement of orders of the Secretary of Agriculture under the Packers and Stockyards Act of 1921.

The final proviso of section 502 of title 33, U.S.C., 1940 ed., Navigation and Navigable Waters, for direct appeal in certain criminal cases for failure to alter bridges obstructing navigation, is recommended for express repeal in view of its implied repeal by section 345 of title 28, U.S.C., 1940 ed. (See *U.S.* v. *Belt*, 1943, 63 S.Ct. 1278, 319 U.S. 521, 87 L.Ed. 1559. See reviser's note under section 1252 of this title.)

Section 28 of title 15, U.S.C., 1940 ed., Commerce and Trade, and section 44 of title 49, U.S.C., 1940 ed., Transportation, are identical and provide for convening of a three-judge court to hear and determine civil cases arising under the Sherman anti-trust law and the Interstate Commerce Act, respectively, wherein the United States is plaintiff and when the Attorney General deems such cases of general public importance.

Section 401(d) of title 47, U.S.C., 1940 ed., Telegraphs, Telephones, and Radiotelegraphs, made the provisions of sections 28 and 29 of title 15, U.S.C., 1940 ed., Commerce and Trade, sections 44 and 45 of title 49, U.S.C., 1940 ed., Transportation, and section 345(1) of title 28, U.S.C., 1940 ed., relating to three-judge courts and direct appeals, applicable to orders of the Federal Communications Commission enforcing the Communications Act of 1934.

### Cross References

Direct appeals from three-judge courts—
- Anti-Trust Laws, see section 29 of Title 15, Commerce and Trade.
- Communications Act of 1934, see section 402 of Title 47, Telegraphs, Telephones, and Radiographs.
- Interstate Commerce Act, see section 45 of Title 49, Transportation.
- Packers and Stockyards Act, see section 217 of Title 7, Agriculture.

Quorum of Supreme Court justices absent, see section 2109 of this title.

Time for appeal or certiorari, see section 2101 of this title.

Writs, see section 1651 of this title.

### Rules of the Supreme Court

Procedure on appeal, see Appendix to this title.

Supersedeas on appeal, see rule 18.

### Federal Rules of Civil Procedure

Stay of proceedings to enforce judgment, see rule 62, Appendix to this title.

### Section Referred to in Other Sections

This section is referred to in section 2101 of this title; title 45 sections 719, 743.

## § 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

(June 25, 1948, ch. 646, 62 Stat. 928.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., §§ 346 and 347 (Mar. 3, 1911, ch. 231, §§ 239, 240, 36 Stat. 1157; Feb. 13, 1925, ch. 229, § 1, 43 Stat. 938; Jan. 31, 1928, ch. 14, § 1, 45 Stat. 54; June 7, 1934, ch. 426, 48 Stat. 926).

Section consolidates sections 346 and 347 of title 28, U.S.C., 1940 ed.

Words "or in the United States Court of Appeals for the District of Columbia" and "or of the United States Court of Appeals for the District of Columbia" in sections 346 and 347 of title 28, U.S.C., 1940 ed., were omitted. (See section 41 of this title.)

The prefatory words of this section preceding paragraph (1) were substituted for subsection (c) of said section 347.

The revised section omits the words of section 347 of title 28, U.S.C., 1940 ed., "and with like effect as if the case had been brought there with unrestricted appeal", and the words of section 346 of such title "in the same manner as if it had been brought there by appeal". The effect of subsections (1) and (3) of the revised section is to preserve existing law and retain the power of unrestricted review of cases certified or brought up on certiorari. Only in subsection (2) is review restricted.

Changes were made in phraseology and arrangement.

### Cross References

Appeal from courts of appeals in bankruptcy cases, see section 47 of Title 11, Bankruptcy.

Quorum of Supreme Court justices, see section 2109 of this title.

Review generally, see section 2101 et seq. of this title.

Review of appeals of orders of Secretary of Health, Education, and Welfare respecting approval of construction projects for State mental retardation facilities and community mental health centers, see section 6068 of Title 42, The Public Health and Welfare.

Review of appeals of orders relating to use of pesticide chemicals and raw agricultural commodities, see section 346a of Title 21, Food and Drugs.

Time for appeal or certiorari, see section 2101 of this title.

Vesting and liquidation of Bulgarian, Hungarian, and Rumanian property, final orders or decrees of district courts of the United States reviewable as provided in this section, see section 1631e of Title 22, Foreign Relations and Intercourse.

Writs, see section 1651 of this title.

### Rules of the Supreme Court

Procedure generally on appeal, writ of certiorari, or certification of questions, see Appendix to this title.

Supersedeas on appeal and stay pending review on certiorari, see rules 18 and 27.

### Federal Rules of Civil Procedure

Power of appellate court to stay proceedings not limited by rule 62, see rule 62(g), Appendix to this title.

### Section Referred to in Other Sections

This section is referred to in section 2350 of this title; title 2 section 437g; title 5 section 1508; title 7 sections 136n, 194, 2050; title 12 sections 1464, 1730, 1730a, 1786, 1818; title 15 sections 21, 29, 45, 57a, 78aa, 79x, 79y, 80a-42, 80a-43, 80b-13, 687a, 687e, 1193, 1262, 1394, 1474, 1710, 1719, 1913, 2004, 2060, 2618; title 16 sections 825*l*, 825p; title 19 sections 1641, 2322; title 20 sections 241e-1, 241k, 351d, 585, 827, 844a, 845, 869a, 1070c-3, 1128, 1132a-7, 1207, 1232c, 1263, 1413, 1416, 1806, 2309; title 21 sections 346a, 348, 355, 360g, 371; title 22 section 1631e; title 23 section 131; title 26 sections 3310, 6363, 7482; title 29 sections 160, 210, 660, 667, 819; title 30 sections 725, 731, 816; title 31 section 1263; title 33 sections 505, 520, 988; title 38 section 784; title 40 section 333; title 42 sections 263a, 263f, 291h, 300s, 504, 1316, 3025, 3045d, 3414, 3759, 5311, 5405, 6068, 6306, 6869; title 45 section 153; title 47 section 402; title 49 sections 45, 1486, 1675.

## § 1255. Court of Claims; certiorari; certified questions

Cases in the Court of Claims may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted on petition of the United States or the claimant;

(2) By certification of any question of law by the Court of Claims in any case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions on such question.

(June 25, 1948, ch. 646, 62 Stat. 928.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 288 (Feb. 13, 1925, ch. 229, § 3, 43 Stat. 939; May 22, 1939, ch. 140, 53 Stat. 752).

Words "including those begun under section 287 of this title" appearing in subsections (a) and (b) of section 288 of title 28, U.S.C., 1940 ed., were omitted as surplusage.

The provision of subsection (a) of section 288 of title 28, U.S.C., 1940 ed., for review and determination of all errors assigned, "with the same power and authority and with like effect, as if the cause had been brought there by appeal," was omitted as unnecessary. Review under this section is unrestricted.

Provisions for authority to review, in addition to other questions of law, "errors assigned to lack of evidence to sustain a finding of facts; that an ultimate finding or findings are not sustained by findings of evidentiary or primary facts; or that there is a failure to make a finding of fact on a material issue," were omitted as unnecessary.

Subsection (c) of section 288 of title 28, U.S.C., 1940 ed., was omitted as covered by the language at the beginning of the revised section.

Changes were made in phraseology and arrangement.

#### Cross References

Time for certiorari, see section 2101 of this title.

Writs, see section 1651 of this title.

#### Rules of the Supreme Court

Considerations governing review on certiorari of judgments of Court of Claims, see rule 19, Appendix to this title.

Questions certified by the Court of Claims, see rule 28.

#### Rules of the Court of Claims

Writs of certiorari, see rule 154, Appendix to this title.

#### Section Referred to in Other Sections

This section is referred to in title 50 App. section 1218a.

### § 1256. Court of Customs and Patent Appeals; certiorari

Cases in the Court of Customs and Patent Appeals may be reviewed by the Supreme Court by writ of certiorari.

(June 25, 1948, ch. 646, 62 Stat. 928.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 308 (Mar. 3, 1911, ch. 231, § 195, 36 Stat. 1145; Aug. 22, 1914, ch. 267, 38 Stat. 703; Sept. 6, 1916, ch. 448, § 6, 39 Stat. 727; Feb. 13, 1925, ch. 229, § 8, 43 Stat. 940; May 28, 1926, ch. 411, § 1, 44 Stat. 669; Jan. 31, 1928, ch. 14, § 1, 45 Stat. 54; Mar. 2, 1929, ch. 488, § 1, 45 Stat. 1475; June 17, 1930, ch. 497, title IV, § 647, 46 Stat. 762).

Provisions of section 308 of title 28, U.S.C., 1940 ed., relating to jurisdiction of the Court of Customs and Patent Appeals are the basis of section 1541 of this title.

Words "duly made as required by section 350 of this title," were omitted as surplusage.

Provision for review and determination "with the same power and authority in the case as if it had been carried by appeal to the Supreme Court" was omitted as unnecessary. Review under this section is unrestricted.

Changes were made in phraseology.

#### Cross References

Time for certiorari, see section 2101 of this title.

Writs, see section 1651 of this title.

#### Rules of the Supreme Court

Considerations governing review on certiorari of judgments of Court of Customs and Patent Appeals, see rule 19, Appendix to this title.

### § 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

(June 25, 1948, ch. 646, 62 Stat. 929; July 29, 1970, Pub. L. 91-358, title I, § 172(a)(1), 84 Stat. 590.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 344 (Mar. 3, 1911, ch. 231, §§ 236, 237, 36 Stat. 1156; Dec. 23, 1914, ch. 2, 38 Stat. 790; Sept. 6, 1916, ch. 448, § 2, 39 Stat. 726; Feb. 17, 1922, ch. 54, 42 Stat. 366; Feb. 13, 1925, ch. 229, § 1, 43 Stat. 937; Jan. 31, 1928, ch. 14, § 1, 45 Stat. 54).

Provisions of section 344 of title 28, U.S.C., 1940 ed., relating to procedure for review of decisions of State courts are incorporated in section 2103 of this title. Other provisions of such section 344 of title 28, U.S.C., 1940 ed., are incorporated in section 2106 of this title.

The revised section applies in both civil and criminal cases. In *Twitchell* v. *Philadelphia*, 1868, 7 Wall. 321, 19 L.Ed. 223, it was expressly held that the provisions of section 25 of the Judiciary Act of 1789, 1 Stat. 85, on which title 28, U.S.C., 1940 ed., § 344, is based, applied to criminal cases, and many other Supreme Court decisions impliedly involve the same holding inasmuch as the Court has taken jurisdiction of criminal cases on appeal from State courts. See, for example, *Herndon* v. *Georgia*, 1935, 55 S.Ct. 794, 295 U.S. 441, 79 L.Ed. 1530 and *Ashcraft* v. *Tennessee*, 1944, 64 S.Ct. 921, 322 U.S. 143, 88 L.Ed. 1192.

Provision, in section 344(b) of title 28, U.S.C., 1940 ed., for review and determination on certiorari "with the same power and authority and with like effect as if brought up by appeal" was omitted as unnecessary. The scope of review under this section is unrestricted.

Words "and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied," in said section 344(b), were omitted as surplusage.

The last sentence in said section 344(b) relating to the right to relief under both subsections of said section 344, was omitted as unnecessary.

Changes were made in phraseology.

#### Amendments

1970—Pub. L. 91-358 provided that for the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

#### Effective Date of 1970 Amendment

Section 199(a) of Pub. L. 91-358 provided that: "The effective date of this title (and the amendments made by this title) [which enacted sections 1363, 1451, and 2113 of this title, and amended this section and sections 292 and 1869 of this title, section 5102 of Title 5, Government Organization and Employees, and section 260a of Title 42, The Public Health and Welfare] shall be the first day of the seventh calendar month which begins after the date of the enactment of this Act [July 29, 1970]."

### CROSS REFERENCES

Appeals from State courts—

Improvidently taken regarded as writs of certiorari, see section 2103 of this title.

Priority of criminal cases, see section 2102 of this title.

Procedure and effect, see section 2104 of this title.

Determination on review, see section 2106 of this title.

Quorum of Supreme Court justices absent, disposition of case, see section 2109 of this title.

Time for appeal or certiorari, see section 2101 of this title.

Writs, see section 1651 of this title.

### RULES OF THE SUPREME COURT

Jurisdiction on appeal, see rules 10 to 18, Appendix to this title.

Jurisdiction on writ of certiorari, see rules 19 to 27.

Jurisdictional statement, see rule 15.

Order granting or denying certiorari, see rule 25.

### SECTION REFERRED TO IN D.C. CODE

This section is referred to in section 11-102 of the District of Columbia Code.

## § 1258. Supreme Court of Puerto Rico; appeal; certiorari

Final judgments or decrees rendered by the Supreme Court of the Commonwealth of Puerto Rico may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of the Commonwealth of Puerto Rico on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of the Commonwealth of Puerto Rico is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution, treaties, or statutes of, or commission held or authority exercised under, the United States.

(Added Pub. L. 87-189, § 1, Aug. 30, 1961, 75 Stat. 417.)

## CHAPTER 83—COURTS OF APPEALS

Sec.

1291. Final decisions of district courts.
1292. Interlocutory decisions.
[1293. Repealed.]
1294. Circuits in which decisions reviewable.

### AMENDMENTS

1961—Pub. L. 87-189, § 4, Aug. 30, 1961, 75 Stat. 417, eliminated item 1293.

### CROSS REFERENCES

Jurisdiction of courts and appeals in particular matters, see reviser's note for section 1291 of this title.

Procedure and particular proceedings, generally, see sections 1651 et seq. and 2201 et seq. of this title.

### FEDERAL RULES OF APPELLATE PROCEDURE

Appeal to a court of appeals, see rules 3 and 4, Appendix to this title.

Joint or consolidated appeals to a court of appeals, see rule 3.

Record on appeal to a court of appeals, see rule 10.

### FEDERAL RULES OF CRIMINAL PROCEDURE

Application of rules, see note by Advisory Committee under rule 54, Title 18, Appendix, Crimes and Criminal Procedure.

Bail upon review, see rule 46.

Stay of execution and relief pending review, see rule 38.

### CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in title 7 section 2050a.

## § 1291. Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

(June 25, 1948, ch. 646, 62 Stat. 929; Oct. 31, 1951, ch. 655, § 48, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, § 12(e), 72 Stat. 348.)

### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§ 225(a), 933(a)(1), and section 1356 of title 48, U.S.C., 1940 ed., Territories and Insular Possessions, and sections 61 and 62 of title 7 of the Canal Zone Code (Mar. 3, 1911, ch. 231, § 128, 36 Stat. 1133; Aug. 24, 1912, ch. 390, § 9, 37 Stat. 566; Jan. 28, 1915, ch. 22, § 2, 38 Stat. 804; Feb. 7, 1925, ch. 150, 43 Stat. 813; Sept. 21, 1922, ch. 370, § 3, 42 Stat. 1006; Feb. 13, 1925, ch. 229, § 1, 43 Stat. 936; Jan. 31, 1928, ch. 14, § 1, 45 Stat. 54; May 17, 1932, ch. 190, 47 Stat. 158; Feb. 16, 1933, ch. 91, § 3, 47 Stat. 817; May 31, 1935, ch. 160, 49 Stat. 313; June 20, 1938, ch. 526, 52 Stat. 779; Aug. 2, 1946, ch. 753, § 412(a)(1), 60 Stat. 844).

This section rephrases and simplifies paragraphs "First", "Second", and "Third" of section 225(a) of title 28, U.S.C., 1940 ed., which referred to each Territory and Possession separately, and to sections 61 and 62 of the Canal Zone Code, section 933(a)(1) of said title relating to jurisdiction of appeals in tort claims cases, and the provisions of section 1356 of title 48, U.S.C., 1940 ed., relating to jurisdiction of appeals from final judgments of the district court for the Canal Zone.

The district courts for the districts of Hawaii and Puerto Rico are embraced in the term "district courts of the United States." (See definitive section 451 of this title.)

Paragraph "Fourth" of section 225(a) of title 28, U.S.C., 1940 ed., is incorporated in section 1293 of this title.

Words "Fifth. In the United States Court for China, in all cases" in said section 225(a) were omitted. (See reviser's note under section 411 of this title.)

Venue provisions of section 1356 of title 48, U.S.C., 1940 ed., are incorporated in section 1295 of this title.

Section 61 of title 7 of the Canal Zone Code is also incorporated in sections 1291 and 1295 of this title.

In addition to the jurisdiction conferred by this chapter, the courts of appeals also have appellate jurisdiction in proceedings under Title 11, Bankruptcy, and jurisdiction to review:

(1) Orders of the Secretary of the Treasury denying an application for, suspending, revoking, or annulling a basic permit under chapter 8 of title 27;

(2) Orders of the Interstate Commerce Commission, the Federal Communications Commission, the Civil Aeronautics Board, the Board of Governors of the Federal Reserve System and the Federal Trade Commission, based on violations of the antitrust laws or

unfair or deceptive acts, methods, or practices in commerce;

(3) Orders of the Secretary of the Army under sections 504, 505 and 516 of title 33, U.S.C., 1940 ed., Navigation and Navigable Waters;

(4) Orders of the Civil Aeronautics Board under chapter 9 of title 49, except orders as to foreign air carriers which are subject to the President's approval;

(5) Orders under chapter 1 of title 7, refusing to designate boards of trade as contract markets or suspending or revoking such designations, or excluding persons from trading in contract markets;

(6) Orders of the Federal Power Commission under chapter 12 of title 16;

(7) Orders of the Federal Security Administrator under section 371(e) of title 21, in a case of actual controversy as to the validity of any such order, by any person adversely affected thereby;

(8) Orders of the Federal Power Commission under chapter 15B of title 15;

(9) Final orders of the National Labor Relations Board;

(10) Cease and desist orders under section 193 of title 7;

(11) Orders of the Securities and Exchange Commission;

(12) Orders to cease and desist from violating section 1599 of title 7;

(13) Wage orders of the Administrator of the Wage and Hour Division of the Department of Labor under section 208 of title 29;

(14) Orders under sections 81r and 1641 of title 19, U.S.C., 1940 ed., Customs Duties.

The courts of appeals also have jurisdiction to enforce:

(1) Orders of the Interstate Commerce Commission, the Federal Communications Commission, the Civil Aeronautics Board, the Board of Governors of the Federal Reserve System, and the Federal Trade Commission, based on violations of the antitrust laws or unfair or deceptive acts, methods, or practices in commerce;

(2) Final orders of the National Labor Relations Board;

(3) Orders to cease and desist from violating section 1599 of title 7.

The Court of Appeals for the District of Columbia also has jurisdiction to review orders of the Post Office Department under section 576 of title 39 relating to discriminations in sending second-class publications by freight; Maritime Commission orders denying transfer to foreign registry of vessels under subsidy contract; sugar allotment orders; decisions of the Federal Communications Commission granting or refusing applications for construction permits for radio stations, or for radio station licenses, or for renewal or modification of radio station licenses, or suspending any radio operator's license.

Changes were made in phraseology.

### AMENDMENTS

1958—Pub. L. 85-508 eliminated provisions which gave the courts of appeals jurisdiction of appeals from the District Court for the Territory of Alaska. See section 81A of this title which establishes a United States District Court for the State of Alaska.

1951—Act Oct. 31, 1951, inserted a reference to the District Court of Guam.

### EFFECTIVE DATE OF 1958 AMENDMENT

Amendment by Pub. L. 85-508 effective Jan. 3, 1959, upon admission of Alaska into the Union pursuant to Proc. No. 3269, Jan. 3, 1959, 24 F.R. 81, 73 Stat. c.16 as required by sections 1 and 8(c) of Pub. L. 85-508, see notes set out under section 81A of this title and preceding section 21 of Title 48, Territories and Insular Possessions.

### CROSS REFERENCES

Antitrust Civil Process Act judicial proceedings subject to appeal pursuant to this section, see section 1314 of Title 15, Commerce and Trade.

Arrangements for debtors, appellate jurisdiction, see section 716 of Title 11, Bankruptcy.

Bankruptcy cases generally, appellate jurisdiction, see section 47 of Title 11.

Copyrights, review of orders, judgments, or decrees, see section 114 of Title 17, Copyrights.

Corporate reorganizations, appellate jurisdiction, see section 521 of Title 11, Bankruptcy.

Criminal cases, direct appeals to Supreme Court, and appeals to courts of appeals, see section 3731 of Title 18, Crimes and Criminal Procedure.

Direct appeals to Supreme Court, see sections 1252 and 1253 of this title.

Prize cases, allowance of appeal, see section 7680 of Title 10, Armed Forces.

Railroad reorganizations, appellate jurisdiction, see section 205 of Title 11, Bankruptcy.

Real property arrangements, appellate jurisdiction, see section 816 of Title 11.

Time for appeal, see section 2107 of this title.

Tort claims cases, appellate jurisdiction of Court of Claims, see section 1504 of this title.

Trade-mark actions, appellate jurisdiction, see section 1121 of Title 15, Commerce and Trade.

Vesting and liquidation of Bulgarian, Hungarian, and Rumanian property, final orders or decrees of district courts of the United States reviewable as provided in this section, see section 1631e of Title 22, Foreign Relations and Intercourse.

Wage earners' plans, appellate jurisdiction, see section 1016 of Title 11, Bankruptcy.

### FEDERAL RULES OF APPELLATE PROCEDURE

Procedure on appeal, see rule 1 et seq., Appendix to this title.

### FEDERAL RULES OF CRIMINAL PROCEDURE

Procedure on appeal, see rules 38 and 46(a)(2), Title 18, Appendix, Crimes and Criminal Procedure.

### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 7 section 2050; title 15 sections 29, 78aa, 79y, 80a-43, 80b-14, 1314, 1719; title 16 section 825p; title 20 section 585; title 22 section 1631e; title 42 sections 2000e-5, 3414; title 45 section 153; title 49 section 45; title 50 App. section 17.

## § 1292. Interlocutory decisions

(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed;

(4) Judgments in civil actions for patent infringement which are final except for accounting.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

(June 25, 1948, ch. 646, 62 Stat. 929; Oct. 31, 1951, ch. 655, § 49, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, § 12(e), 72 Stat. 348; Sept. 2, 1958, Pub. L. 85-919, 72 Stat. 1770.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., §§ 225(b), 227, 227a, and section 61 of title 7 of the Canal Zone Code (Mar. 3, 1911, ch. 231, §§ 128, 129, 36 Stat. 1133, 1134; Feb. 13, 1925, ch. 229, § 1, 43 Stat. 937; Feb. 28, 1927, ch. 228, 44 Stat. 1261; Apr. 3, 1926, ch. 102, 44 Stat. 233; May 20, 1926, ch. 347, § 13(a), 44 Stat. 587; Apr. 11, 1928, ch. 354, § 1, 45 Stat. 422; May 17, 1932, ch. 190, 47 Stat. 158).

Section consolidates sections 225(b), 227 and part of 227a of title 28, U.S.C., 1940 ed., with necessary changes in phraseology to effect the consolidation.

The second paragraph of section 225(b) of title 28, U.S.C., 1940 ed., relating to review of decisions of the district courts, under section 9 of the Railway Labor Act (section 159 of title 45), was omitted as covered by section 1291 of this title.

Words in section 227 of title 28, U.S.C., 1940 ed., "or decree," after "interlocutory order," were deleted, in view of Rule 65 of the Federal Rules of Civil Procedure, using only the word "order."

Provisions of sections 227 and 227a of title 28, U.S.C., 1940 ed., relating to stay of proceedings pending appeal were omitted as superseded by Federal Rules of Civil Procedure, Rule 73.

Provisions of section 227 of title 28, U.S.C., 1940 ed., requiring an additional bond by the district court as a condition of appeal were omitted in view of Federal Rules of Civil Procedure, Rule 73.

Words in section 227 of title 28, U.S.C., 1940 ed., "and sections 346 and 347 of this title shall apply to such cases in the circuit courts of appeals as to other cases therein," at the end of the first sentence of section 227 of title 28, U.S.C., 1940 ed., were deleted as fully covered by section 1254 of this title, applicable to any case in a court of appeals. Other procedural provisions of said section 227 were omitted as covered by section 2101 et seq. of this title.

In subsection (4), which is based on section 227a of title 28, U.S.C., 1940 ed., words "civil actions" were substituted for "suits in equity" and word "judgments" was substituted for "decree," in view of Rules 2 and 54 of the Federal Rules of Civil Procedure.

The provision of sections 227 and 227a of title 28, U.S.C., 1940 ed., that appeal must be taken within thirty days after entry of order, decree or judgment is incorporated in section 2107 of this title.

The provisions of section 227a of title 28, U.S.C., 1940 ed., relating to stay of proceedings pending appeal, were omitted as superseded by Rule 73 of the Federal Rules of Civil Procedure.

The district courts for the districts of Hawaii and Puerto Rico are embraced in the term "district courts of the United States." (See definitive section 451 of this title.) Consequently the specific reference in section 225 of title 28, U.S.C., 1940 ed., to "the United States district courts for Hawaii" was omitted.

The District Court for the District of Puerto Rico is not enumerated in section 225(b) of title 28, U.S.C., 1940 ed., nevertheless subsection (2) of the revised section does not except such court. Thus in conformity with the last sentence of section 864, title 48, U.S.C., 1940 ed. For distribution of said section 864, see Distribution Table.

Section 61 of title 7 of the Canal Zone Code is also incorporated in sections 1291 and 1294 of this title.

### Amendments

1958—Subsec. (a). Pub. L. 85-919 designated as subsec. (a) the former entire section.

Subsec. (a)(1). Pub. L. 85-508 eliminated the District Court for the Territory of Alaska. See section 81A of this title which establishes a United States District Court for the State of Alaska.

Subsec. (b). Pub. L. 85-919 added subsec. (b).

1951—Par. (1). Act Oct. 31, 1951, inserted a reference to the District Court of Guam.

### Effective Date of 1958 Amendment

Amendment by Pub. L. 85-508 effective Jan. 3, 1959, upon admission of Alaska into the Union pursuant to Proc. No. 3269, Jan. 3, 1959, 24 F.R. 81, 73 Stat. c16, as required by sections 1 and 8(c) of Pub. L. 85-508, see notes set out under section 81A of this title and preceding section 21 of Title 48, Territories and Insular Possessions.

### Cross References

Bankruptcy cases, appellate jurisdiction of courts of appeals, and time for appeal, see sections 47 and 48 of Title 11, Bankruptcy.

Direct review in Supreme Court, see sections 1252 and 1253 of this title, and section 3731 of Title 18, Crimes and Criminal Procedure.

Time for appeal, see section 2107 of this title.

Vesting and liquidation of Bulgarian, Hungarian, and Rumanian property, final orders or decrees of district courts of the United States reviewable as provided in this section, see section 1631e of Title 22, Foreign Relations and Intercourse.

Writs in aid of jurisdiction, power to issue, see section 1651 of this title.

### Federal Rules of Civil Procedure

Stay of proceedings on appeal, see rule 62, Appendix to this title.

### Section Referred to in Other Sections

This section is referred to in title 15 sections 29, 78aa, 79y, 80a-43, 80b-14; title 16 section 825p; title 22 section 1631e; title 42 section 2000e-5; title 49 section 45.

## [§ 1293. Repealed. Pub. L. 87-189, § 3, Aug. 30, 1961, 75 Stat. 417]

Section, acts June 25, 1948, ch. 646, 62 Stat. 929; Mar. 18, 1959, Pub. L. 86-3, § 14(b), 73 Stat. 10, provided for appeal from the supreme court of Puerto Rico to the court of appeals for the First Circuit. See section 1258 of this title.

### Savings Provisions

Section 3 of Pub. L. 87-189 provided in part: "That such repeal [of this section] shall not deprive the Court of Appeals for the First Circuit of jurisdiction to hear and determine appeals taken to that court from the Supreme Court of Puerto Rico before the effective date of this Act [Aug. 30, 1961]."

## § 1294. Circuits in which decisions reviewable

Appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows:

**(1) From a district court of the United States to the court of appeals for the circuit embracing the district;**

**(2) From the United States District Court for the District of the Canal Zone, to the Court of Appeals for the Fifth Circuit;**

**(3) From the District Court of the Virgin Islands, to the Court of Appeals for the Third Circuit;**

**(4) From the District Court of Guam, to the Court of Appeals for the Ninth Circuit.**

(June 25, 1948, ch. 646, 62 Stat. 930; Oct. 31, 1951, ch. 655, § 50(a), 65 Stat. 727; July 7, 1958, Pub. L. 85-508, § 12(g), 72 Stat. 348; Mar. 18, 1959, Pub. L. 86-3, § 14(c), 73 Stat. 10; Aug. 30, 1961, Pub. L. 87-189, § 5, 75 Stat. 417.)

### Historical and Revision Notes

Based on section 1141(b)(1)(2)(3) of title 26, U.S.C., 1940 ed., Internal Revenue Code, title 28, U.S.C., 1940 ed., § 225(d) and sections 645, 864, 865, 1356, and 1392 of title 48, U.S.C., 1940 ed., Territories and Insular Possessions, and section 61 of title 7 of the Canal Zone Code (Apr. 12, 1900, ch. 191, § 35, 31 Stat. 85; Mar. 3, 1911, ch. 231, § 128, 36 Stat. 1133; Aug. 24, 1912, ch. 390, § 9, 37 Stat. 566; Mar. 2, 1917, ch. 145, §§ 42, 43, 39 Stat. 966; Mar. 3, 1917, ch. 171, § 2, 39 Stat. 1132; Sept. 21, 1922, ch. 370, § 3, 42 Stat. 1006; Feb. 13, 1925, ch. 229, §§ 1, 13, 43 Stat. 936, 942; Feb. 26, 1926, ch. 27, § 1002, 44 Stat. 110; Jan. 31, 1928, ch. 14, § 1, 45 Stat. 54; May 17, 1932, ch. 190, 47 Stat. 158; Feb. 16, 1933, ch. 91, § 3, 47 Stat. 817; May 10, 1934, ch. 277, § 519, 48 Stat. 760; Feb. 10, 1939, ch. 2, § 1141(b)(1)(2)(3), 53 Stat. 164).

Section consolidates the venue provisions of sections 645, 864, 1356, and 1392 of title 48, U.S.C., 1940 ed., Territories and Insular Possessions with sections 1141(b)(1)(2)(3) to title 26, U.S.C., 1940 ed., Internal Revenue and sections 225(d) and 865 of said title 48. Other provisions of said section 864, not incorporated in this section and sections 41 and 119 of this title, were retained in title 48. Other provisions of said section 1356 are incorporated in section 1291 of this title. Other provisions of said section 1392 were also retained in title 48.

Paragraph (3) of section 1141(b) of title 26, U.S.C., 1940 ed., was omitted as executed. It made such subsection applicable to all decisions of the Board of Tax Appeals (Tax Court) rendered on and after May 10, 1934.

Provisions of section 225(d) of title 28, U.S.C., 1940 ed., for review of the decisions of the United States Court for China were omitted. (See reviser's note under section 411 of this title.)

Subsection (b) rephrases and rearranges the relevant provisions of section 1141(b)(1)(2)(3) of title 26, U.S.C., 1940 ed.

Specific reference to the United States district courts for the districts of Hawaii, Puerto Rico and District of Columbia was omitted as unnecessary, these courts being embraced in the definition of "a district court of the United States" contained in section 451 of this title.

Administrative orders, referred to in reviser's note under section 1291 of this title, are reviewable and enforceable in the following circuits:

### Orders Reviewable

(1) Alcoholic permit orders—in the District of Columbia or in the circuit where the applicant or permittee resides or has his principal place of business;

(2) Antitrust and unfair trade orders—in the circuit where unlawful act occurred or petitioner resides or carries on business;

(3) Bridge alteration; cost orders—in the circuit where bridge is wholly or partly located;

(4) Civil aeronautics orders—in the District of Columbia or circuit where petitioner resides or has his principal place of business;

(5) Commodity exchange orders—in the circuit where board of trade has its principal place of business or in circuit where petitioner for review of exclusion order carries on business;

(6) Electric and water power orders—in the District of Columbia or circuit where licensee or public utility to which order relates is located or has its principal place of business;

(7) Food, drug and cosmetic orders—in the circuit where person adversely affected resides or has his principal place of business;

(8) Gas orders—in the District of Columbia or circuit where company to which order relates is located or has its principal place of business;

(9) National Labor Relations Board's final orders—in the District of Columbia or circuit where unfair labor practice occurred or violator resides or transacts business;

(10) Packers cease and desist orders—in the circuit where packer has his principal place of business;

(11) Radio license decisions—in the District of Columbia;

(12) Securities and Exchange Commission orders—in the District of Columbia or circuit where petitioner resides or has his principal place of business;

(13) Seed orders—in the circuit where violator resides or has his principal place of business;

(14) Wage orders—in the District of Columbia or circuit where petitioner resides or has his principal place of business;

(15) Foreign Trade Zones Board orders—in the circuit where the Zone is located;

(16) Customhouse broker licenses—in circuit where applicant or licensee resides or has his principal place of business.

### Orders Enforceable

(1) Antitrust and unfair trade orders—in the circuit where unlawful act occurred or person allegedly committing unlawful act resides or carries on business;

(2) National Labor Relations Board's final orders—in the circuit where unfair labor practice occurred or violator resides or transacts business;

(3) Seed orders—in the circuit where violator resides or has his principal place of business.

Section 61 of title 7 of the Canal Zone Code is also incorporated in sections 1291 and 1292 of this title.

Changes were made in phraseology.

By Senate amendment, this section was renumbered "1294", and subsec. (b), which related to the Tax Court, was eliminated. Therefore, as finally enacted, section 1141(b)(1)(2)(3) of Title 26, U.S.C., Internal Revenue Code 1939, was not one of the sources of this section. The Senate amendments also eliminated section 1141 of the Internal Revenue Code 1939 from the schedule of repeals. See Senate Report No. 1559.

### Amendments

1961—Subsec. (4). Pub. L. 87-189 redesignated former subsec. (5) as (4) and repealed former subsec. (4), which provided that appeals from the Supreme Court of Puerto Rico should be taken to the Court of Appeals for the First Circuit. See section 1258 of this title.

1959—Subsec. (4). Pub. L. 86-3 redesignated former subsec. (5) as (4), and repealed former subsec. (4), which provided that appeals from the Supreme Court of Hawaii should be taken to the Court of Appeals for the Ninth Circuit. See section 91 of this title and notes thereunder.

Subsec. (5). Pub. L. 86-3 redesignated former subsec. (6) as (5).

1958—Subsec. (2). Pub. L. 85-508 redesignated former subsec. (3) as (2) and repealed former subsec. (2), which provided that appeals from the District Court for the Territory of Alaska or any division thereof should be taken to the Court of Appeals for the Ninth Circuit. See section 81A of this title which establishes a United States District Court for the State of Alaska.

Subsecs. (3) to (6). Pub. L. 85-508 redesignated former subsecs. (4) to (7) as subsecs. (3) to (6).

1951—Subsec. (7). Act Oct. 31, 1951, added subsec. (7).

### EFFECTIVE DATE OF 1959 AMENDMENT

Amendment by Pub. L. 86-3 effective upon the admission of the State of Hawaii into the Union, see note set out under section 1252 of this title. Admission of Hawaii into the Union was accomplished Aug. 25, 1959, upon issuance of Proc. No. 3309, Aug. 21, 1959, 25 F.R. 6868, 73 Stat. c74, as required by sections 1 and 7(c) of Pub. L. 86-3, Mar. 18, 1959, 73 Stat. 4, set out as notes preceding section 491 of Title 48, Territories and Insular Possessions.

### EFFECTIVE DATE OF 1958 AMENDMENT

Amendment by Pub. L. 85-508 effective Jan. 3, 1959, upon admission of Alaska into the Union pursuant to Proc. No. 3269, Jan. 3, 1959, 24 F.R. 81, 73 Stat. c16, as required by sections 1 and 8(c) of Pub. L. 85-508, see notes set out under section 81A of this title and preceding section 21 of Title 48, Territories and Insular Possessions.

### CROSS REFERENCES

Administrative orders, circuits where reviewable and enforceable, see reviser's note for this section.

### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 15 section 80a-43.

## CHAPTER 85—DISTRICT COURTS; JURISDICTION

Sec.
1330. Action against foreign states.
1331. Federal question; amount in controversy; costs.
1332. Diversity of citizenship; amount in controversy; costs.
1333. Admiralty, maritime and prize cases.
1334. Bankruptcy matters and proceedings.
1335. Interpleader.
1336. Interstate Commerce Commission's orders.
1337. Commerce and anti-trust regulations.
1338. Patents, copyrights, trade-marks and unfair competition.[1]
1339. Postal matters.
1340. Internal revenue; customs duties.
1341. Taxes by States.
1342. Rate orders of State agencies.
1343. Civil rights.[1]
1344. Election disputes.
1345. United States as plaintiff.
1346. United States as defendant.
1347. Partition action where United States is joint tenant.
1348. Banking association as party.
1349. Corporation organized under federal law as party.
1350. Alien's action for tort.
1351. Consuls and vice consuls as defendants.
1352. Bonds executed under federal law.
1353. Indian allotments.
1354. Land grants from different states.
1355. Fine, penalty or forfeiture.
1356. Seizures not within admiralty and maritime jurisdiction.
1357. Injuries under Federal laws.
1358. Eminent domain.
1359. Parties collusively joined or made.
1360. State civil jurisdiction in actions to which Indians are parties.
1361. Action to compel an officer of the United States to perform his duty.
1362. Indian tribes.
1363. Construction of references to laws of the United States or Acts of Congress.

### AMENDMENTS

1976—Pub. L. 94-583, § 2(b), Oct. 21, 1976, 90 Stat. 2891, added item 1330.

1970—Pub. L. 91-358, title I, § 172(c)(2), July 29, 1970, 84 Stat. 591, added item 1363.

1966—Pub. L. 89-635, § 2, Oct. 19, 1966, 80 Stat. 880, added item 1362.

1962—Pub. L. 87-748, § 1(b), Oct. 5, 1962, 76 Stat. 744, added item 1361.

1958—Pub. L. 85-554, § 4, July 25, 1958, 72 Stat. 415 inserted "costs" in items 1331 and 1332.

1953—Act Aug. 15, 1953, ch. 505, § 3, 67 Stat. 589, added item 1360.

### CROSS REFERENCES

Admiralty and maritime jurisdiction, see section 740 of Title 46, Shipping.

Amendment of pleadings to show jurisdiction, see section 1653 of this title.

Costs on dismissal for lack of jurisdiction, see section 1919 of this title.

Criminal jurisdiction of district courts, see section 3231 et seq. of Title 18, Crimes and Criminal Procedure.

Criminal procedure, see section 3001 et seq. of Title 18.

District of Columbia district court, additional jurisdiction, see D.C. Code § 11-501.

Guam, jurisdiction of district court, see section 1424 of Title 48, Territories and Insular Possessions.

Immigration and naturalization, jurisdiction of district courts, see sections 1329 and 1421 of Title 8, Aliens and Nationality.

Jurisdiction in suits to recover share of expenses against handlers of agricultural commodities regardless of amount in controversy, see section 610 of Title 7, Agriculture.

Jurisdiction of district courts in particular matters, see table in reviser's note for section 1332 of this title.

Process, see section 1691 et seq. of this title.

Removal of cases from state courts, see sections 1441 et seq. of this title.

Virgin Islands, jurisdiction of district court, see sections 1612 and 1613 of Title 48, Territories and Insular Possessions.

### FEDERAL RULES OF CIVIL PROCEDURE

Procedure, generally, in district courts, see Appendix to this title.

Jurisdictional grounds, statement required in claim for relief, see rule 8.

Parties, see rules 17 to 25.

Process and service, see rules 4 and 5.

### FEDERAL RULES OF CRIMINAL PROCEDURE

Procedure, generally, in district courts, see Title 18, Appendix, Crimes and Criminal Procedure.

### § 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605–1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

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[1] So in original. Does not conform to section catchline.

(Added Pub. L. 94-583, § 2(a), Oct. 21, 1976, 90 Stat. 2891.)

#### Effective Date

Section effective 90 days after Oct. 21, 1976, see section 8 of Pub. L. 94-583, set out as an Effective Date note under section 1602 of this title.

### § 1331. Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency, thereof, or any officer or employee thereof in his official capacity.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(June 25, 1948, ch. 646, 62 Stat. 930; July 25, 1958, Pub. L. 85-554, § 1, 72 Stat. 415; Oct. 21, 1976, Pub. L. 94-574, § 2, 90 Stat. 2721.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 41(1) (Mar. 3, 1911, ch. 231, § 24, par. 1, 36 Stat. 1091; May 14, 1934, ch. 283, § 1, 48 Stat. 775; Aug. 21, 1937, ch. 726, § 1, 50 Stat. 738; Apr. 20, 1940, ch. 117, 54 Stat. 143).

Jurisdiction of federal questions arising under other sections of this chapter is not dependent upon the amount in controversy. (See annotations under former section 41 of title 28, U.S.C.A., and 35 C.J.S., p. 833 et seq., §§ 30-43. See, also, reviser's note under section 1332 of this title.)

Words "wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs," were added to conform to rulings of the Supreme Court. See construction of provision relating to jurisdictional amount requirement in cases involving a Federal question in *United States* v. *Sayward*, 16 S.Ct. 371, 160 U.S. 493, 40 L.Ed. 508; *Fishback* v. *Western Union Tel. Co.*, 16 S.Ct. 506, 161 U.S. 96, 40 L.Ed. 630; and *Hall* v. *Indiana Manufacturing Co.*, 1900, 20 S.Ct. 272, 176 U.S. 68, 44 L.Ed. 374.

Words "all civil actions" were substituted for "all suits of a civil nature, at common law or in equity" to conform with Rule 2 of the Federal Rules of Civil Procedure.

Words "or treaties" were substituted for "or treaties made, or which shall be made under their authority," for purposes of brevity.

The remaining provisions of section 41(1) of title 28, U.S.C., 1940 ed., are incorporated in sections 1332, 1341, 1342, 1345, 1354, and 1359 of this title.

Changes were made in arrangement and phraseology.

#### Amendments

1976—Subsec. (a). Pub. L. 94-574 eliminated the $10,000 jurisdictional amount where the action is brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

1958—Pub. L. 85-554 included costs in catchline.

Subsec. (a). Pub. L. 85-554 designated the former entire section as subsec. (a) and substituted "$10,000" for "$3,000".

Subsec. (b). Pub. L. 85-554 added subsec. (b).

#### Effective Date of 1958 Amendment

Section 3 of Pub. L. 85-554 provided that: "This Act [amending sections 1331, 1332 and 1345 of this title] shall apply only in the case of actions commenced after the date of the enactment of this Act [July 25, 1958]."

#### Cross References

Controversies involving pollution of waters, jurisdiction of actions by States, see section 466g-1 of Title 33, Navigation and Navigable Waters.

Convention on the Settlement of Investment Disputes, exclusive jurisdiction of district courts over actions and proceedings for enforcement of arbitration awards under the Convention, regardless of amount in controversy, see section 1650a of Title 22, Foreign Relations and Intercourse.

Federal Deposit Insurance Corporation as party, see section 1819 of Title 12, Banks and Banking.

Federal Reserve Bank as party, see section 632 of Title 12.

International Finance Corporation as party, see section 282f of Title 22, Foreign Relations and Intercourse.

International or foreign banking transactions, see section 632 of Title 12, Banks and Banking.

Reclamation projects, compensation for rights-of-way, see section 945b of Title 43, Public Lands.

#### Section Referred to in Other Sections

This section is referred to in title 15 sections 2064, 2072; title 42 section 405.

### § 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: *Provided further*, That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

(June 25, 1948, ch. 646, 62 Stat. 930; July 26, 1956, ch. 740, 70 Stat. 658; July 25, 1958, Pub. L. 85-554, § 2, 72 Stat. 415; Aug. 14, 1964, Pub. L. 88-439, § 1, 78 Stat. 445; Oct. 21, 1976, Pub. L. 94-583, § 3, 90 Stat. 2891.)

### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 41(1) (Mar. 3, 1911, ch. 231, § 24, par. 1, 36 Stat. 1091; May 14, 1934, ch. 283, § 1, 48 Stat. 775; Aug. 21, 1937, ch. 726, § 1, 50 Stat. 738; Apr. 20, 1940, ch. 117, 54 Stat. 143).

Other provisions of section 41(1) of title 28, U.S.C., 1940 ed., are incorporated in sections 1331, 1341, 1342, 1345, 1354, and 1359 of this title. (See reviser's notes under said sections.)

Jurisdiction conferred by other sections of this chapter, except section 1335, is not dependent upon diversity of citizenship. (See annotations under former section 41 of title 28, U.S.C.A., and 35 C.J.S., p. 833 et seq. §§ 30-43. See, also, reviser's note under section 1331 of this title.) As to citizenship of bank where jurisdiction depends upon diversity of citizenship, see section 1348 of this title.

Words "all civil actions" were substituted for "all suits of a civil nature, at common law or in equity" in order to conform to Rule 2 of the Federal Rules of Civil Procedure.

Words "or citizens of the District of Columbia, Territory of Hawaii, or Alaska, and any State or Territory" which were inserted by the amendatory act April 20, 1940, are omitted. The word "States" is defined in this section and enumeration of the references is unnecessary.

The revised section conforms with the views of Philip F. Herrick, United States Attorney, Puerto Rico, who observed that the act of April 20, 1940, permitted action between a citizen of Hawaii and of Puerto Rico, but not between a citizen of New York and Puerto Rico, in the district court.

This changes the law to insure uniformity. The 1940 amendment applied only to the provision as to controversies between "citizens of different States." The new definition in subsection (b) extends the 1940 amendment to apply to controversies between citizens of the Territories or the District of Columbia, and foreign states or citizens or subjects thereof.

The diversity of citizenship language of section 41(1) of title 28, U.S.C., 1940 ed., as amended in 1940, was described as ambiguous in *McGarry* v. *City of Bethlehem*, 45 F.Supp. 385, 386. In that case the 1940 amendment was held unconstitutional insofar as it affected the District of Columbia. However, two other district courts upheld the amendment. *Winkler* v. *Daniels*, D.C.Va. 1942, 43 F.Supp. 265; *Glaeser* v. *Acacia Mutual Life Ass'n.*, D.C.Cal. 1944, 55 F.Supp. 925.

This section is intended to cover all diversity of citizenship instances in civil actions in accordance with the judicial construction of the language in the original section 41(1) of title 28, U.S.C., 1940 ed. Therefore, the revised language covers civil actions between—

Citizens of a State, and citizens of other States and foreign states or citizens or subjects thereof;

Citizens of a Territory or the District of Columbia, and foreign states or citizens or subjects thereof;

Citizens of different States;

Citizens of different Territories;

Citizens of a State, and citizens of Territories;

Citizens of a State or Territory, and citizens of the District of Columbia;

Citizens of a State, and foreign states or citizens or subjects thereof.

The revised section removes an uncertainty referred to in the McGarry case, supra, as to whether Congress intended to permit citizens of the Territories or the District of Columbia to sue a State or Territory itself rather than the citizens thereof. The court observed that "Congress could hardly have had such intention."

The sentence "The foregoing provisions as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding paragraphs of this section" was omitted as unnecessary. Those paragraphs are (2)-(28) of said section 41 of title 28, U.S.C., 1940 ed., which are revised and incorporated in this chapter and, except for those relating to actions against the United States and interpleader, contains no provision as to a sum or value necessary to confer jurisdiction. Consequently the omitted sentence is covered by excluding such requirement.

Section 41(1) of title 28, U.S.C., 1940 ed., as originally enacted, purported to include all jurisdictional provisions relating to the district courts. Subsequently, many special jurisdictional provisions were enacted and incorporated in other titles of the U.S.C., 1940 ed., as follows:

| *Title* | *Section* |
|---|---|
| 7 | 209 |
| 7 | 210 |
| 7 | 216 |
| 7 | 292 |
| 7 | 499g |
| 7 | 608a(6) |
| 7 | 608c(15)(B) |
| 7 | 610(b)(2) |
| 7 | 648 |
| 7 | 1175 |
| 7 | 1365-1367 |
| 7 | 1376 |
| 7 | 1508(c) |
| 8 | 164 |
| 8 | 701 |
| 8 | 903 |
| 9 | 4 |
| 9 | 8 |
| 9 | 9 |
| 11 | 11(a) |
| 11 | 46 |
| 11 | 205(a)(*l*) |
| 11 | 401 |
| 11 | 511 |
| 11 | 512 |
| 11 | 514-516 |
| 11 | 711 |
| 11 | 712 |
| 11 | 811 |
| 11 | 812 |
| 11 | 1011 |
| 11 | 1012 |
| 11 | 1013 |
| 11 | 1200 |
| 12 | 93 |
| 12 | 195 |
| 12 | 632 |
| 15 | 4 |
| 15 | 9 |
| 15 | 15 |
| 15 | 25 |
| 15 | 26 |
| 15 | 31 |
| 15 | 53 |
| 15 | 68e |
| 15 | 77t |
| 15 | 77v |
| 15 | 77vvv |
| 15 | 78u(e) |
| 15 | 78u(f) |
| 15 | 78aa |
| 15 | 79k(d)(e) |
| 15 | 79r(f)(g) |
| 15 | 80a-25 |
| 15 | 80a-34 |
| 15 | 80a-35 |

| *Title* | *Section* |
|---|---|
| 15 | 80a–41(c)(e) |
| 15 | 80a–43 |
| 15 | 80b–14 |
| 15 | 97 |
| 15 | 99 |
| 15 | 433 |
| 15 | 715d(c) |
| 15 | 715l |
| 15 | 717s |
| 15 | 717u |
| 16 | 10 |
| 16 | 583e |
| 16 | 820 |
| 16 | 825m |
| 16 | 825n |
| 16 | 825p |
| 17 | 26 |
| 17 | 34 |
| 21 | 193 |
| 21 | 332 |
| 21 | 355 |
| 25 | 314 |
| 25 | 345 |
| 26 | 3633 |
| 26 | 3800 |
| 27 | 207 |
| 29 | 101 |
| 29 | 103–109 |
| 29 | 160(e) |
| 29 | 216 |
| 29 | 217 |
| 30 | 188 |
| 31 | 232 |
| 33 | 495 |
| 33 | 918 |
| 33 | 921 |
| 35 | 63 |
| 35 | 66 |
| 35 | 67 |
| 35 | 72a |
| 35 | 90 |
| 38 | 445 |
| 40 | 257 |
| 40 | 270b |
| 40 | 361 |
| 41 | 113(b)(2) |
| 42 | 405(c)(5)(g) |
| 43 | 546 |
| 43 | 1062 |
| 45 | 56 |
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| 45 | 153(p) |
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| 45 | 228k |
| 45 | 268 |
| 45 | 355(f) |
| 46 | 597 |
| 46 | 688 |
| 46 | 711 |
| 46 | 741 et seq. |
| 46 | 781 et seq. |
| 46 | 941(c) |
| 46 | 951 |
| 46 | 954 |
| 46 | 1114(c) |
| 46 | 1128d |
| 47 | 11 |
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| 47 | 33 |
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| 49 | 19a(*l*) |
| 49 | 20(9) |
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| 49 | 41(1)(3) |
| 49 | 43 |
| 49 | 181(b)(c) |
| 49 | 305(g) |
| 49 | 322(b) |
| 49 | 647 |
| 49 | 916 |
| 49 | 1017 |
| 49 | 1021 |
| 50 | 23 |
| D.C. Code | 11-305—11-307 |
| D.C. Code | 11-309 |
| D.C. Code | 11-324 |

### Amendments

1976—Subsec. (a)(2). Pub. L. 94-583 substituted "and citizens or subjects of a foreign state;" for ", and foreign states or citizens or subjects thereof; and".

Subsec. (a)(3). Pub. L. 94-583 substituted "citizens or subjects of a foreign state are additional parties; and" for "foreign states or citizens or subjects thereof are additional parties".

Subsec. (a)(4). Pub. L. 94-583 added subsec. (a)(4).

1964—Subsec. (c). Pub. L. 88-439 added the proviso deeming an insurer of liability insurance, in an action to which the insurer is not joined as a party-defendant, a citizen, of the State of which the insured is a citizen, as well as the State the insurer has been incorporated by and the State where it has its principal place of business.

1958—Pub. L. 85-554 included costs in the catchline.

Subsec. (a). Pub. L. 85-554 substituted "$10,000" for "$3,000".

Subsec. (b). Pub. L. 85-554 added subsec. (b) and redesignated former subsec. (b) as (d).

Subsec. (c). Pub. L. 85-554 added subsec. (c).

Subsec. (d). Pub. L. 85-554 redesignated former subsec. (b) as (d).

1956—Subsec. (b). Act July 26, 1956, included the Commonwealth of Puerto Rico.

### Effective Date of 1976 Amendment

Amendment by Pub. L. 94-583 effective 90 days after Oct. 21, 1976, see section 8 of Pub. L. 94-583, set out as an Effective Date note under section 1602 of this title.

### Effective Date of 1964 Amendment

Section 2 of Pub. L. 88-439 provided that: "The amendment made by this Act to section 1332(c), title 28, United States Code, applies only to causes of action arising after the date of enactment of this Act [Aug. 14, 1964]."

### Effective Date of 1958 Amendment

Amendment by Pub. L. 85-554 applicable only in the case of actions commenced after July 25, 1958, see section 3 of Pub. L. 85-554, set out as an Effective Date of 1958 Amendment note under section 1331 of this title.

### Cross References

Controversies involving pollution of waters, jurisdiction of actions by States, see section 466g-1 of Title 33, Navigation and Navigable Waters.

Removal of cases from State courts, see section 1441 et seq. of this title.

Venue of actions based on diversity of citizenship, see section 1391 of this title.

#### Federal Rules of Civil Procedure

Defenses and objections, see rule 12, Appendix to this title.

#### Section Referred to in Other Sections

This section is referred to in sections 1335, 1603 of this title.

### § 1333. Admiralty, maritime and prize cases

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

(June 25, 1948, ch. 646, 62 Stat. 931; May 24, 1949, ch. 139, § 79, 63 Stat. 101.)

#### Historical and Revision Notes

#### 1948 Act

Based on title 28, U.S.C., 1940 ed., §§ 41(3) and 371 (3), (4) (Mar. 3, 1911, ch. 231, §§ 24, par. 3, 256, pars. 3, 4, 36 Stat. 1091, 1160; Oct. 6, 1917, ch. 97, §§ 1, 2, 40 Stat. 395; June 10, 1922, ch. 216, §§ 1, 2, 42 Stat. 634).

Section consolidates certain provisions of sections 41(3), 371(3) and 371(4) of title 28, U.S.C., 1940 ed. Other provisions of sections 41(3) and 371(4), relating to seizures, are incorporated in section 1356 of this title. (See reviser's note thereunder.)

The "saving to suitors" clause in sections 41(3) and 371(3) of title 28, U.S.C., 1940 ed., was changed by substituting the words "any other remedy to which he is otherwise entitled" for the words "the right of a common law remedy where the common law is competent to give it." The substituted language is simpler and more expressive of the original intent of Congress and is in conformity with Rule 2 of the Federal Rules of Civil Procedure abolishing the distinction between law and equity.

Provisions of section 41(3) of title 28, U.S.C., 1940 ed., based on the 1917 and 1922 amendments, relating to remedies under State workmen's compensation laws, were deleted. Such amendments were held unconstitutional by the Supreme Court. (See *Knickerbocker Ice Co.* v. *Stewart*, 1920, 40 S.Ct. 438, 253 U.S. 149, 64 L.Ed. 834, and *State of Washington* v. *W. C. Dawson & Co.*, 1924, 44 S.Ct. 302, 264 U.S. 219, 68 L.Ed. 646.)

Words "libellant or petitioner" were substituted for "suitors" to describe moving party in admiralty cases.

Changes were made in phraseology.

#### 1949 Act

This section amends section 1333(a)(1) of title 28, U.S.C., by substituting "suitors" for "libellant or petitioner" to conform to the language of the law in existence at the time of the enactment of the revision of title 28.

#### Amendments

1949—Subd. (1). Act May 24, 1949, substituted "suitors" for "libellant or petitioner".

#### Cross References

Admiralty and maritime jurisdiction of cases of damage or injury to persons or property, caused by a vessel, whether done or consummated on land, see section 740 of Title 46, Shipping.

Admiralty suits against United States, jurisdiction, see sections 741 et seq. and 781 et seq. of Title 46.

Jury trial in admiralty cases, see section 1873 of this title.

Limitation of vessel owner's liability, see section 181 et seq. of Title 46, Shipping.

Prize—
  Generally, see section 7651 et seq. of Title 10, Armed Forces.
  Jurisdiction, see section 7652 of Title 10.

Seaman, definition of, see section 713 of Title 46, Shipping.

### § 1334. Bankruptcy matters and proceedings

The district courts shall have original jurisdiction, exclusive of the courts of the States, of all matters and proceedings in bankruptcy.

(June 25, 1948, ch. 646, 62 Stat. 931.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., §§ 41(19) and 371(6) (Mar. 3, 1911, ch. 231, §§ 24, par. 19, 256, par. 6, 36 Stat. 1093, 1160).

Changes in phraseology were made.

#### Cross References

Jurisdiction of district courts—
  Arrangements for debtors, see section 712 of Title 11, Bankruptcy.
  Bankruptcy cases generally, see sections 1, 11, and 46 of Title 11.
  Corporate reorganizations, see section 511 of Title 11.
  Railroad reorganizations, see section 205 of Title 11.
  Real property arrangements, see section 812 of Title 11.
  Wage earners' plans, see section 1012 of Title 11.

### § 1335. Interpleader

(a) The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm, or corporation, association, or society having in his or its custody or possession money or property of the value of $500 or more, or having issued a note, bond, certificate, policy of insurance, or other instrument of value or amount of $500 or more, or providing for the delivery or payment or the loan of money or property of such amount or value, or being under any obligation written or unwritten to the amount of $500 or more, if

(1) Two or more adverse claimants, of diverse citizenship as defined in section 1332 of this title, are claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy or other instrument, or arising by virtue of any such obligation; and if (2) the plaintiff has deposited such money or property or has paid the amount of or the loan or other value of such instrument or the amount due under such obligation into the registry of the court, there to abide the judgment of the court, or has given bond payable to the clerk of the court in such amount and with such surety as the court or judge may deem proper, conditioned upon the compliance by the plaintiff with the future order or judgment of the court with respect to the subject matter of the controversy.

(b) Such an action may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another.

(June 25, 1948, ch. 646, 62 Stat. 931.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 41(26) (Mar. 3, 1911, ch. 231, § 24, par. 26, as added Jan. 20, 1936, ch. 13, § 1, 49 Stat. 1096).

Words "civil action" were substituted for "suits in equity"; word "plaintiff" was substituted for "complainant"; and word "judgement" was substituted for "decree," in order to make the language of this section conform with the Federal Rules of Civil Procedure.

The words "duly verified" following "in the nature of interpleader," near the beginning of the section, were omitted. Under Rule 11 of the Federal Rules of Civil Procedure pleadings are no longer required to be verified or accompanied by affidavit unless specially required by statute. Although verification was specially required by section 41(26) of title 28, U.S.C., 1940 ed., the need therefor is not apparent.

Provisions of section 41(26)(b) of title 28, U.S.C., 1940 ed., relating to venue are the basis of section 1397 of this title. (See, also, reviser's note under said section.)

Subsections (c) and (d) of said section 41(26) relating to issuance of injunctions constitute section 2361 of this title. (See reviser's note under said section.)

Subsection (e) of such section 41(26), relating to defense in nature of interpleader and joinder of additional parties, was omitted as unnecessary, such matters being governed by the Federal Rules of Civil Procedure.

Changes were made in phraseology.

#### Cross References

Actions on war risk insurance claims, see section 1292 of Title 46, Shipping.

Interpleader actions—
- Process and procedure, see section 2361 of this title.
- Venue, see section 1397 of this title.

#### Federal Rules of Civil Procedure

Interpleader, injunctions and deposit in court, see rules 22, 65 and 67, Appendix to this title.

Form of complaint, see Form 18, Appendix to rules.

#### Section Referred to in Other Sections

This section is referred to in sections 1397, 2361 of this title.

### § 1336. Interstate Commerce Commission's orders

**(a) Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, in whole or in part, any order of the Interstate Commerce Commission, and to enjoin or suspend, in whole or in part, any order of the Interstate Commerce Commission for the payment of money or the collection of fines, penalties, and forfeitures.**

**(b) When a district court or the Court of Claims refers a question or issue to the Interstate Commerce Commission for determination, the court which referred the question or issue shall have exclusive jurisdiction of a civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission arising out of such referral.**

**(c) Any action brought under subsection (b) of this section shall be filed within 90 days from the date that the order of the Interstate Commerce Commission becomes final.**

**(June 25, 1948, ch. 646, 62 Stat. 931; Aug. 30, 1964, Pub. L. 88-513, 78 Stat. 695; Jan. 2, 1975, Pub. L. 93-584, § 1, 88 Stat. 1917.)**

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 41(27), (28) (Mar. 3, 1911, ch. 231, §§ 24(27), (28), 207, 36 Stat. 1091, 1148; Oct. 22, 1913, ch. 32, 38 Stat. 219).

Words "Except as otherwise provided by enactment of Congress" were inserted because of certain similar cases of which the courts of appeals are given jurisdiction. (See, for example, section 21 of title 15, U.S.C., 1940 ed., Commerce and Trade.)

Words "any civil action" were substituted for "all cases" and "cases" in view of Rule 2 of the Federal Rules of Civil Procedure.

Changes were made in phraseology.

#### Amendments

1975—Subsec. (a). Pub. L. 93-584 substituted provisions that the district courts shall have jurisdiction of civil actions to enforce, in whole or in part, orders of the Interstate Commerce Commission, and to enjoin or suspend, in whole or in part, any order of the Interstate Commerce Commission for the payment of money or the collection of fines, penalties, and forfeitures, for provisions that the district courts shall have jurisdiction of civil actions to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission.

1964—Pub. L. 88-513 designated existing provisions as subsec. (a), and added subsecs. (b) and (c).

#### Effective Date of 1975 Amendment

Amendment by Pub. L. 93-584 not applicable to actions commenced on or before the last day of the first month beginning after Jan. 2, 1975, and actions to enjoin or suspend orders of the Interstate Commerce Commission which are pending when this amendment becomes effective shall not be affected thereby, but shall proceed to final disposition under the law existing on the date they were commenced, see section 10 of Pub. L. 93-584, set out as an Effective Date of 1975 Amendment note under section 2321 of this title.

#### Cross References

Procedure for enforcement and review of Interstate Commerce Commission orders, see section 2321 et seq. of this title.

Venue of actions involving Interstate Commerce Commission's order, see section 1398 of this title.

#### Section Referred to in Other Sections

This section is referred to in section 1398 of this title.

### § 1337. Commerce and anti-trust regulations

**The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.**

**(June 25, 1948, ch. 646, 62 Stat. 931.)**

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 41(8), (23) (Mar. 3, 1911, ch. 231, § 24, pars. 8, 23, 36 Stat. 1092, 1093; Oct. 22, 1913, ch. 32, 38 Stat. 219).

Words "civil action" were substituted for "suits", in view of Rule 2 of the Federal Rules of Civil Procedure.

Changes were made in phraseology.

### § 1338. Patents, plant variety protection, copyrights, trade-marks, and unfair competition

**(a) The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trade-marks. Such jurisdiction shall be exclusive of the**

**courts of the states in patent, plant variety protection and copyright cases.**

**(b) The district courts shall have original jurisdiction of any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the copyright, patent, plant variety protection or trade-mark laws.**

(June 25, 1948, ch. 646, 62 Stat. 931; Dec. 24, 1970, Pub. L. 91-577, title III, § 143(b), 84 Stat. 1559.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., §§ 41(7) and 371(5) (Mar. 3, 1911, ch. 231, §§ 24, par. 7, 256, par. 5, 36 Stat. 1092, 1160).

Section consolidates section 41(7) with section 371 (5) of title 28, U.S.C., 1940 ed., with necessary changes in phraseology.

Words "of any civil action" were substituted for "all suits at law or in equity" and "cases" to conform section to Rule 2 of the Federal Rules of Civil Procedure.

Word "patents" was substituted for "patent-right" in said section 371 (Fifth) of title 28, U.S.C., 1940 ed.

Similar provisions respecting suits cognizable in district courts, including those of territories and possessions. (See section 34 of title 17, U.S.C., 1940 ed., Copyrights.)

Subsection (b) is added and is intended to avoid "piecemeal" litigation to enforce common-law and statutory copyright, patent, and trade-mark rights by specifically permitting such enforcement in a single civil action in the district court. While this is the rule under Federal decisions, this section would enact it as statutory authority. The problem is discussed at length in *Hurn* v. *Oursler* (1933, 53 S.Ct. 586, 289 U.S. 238, 77 L.Ed. 1148) and in *Musher Foundation* v. *Alba Trading Co.* (C.C.A. 1942, 127 F.2d 9) (majority and dissenting opinions).

### Amendments

1970—Pub. L. 91-577 inserted references to "plant variety protection" in the heading and in subsecs. (a) and (b).

### Effective Date of 1970 Amendment

Amendment by Pub. L. 91-577 effective Dec. 24, 1970, see section 141 of Pub. L. 91-577, set out as an Effective Date note under section 2321 of Title 7, Agriculture.

### Cross References

Amount in controversy under this section, see Reviser's Note under section 1331 of this title.

Civil action to obtain patent or in case of interference, see sections 145 and 146 of Title 35, Patents.

Court of Claims, jurisdiction of claims against United States for patent infringement, see section 1498 of this title.

Court of Customs and Patent Appeals, jurisdiction of patent and trade-mark proceedings, see section 1542 of this title.

Diversity of citizenship under this section, see Reviser's Note under section 1332 of this title.

Foreign Assistance Act of 1961, jurisdiction and legal remedy for unauthorized use or disclosure of patents and technical information, see section 2356 of Title 22, Foreign Relations and Intercourse.

Infringements of—
  Copyrights and rights and remedies therefor, see section 101 of Title 17, Copyrights.
  Patents, see sections 271 et seq. and 281 et seq. of Title 35, Patents.
  Trade-marks, see sections 1057, 1114, 1115 and 1117 of Title 15, Commerce and Trade.

Jurisdiction of trade-mark actions, see section 1121 of Title 15.

Pleading and proof in patent actions for infringement, see section 282 of Title 35, Patents.

Venue—
  Patent or copyright actions, see section 1400 of this title.
  Trade-mark infringement action, see section 1391(b) of this title.

### Section Referred to in Other Sections

This section is referred to in title 17 sections 112, 114.

## § 1339. Postal matters

**The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to the postal service.**

(June 25, 1948, ch. 646, 62 Stat. 932.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 41(6) (Mar. 3, 1911, ch. 231, § 24, par. 6, 36 Stat. 1092).

Changes were made in phraseology.

### Cross References

Amount in controversy immaterial in actions under this section, see Historical and Revision notes under section 1331 of this title.

Diversity of citizenship immaterial in action under this section, see Reviser's Note under section 1332 of this title.

Postal laws in general, see Title 39, Postal Service.

## § 1340. Internal revenue; customs duties

**The district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue, or revenue from imports or tonnage except matters within the jurisdiction of the Customs Court.**

(June 25, 1948, ch. 646, 62 Stat. 932.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 41(5) (Mar. 3, 1911, ch. 231, § 24, par. 5, 36 Stat. 1092; Mar. 2, 1929, ch. 488, § 1, 45 Stat. 1475).

Words "Customs Court" were substituted for "Court of Customs and Patent Appeals." Section 41(5) of title 28, U.S.C., 1940 ed., is based on the Judicial Code of 1911. At that time the only court, other than the district courts, having jurisdiction of customs cases, was the Court of Customs Appeals which became the Court of Customs and Patent Appeals in 1929. The Customs Court was created in 1926 as a court of original jurisdiction over customs cases. (See reviser's note preceding section 251 of this title.)

Words "any civil action" were substituted for "all cases" in view of Rule 2 of the Federal Rules of Civil Procedure.

Changes were made in phraseology.

### Cross References

Action by the United States—
  Collection of unpaid estate tax, see section 7404 of Title 26, Internal Revenue Code.
  Enforcement of tax lien or subjection of property to payment of tax, see section 7403 of Title 26.
  Recovery of erroneous tax refund, see section 7405 of Title 26.

Action to clear title to property upon which tax lien filed by United States, see section 7424 of Title 26.

Amount in controversy immaterial in action under this section, see Reviser's Note under section 1331 of this title.

Customs officers' immunity from liability, see section 1513 of Title 19, Customs Duties.

Customs Court jurisdiction, see section 1581 et seq. of this title, and section 169 of Title 19.

Diversity of citizenship immaterial in action under this section, see Reviser's Note under section 1332 of this title.

Jurisdiction of action for refund by taxpayer against United States, see section 1346 of this title.

Prohibition of suits to restrain tax assessment or collection, see section 7421 of Title 26, Internal Revenue Code.

Venue—

- Action for collection of internal revenue taxes, see section 1396 of this title.
- Action for refund brought by taxpayer against collection officer, see section 1391 of this title.
- Action for refund brought by taxpayer against United States, see section 1402 of this title.
- Fines, penalties or forfeitures, generally, see section 1395 of this title.
- Judicial action to enforce forfeiture under internal revenue laws, see section 7323 of Title 26.

### Section Referred to in Other Sections

This section is referred to in title 26 section 7402.

## § 1341. Taxes by States

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

(June 25, 1948, ch. 646, 62 Stat. 932.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 41(1) (Mar. 3, 1911, ch. 231, § 24, par. 1, 36 Stat. 1091; May 14, 1934, ch. 283, § 1, 48 Stat. 775; Aug. 21, 1937, ch. 726, § 1, 50 Stat. 738; Apr. 20, 1940, ch. 117, 54 Stat. 143).

This section restates the last sentence of section 41(1) of title 28, U.S.C., 1940 ed.

Other provisions of section 41(1) of title 28, U.S.C., 1940 ed., are incorporated in sections 1331, 1332, 1342, 1345, 1354, and 1359 of this title.

Words "at law or in equity" before "in the courts of such State" were omitted as unnecessary.

Words "civil action" were substituted for "suit" in view of Rule 2 of the Federal Rules of Civil Procedure.

Words "under State law" were substituted for "imposed by or pursuant to the laws of any State" for the same reason.

### Cross References

Injunction against enforcement of State statute, see section 2281 of this title.

### Section Referred to in Other Sections

This section is referred to in title 49 section 26c.

## § 1342. Rate orders of State agencies

The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:

(1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,

(2) The order does not interfere with interstate commerce; and,

(3) The order has been made after reasonable notice and hearing; and,

(4) A plain, speedy and efficient remedy may be had in the courts of such State.

(June 25, 1948, ch. 646, 62 Stat. 932.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 41(1) (Mar. 3, 1911, ch. 231, § 24, par. 1, 36 Stat. 1091; May 14, 1934, ch. 283, § 1, 48 Stat. 775; Aug. 21, 1937, ch. 726, § 1, 50 Stat. 738; Apr. 20, 1940, ch. 117, 54 Stat. 143).

This section rearranges and restates the fourth sentence of section 41(1) of title 28, U.S.C., 1940 ed.

Other provisions of section 41(1) of title 28, U.S.C., 1940 ed., are incorporated in sections 1331, 1332, 1341, 1345, 1354, and 1359 of this title.

Words "at law or in equity" before "in the courts of such State" were omitted as unnecessary.

Words "civil action" were substituted for "suit," in view of Rule 2 of the Federal Rules of Civil Procedure.

Word "operation" was substituted for "enforcement, operation or execution" for the same reason.

### Cross References

Injunction against enforcement of state statute, see section 2281 of this title.

## § 1343. Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

(June 25, 1948, ch. 646, 62 Stat. 932; Sept. 3, 1954, ch. 1263, § 42, 68 Stat. 1241; Sept. 9, 1957, Pub. L. 85-315, part III, § 121, 71 Stat. 637.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 41(12), (13), and (14) (Mar. 3, 1911, ch. 231, § 24, pars. 12, 13, 14, 36 Stat. 1092).

Words "civil action" were substituted for "suits," "suits at law or in equity" in view of Rule 2 of the Federal Rules of Civil Procedure.

Numerous changes were made in arrangement and phraseology.

### Amendments

1957—Pub. L. 85-315 inserted "and elective franchise" in the catchline and added par. (4).

1954—Act Sept. 3, 1954, substituted "section 1985 of Title 42" for "section 47 of Title 8" wherever appearing.

### Cross References

Generally, see section 1981 et seq. of Title 42, The Public Health and Welfare.

Amount in controversy immaterial in action under this section, see Reviser's Note under section 1331 of this title.

Civil action for deprivation of civil rights, see section 1983 of Title 42, The Public Health and Welfare.

Civil action or injunction for deprivation of voting rights, see section 1971 of Title 42.

Conspiracy against rights of citizens constituting federal crime, see section 241 of Title 18, Crimes and Criminal Procedure.

Conspiracy to interfere with civil rights, see section 1985 of Title 42, The Public Health and Welfare.

Diversity of citizenship immaterial in action under this section, see Reviser's Note under section 1332 of this title.

Injunction against enforcement of state statute, see section 2281 of this title.

## § 1344. Election disputes

The district courts shall have original jurisdiction of any civil action to recover possession of any office, except that of elector of President or Vice President, United States Senator, Representative in or delegate to Congress, or member of a state legislature, authorized by law to be commenced, where in it appears that the sole question touching the title to office arises out of denial of the right to vote, to any citizen offering to vote, on account of race, color or previous condition of servitude.

The jurisdiction under this section shall extend only so far as to determine the rights of the parties to office by reason of the denial of the right, guaranteed by the Constitution of the United States and secured by any law, to enforce the right of citizens of the United States to vote in all the States.

(June 25, 1948, ch. 646, 62 Stat. 932.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 41(15) (Mar. 3, 1911, ch. 231, § 24, par. 15, 36 Stat. 1092).

Words "civil action" were substituted for "suits," in view of Rule 2 of the Federal Rules of Civil Procedure.

Words "United States Senator" were added, as no reason appears for including Representatives and excluding Senators. Moreover, the Seventeenth amendment, providing for the popular election of Senators, was adopted after the passage of the 1911 law on which this section is based.

Changes were made in phraseology.

### Cross References

Amount in controversy immaterial in action under this section, see Reviser's Note under section 1331 of this title.

Diversity of citizenship immaterial in action under this section, see Reviser's Note under section 1332 of this title.

Jurisdiction of action for damages for injuries in voting, see section 1357 of this title.

## § 1345. United States as plaintiff

Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

(June 25, 1948, ch. 646, 62 Stat. 933.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 41(1) (Mar. 3, 1911, ch. 231, § 24, par. 1, 36 Stat. 1091; May 14, 1934, ch. 283, § 1, 48 Stat. 775; Aug. 21, 1937, ch. 726, § 1, 50 Stat. 738; Apr. 20, 1940, ch. 117, 54 Stat. 143).

Other provisions of section 41(1) of title 28, U.S.C., 1940 ed., are incorporated in sections 1331, 1332, 1341, 1342, 1354, and 1359 of this title.

Words "civil actions, suits or proceedings" were substituted for "suits of a civil nature, at common law or in equity" in view of Rules 2 and 81(a)(7) of the Federal Rules of Civil Procedure.

Word "agency" was inserted in order that this section shall apply to actions by agencies of the Government and to conform with special acts authorizing such actions. (See definitive section 451 of this title.)

The phrase "Except as otherwise provided by Act of Congress," at the beginning of the section was inserted to make clear that jurisdiction exists generally in district courts in the absence of special provisions conferring it elsewhere.

Changes were made in phraseology.

### Cross References

Amount in controversy immaterial in action under this section, see Reviser's Note under section 1331 of this title.

Diversity of citizenship immaterial in action under this section, see Reviser's Note under section 1332 of this title.

Jurisdiction of—
- Action against national banking association, see section 1348 of this title.
- Action for enforcement of fines, penalties, or forfeitures, see section 1355 of this title.
- Bonds executed under federal law, see section 1352 of this title.
- District courts in postal matters, see section 1339 of this title.

Third party tort liability for hospital and medical care, see section 2651 et seq. of Title 42, The Public Health and Welfare.

United States as party—
- Generally, see section 2401 et seq. of this title.
- Interstate Commerce Commission orders, see section 2322 of this title.

### Section Referred to in Other Sections

This section is referred to in title 12 section 1452.

## § 1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 7426 or section 7428 (in the case of the United States district court for the District of Columbia) or section 7429 of the Internal Revenue Code of 1954.

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

(June 25, 1948, ch. 646, 62 Stat. 933; Apr. 25, 1949, ch. 92, § 2(a), 63 Stat. 62; May 24, 1949, ch. 139, § 80(a), (b), 63 Stat. 101; Oct. 31, 1951, ch. 655, § 50(b), 65 Stat. 727; July 30, 1954, ch. 648, § 1, 68 Stat. 589; July 7, 1958, Pub. L. 85-508, § 12(e), 72 Stat. 348; Aug. 30, 1964, Pub. L. 88-519, 78 Stat. 699; Nov. 2, 1966, Pub. L. 89-719, title II, § 202(a), 80 Stat. 1148; July 23, 1970, Pub. L. 91-350, § 1(a), 84 Stat. 449; Oct. 25, 1972, Pub. L. 92-562, § 1, 86 Stat. 1176; Oct. 4, 1976, Pub. L. 94-455, title XII, § 1204(c)(1), title XIII, § 1306(b)(7), 90 Stat. 1697, 1719.)

### Historical and Revision Notes

#### 1948 Act

Based on title 28, U.S.C., 1940 ed., §§ 41(20), 931(a), 932 (Mar. 3, 1911, ch. 231, § 24, par. 20, 36 Stat. 1093; Nov. 23, 1921, ch. 136, § 1310(c), 42 Stat. 311; June 2, 1924, ch. 234, § 1025(c), 43 Stat. 348; Feb. 24, 1925, ch. 309, 43 Stat. 972; Feb. 26, 1926, ch. 27, §§ 1122(c), 1200, 44 Stat. 121, 125; Aug. 2, 1946, ch. 753, §§ 410(a), 411, 60 Stat. 843).

Section consolidates provisions of section 41(20) conferring jurisdiction upon the district court, in civil actions against the United States, with the first sentence of section 931(a) relating to jurisdiction of the district courts in tort claims cases, and those provisions of section 932 making the provisions of said section 41(20), relating to counterclaim and set-off, applicable to tort claims cases, all of title 28, U.S.C., 1940 ed.

Provision in section 931(a) of title 28, U.S.C., 1940 ed., for trials without a jury, is incorporated in section 2402 of this revised title. For other provisions thereof, see Distribution Table.

Words "commencing an action under this section" in subsec. (c) of this revised section cover the provision in section 932 of title 28, U.S.C., 1940 ed., requiring that the same provisions "for counterclaim and set-off" shall apply to tort claims cases brought in the district courts.

The phrase in section 931(a) of title 28, U.S.C., 1940 ed., "accruing on and after January 1, 1945" was omitted because executed as of the date of the enactment of this revised title.

Provisions in section 41(20) of title 28, U.S.C., 1940 ed., relating to time for commencing action against United States and jury trial constitute sections 2401 and 2402 of this title. (See reviser's notes under said sections.)

Words in section 41(20) of title 28, U.S.C., 1940 ed., "commenced after passage of the Revenue Act of 1921" were not included in revised subsection (a)(1) because obsolete and superfluous. Actions under this section involving erroneous or illegal assessments by the collector of taxes would be barred unless filed within the 5-year limitation period of section 1113(a) of the Revenue Act of 1926, 44 Stat. 9, 116. (See *United States* v. *A. S. Kreider Co.*, 1941, 61 S.Ct. 1007, 313 U.S. 443, 85 L.Ed. 1447.)

Words in section 41(20) of title 28, U.S.C., 1940 ed., "if the collector of internal revenue is dead or is not in office at the time such action or proceeding is commenced" were omitted.

The revised section retains the language of section 41(20) of title 28, U.S.C., 1940 ed., with respect to actions against the United States if the collector is dead or not in office when action is commenced, and consequently maintains the long existing distinctions in practice between actions against the United States and actions against the collector who made the assessment or collection. In the latter class of actions either party may demand a jury trial while jury trial is denied in actions against the United States. See section 2402 of this title. In reality all such actions are against the United States and not against local collectors. (See *Lowe* v. *United States*, 1938, 58 S.Ct. 896, 304 U.S. 302, 82 L.Ed. 1362; *Manseau* v. *United States*, D.C.Mich. 1943, 52 F.Supp. 395, and *Combined Metals Reduction Co.* v. *United States*, D.C.Utah 1943, 53 F.Supp. 739.)

The revised subsection (c)(1) omitted clause: "but no suit pending on the 27th day of June 1898 shall abate or be affected by this provision," contained in section 41(20) of title 28, U.S.C., 1940 ed., as obsolete and superfluous. The words contained in section 41(20) of title 28, U.S.C., 1940 ed., "claims growing out of the Civil War, and commonly known as 'war-claims,' or to hear and determine other claims which had been reported adversely prior to the 3d day of March 1887 by any court, department, or commission authorized to have and determine the same," were omitted for the same reason.

The words "in a civil action or in admiralty," in subsection (a)(2), were substituted for "either in a court of law, equity, or admiralty" to conform to Rule 2 of the Federal Rules of Civil Procedure.

Words in section 41(20) "in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable" were omitted from subsection (a)(2) of this revised section as unnecessary. See reviser's note under section 1491 of this title.

For jurisdiction of The Tax Court to review claims for refunds of processing taxes collected under the unconstitutional Agriculture Adjustment Act, see sections 644-659 of title 7, U.S.C., 1940 ed., Agriculture, and the 1942 Revenue Act, Act Oct. 21, 1942, ch. 610, title V, § 510(a), (c), (d), 56 Stat. 667. (See, also, *Lamborn* v. *United States*, C.C.P.A. 1939, 104 F.2d 75, certiorari denied 60 S.Ct. 115, 308 U.S. 589, 84 L.Ed. 493.)

See, also, reviser's note under section 1491 of this title as to jurisdiction of the Court of Claims in suits against the United States generally. For venue of actions under this section, see section 1402 of this title and reviser's note thereunder.

Minor changes were made in phraseology.

#### Senate Revision Amendment

The provision of title 28, U.S.C., § 932, which related to application of the Federal Rules of Civil Procedure, were originally set out in section 2676 of this revised title, but such section 2676 was eliminated by Senate amendment. See 80th Congress Senate Report No. 1559, amendment No. 61.

### 1949 Act

This section corrects typographical errors in section 1346(a)(1) of title 28, U.S.C., and in section 1346(b) of such title.

### References in Text

The internal-revenue laws, referred to in subsec. (a)(1), are classified generally to Title 26, Internal Revenue Code.

### Amendments

1976—Subsec. (e). Pub. L. 94-455 inserted "or section 7429" and "or section 7428 (in the case of the United States district court for the District of Columbia)", immediately after "section 7426".

1972—Subsec. (f). Pub. L. 92-562 added subsec. (f).

1970—Subsec. (a)(2). Pub. L. 91-350 specified that the term "express or implied contracts with the United States" includes express or implied contracts with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration.

1966—Subsec. (e). Pub. L. 89-719 added subsec. (e).

1964—Subsec. (d). Pub. L. 88-519 eliminated provisions which prohibited district courts from exercising jurisdiction of civil actions or claims to recover fees, salary, or compensation for official services of officers or employees of the United States.

1958—Subsec. (b). Pub. L. 85-508 eliminated the District Court for the Territory of Alaska. See section 81A of this title which establishes a United States District Court for the State of Alaska.

1954—Subsec. (a)(1). Act July 30, 1954, deleted the language imposing the jurisdictional limitation of $10,000 on suits to recover taxes.

1951—Subsec. (d). Act Oct. 31, 1951, inserted references to "claim" and "employees".

1949—Subsec. (a)(1). Act May 24, 1949, § 80(a) inserted ", (i) if the claim does not exceed $10,000 or (ii)".

Subsec. (b). Acts Apr. 25, 1949, and May 24, 1949, § 80(b), made a technical change to correct "chapter 173" to read "chapter 171", and inserted "on and after January 1, 1945" following "for money damages".

### Effective Date of 1970 Amendment

Section 2 of Pub. L. 91-350 provided that:

"(a) In addition to granting jurisdiction over suits brought after the date of enactment of this Act [July 23, 1970], the provisions of this Act [amending this section and section 1491 of this title and section 724a of Title 31, Money and Finance] shall also apply to claims and civil actions dismissed before or pending on the date of enactment of this Act if the claim or civil action is based upon a transaction, omission, or breach that occurred not more than six years prior to the date of enactment of this Act [July 23, 1970].

"(b) The provisions of subsection (a) of this section shall apply notwithstanding a determination or judgment made prior to the date of enactment of this Act that the United States district courts or the United States Court of Claims did not have jurisdiction to entertain a suit on an express or implied contract with a nonappropriated fund instrumentality of the United States described in section 1 of this Act."

### Effective Date of 1966 Amendment

Section 203 of Pub. L. 89-719 provided that: "The amendments made by this title [amending sections 1346, 1402, and 2410 of this title] shall apply after the date of the enactment of this Act [Nov. 2, 1966]."

### Effective Date of 1958 Amendment

Amendment by Pub. L. 85-508 effective Jan. 3, 1959, upon admission of Alaska into the Union pursuant to Proc. No. 3269, Jan. 3, 1959, 24 F.R. 81, 73 Stat. c16, as required by sections 1 and 8(c) of Pub. L. 85-508, see notes set out under section 81A of this title and preceding section 21 of Title 48, Territories and Insular Possessions.

### Savings Clause for Act Oct. 31, 1951

Act June 4, 1956, ch. 363, 70 Stat. 246, which conferred jurisdiction on district courts of certain actions to recover pay of employees who had been dismissed, was repealed by Pub. L. 89-554, § 8(a), Sept. 6, 1966, 80 Stat. 658.

### Cross References

Costs where United States is party, see section 2412 of this title.

Court of Claims jurisdiction, see section 1491 et seq. of this title.

Interest on judgments against United States, see section 2411 of this title.

Jury trial denied in actions under this section, see section 2402 of this title.

Nuclear incident involving nuclear reactor of United States warship, payment of claims or judgments for bodily injury, death, or damage resulting from, see section 2211 of Title 42, The Public Health and Welfare.

Remedy under this section for damages caused by operation of motor vehicles by Government employees to be exclusive of any other civil action or proceeding, see section 2679 of this title.

Tax Court jurisdiction, see section 7441 et seq. of Title 26, Internal Revenue Code.

Time for commencing action against United States, see section 2401 of this title.

Tort claims procedure, see section 2671 et seq. of this title.

Venue of actions against United States, see section 1402 of this title.

### Federal Rules of Civil Procedure

Costs where United States is party, see rule 54, Appendix to this title.

### Section Referred to in Other Sections

This section is referred to in sections 1402, 1504, 2402, 2409a, 2411, 2671, 2676, 2677, 2678, 2679, 2680 of this title; title 2 section 190g; title 5 sections 3373, 3374; title 10 section 1089; title 20 section 1105; title 22 section 817; title 25 section 640d-17; title 26 section 7422; title 29 section 926; title 38 sections 351, 4116; title 42 sections 233, 247b, 405, 2221, 2223, 2458a, 4654, 5032, 5055; title 46 section 1242; title 47 section 606; title 49 section 1540; title 50 App. sections 9, 2405.

## § 1347. Partition action where United States is joint tenant

The district courts shall have original jurisdiction of any civil action commenced by any tenant in common or joint tenant for the partition of lands where the United States is one of the tenants in common or joint tenants.

(June 25, 1948, ch. 646, 62 Stat. 933.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 41(25) (Mar. 3, 1911, ch. 231, § 24, par. 25, 36 Stat. 1094).

The venue provision in section 41(25) of title 28, U.S.C., 1940 ed., is incorporated in section 1399 of this title.

Words "civil action" were substituted for "suits in equity," in view of Rule 2 of the Federal Rules of Civil Procedure.

A change was made in phraseology.

### Cross References

Amount in controversy immaterial in action under this section, see Reviser's Note under section 1331 of this title.

Diversity of citizenship immaterial in action under this section, see Reviser's Note under section 1332 of this title.

Venue of action for partition of lands where United States is tenant in common or joint tenant, see section 1399 of this title.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 2409a of this title.

### § 1348. Banking association as party

The district courts shall have original jurisdiction of any civil action commenced by the United States, or by direction of any officer thereof, against any national banking association, any civil action to wind up the affairs of any such association, and any action by a banking association established in the district for which the court is held, under chapter 2 of Title 12, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by such chapter.

All national banking associations shall, for the purposes of all other actions by or against them, be deemed citizens of the States in which they are respectively located.

(June 25, 1948, ch. 646, 62 Stat. 933.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 41(16) (Mar. 3, 1911, ch. 231, § 24, par. 16, 36 Stat. 1092).

Words "any civil action" were substituted for "all cases," in view of Rule 2 of the Federal Rules of Civil Procedure.

Words "real, personal, or mixed, and all suits in equity," after "all other actions by or against them," were omitted as superfluous.

#### EXCEPTION AS TO TRANSFER OF FUNCTIONS

Functions vested by any provision of law in the Comptroller of the Currency, referred to in this section, were not included in the transfer of functions of officers, agencies and employees of the Department of the Treasury to the Secretary of the Treasury, made by Reorg. Plan No. 26 of 1950, § 1, eff. July 31, 1950, 15 F.R. 4935, 64 Stat. 1280, set out in the Appendix to Title 5, Government Organization and Employees.

#### CROSS REFERENCES

Amount in controversy—
- Immaterial in action other than on diverse citizenship, see Reviser's Note under section 1331 of this title.
- Required in diverse citizenship action under this section, see Reviser's Note under section 1332 of this title.

Injunction by national bank against Comptroller of Currency denying failure to redeem notes, see section 195 of Title 12, Banks and Banking.

Jurisdiction of action by or against—
- Federal reserve bank, see section 632 of Title 12.
- Liquidating agent of national bank, see section 197 of Title 12.
- National bank receiver, see section 1345 of this title.

Powers of conservator of national bank, see section 203 of Title 12, Banks and Banking.

Prohibition on state court from enjoining national bank, see section 91 of Title 12.

Venue of action—
- Against national banking association, see section 94 of Title 12.
- By banking association to enjoin the Comptroller of the Currency, see section 1394 of this title.

### § 1349. Corporation organized under federal law as party

The district courts shall not have jurisdiction of any civil action by or against any corporation upon the ground that it was incorporated by or under an Act of Congress, unless the United States is the owner of more than one-half of its capital stock.

(June 25, 1948, ch. 646, 62 Stat. 934.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 42 (Feb. 13, 1925, ch. 229, § 12, 43 Stat. 941).

Words "civil action" were substituted for "action or suit," in view of Rule 2 of the Federal Rules of Civil Procedure.

Minor changes were made in phraseology.

#### CROSS REFERENCES

Action arising under law of United States, see section 1331 of this title.

Action by agency of United States, see section 1345 of this title.

Action by or against—
- Federal land banks, see section 2012 of Title 12, Banks and Banking.
- Federal reserve banks, see section 632 of Title 12.
- National banking association, see section 1348 of this title.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 12 section 1452.

### § 1350. Alien's action for tort

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

(June 25, 1948, ch. 646, 62 Stat. 934.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 41(17) (Mar. 3, 1911, ch. 231, § 24, par. 17, 36 Stat. 1093).

Words "civil action" were substituted for "suits," in view of Rule 2 of the Federal Rules of Civil Procedure.

Changes in phraseology were made.

#### CROSS REFERENCES

Amount in controversy immaterial in action under this section, see Reviser's Note under section 1331 of this title.

### § 1351. Consuls and vice consuls as defendants

The district courts shall have original jurisdiction, exclusive of the courts of the States, of all actions and proceedings against consuls or vice consuls of foreign states.

(June 25, 1948, ch. 646, 62 Stat. 934; May 24, 1949, ch. 139, § 80(c), 63 Stat. 101.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§ 41(18), 371(8) (Mar. 3, 1911, ch. 231, §§ 24, par. 18, 256, par. 8, 36 Stat. 1093, 1160).

Words "civil action" were substituted for "suits," and "all suits and proceedings", in view of Rule 2 of the Federal Rules of Civil Procedure.

Changes were made in phraseology.

#### AMENDMENTS

1949—Act May 24, 1949, substituted "of all actions and proceedings" for "of any civil action".

#### Cross References

Amount in controversy immaterial in action under this section, see Historical and Revision note under section 1331 of this title.

Diversity of citizenship immaterial in action under this section, see Historical and Revision note under section 1332 of this title.

Judicial power extended in cases affecting consuls, see Const. Art. 3, § 2, cl. 1.

### § 1352. Bonds executed under federal law

The district courts shall have original jurisdiction, concurrent with State courts, of any action on a bond executed under any law of the United States.

(June 25, 1948, ch. 646, 62 Stat. 934.)

#### Historical and Revision Notes

This section is necessary to permit actions in the district courts upon any bond authorized by a law of the United States. In the absence of this new provision, such actions could not be maintained except by the United States, where the amount and other jurisdictional requisites did not exist. The new section also makes clear that it does not affect the right to prosecute such actions in State courts.

### § 1353. Indian allotments

The district courts shall have original jurisdiction of any civil action involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any Act of Congress or treaty.

The judgment in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him; but this provision shall not apply to any lands held on or before December 21, 1911, by either of the Five Civilized Tribes, the Osage Nation of Indians, nor to any of the lands within the Quapaw Indian Agency.

(June 25, 1948, ch. 646, 62 Stat. 934.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 41(24) (Mar. 3, 1911, ch. 231, § 24, par. 24, 36 Stat. 1094; Dec. 21, 1911, ch. 5, 37 Stat. 46).

Words "any civil action" were substituted for "all actions, suits, or proceedings," in view of Rule 2 of the Federal Rules of Civil Procedure.

The sentence "The right of appeal shall be allowed to either party as in other cases" was omitted as covered by section 1291 of this title, relating to appeals to the court of appeals.

Changes in phraseology were made.

#### Cross References

Amount in controversy immaterial in action under this section, see Reviser's Note under section 1331 of this title.

Jurisdiction of action for allotment, see section 345 of Title 25, Indians.

### § 1354. Land grants from different states

The district courts shall have original jurisdiction of actions between citizens of the same state claiming lands under grants from different states.

(June 25, 1948, ch. 646, 62 Stat. 934.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 41(1) (Mar. 3, 1911, ch. 231, § 24, par. 1, 36 Stat. 1091; May 14, 1934, ch. 283, § 1, 48 Stat. 775; Aug. 21, 1937, ch. 726, § 1, 50 Stat. 738; Apr. 20, 1940, ch. 117, 54 Stat. 143).

Other provisions of section 41(1) of title 28, U.S.C., 1940 ed., are incorporated in sections 1331, 1332, 1341, 1342, 1345, and 1359 of this title.

Changes were made in phraseology.

#### Cross References

Amount in controversy immaterial in action under this section, see Reviser's Note under section 1331 of this title.

### § 1355. Fine, penalty or forfeiture

The district courts shall have original jurisdiction, exclusive of the courts of the States, of any action or proceeding for the recovery or enforcement of any fine, penalty, or forfeiture, pecuniary or otherwise, incurred under any Act of Congress.

(June 25, 1948, ch. 646, 62 Stat. 934.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., §§ 41(9) and 371(2) (Mar. 3, 1911, ch. 231, §§ 24, par. 9, 256, par. 2, 36 Stat. 1092, 1160).

Word "fine" was inserted so that this section will apply to the many provisions in the United States Code for fines which are essentially civil. (See, also, section 2461 of this title and reviser's note thereunder.)

Words "pecuniary or otherwise" were added to make this section expressly applicable to both pecuniary and property forfeitures. The original section was so construed in *Miller* v. *United States*, 1870, 11 Wall. 268, 20 L.Ed. 135; *Tyler* v. *Defrees*, 1870, 11 Wall. 331, and *The Rosemary*, C.C.A. 1928, 26 F.2d 354, certiorari denied 49 S.Ct. 23, 278 U.S. 619, 73 L.Ed. 542.

Changes were made in phraseology.

#### Cross References

Actions for forfeiture under customs laws, see section 1604 of Title 19, Customs Duties.

Amount in controversy immaterial in action under this section, see Reviser's Note under section 1331 of this title.

Diversity of citizenship immaterial in action under this section, see Reviser's Note under section 1332 of this title.

Fines, penalties and forfeitures, proceedings, see section 2461 et seq. of this title.

Venue of action for fine, penalty, or forfeiture see section 1395 of this title.

#### Section Referred to in Other Sections

This section is referred to in title 21 section 842; title 42 section 263k.

### § 1356. Seizures not within admiralty and maritime jurisdiction

The district courts shall have original jurisdiction, exclusive of the courts of the States, of any seizure under any law of the United States on land or upon waters not within admiralty and maritime jurisdiction.

(June 25, 1948, ch. 646, 62 Stat. 934.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., §§ 41(3) and 371(4) (Mar. 3, 1911, ch. 231, §§ 24, par. 3, 256, par. 4, 36 Stat. 1091, 1160; Oct. 6, 1917, ch. 97, § 1, 40 Stat. 395; June 10, 1922, ch. 216, § 1, 42 Stat. 634).

Section consolidates certain provisions of sections 41(3) and 371(4) of title 28, U.S.C., 1940 ed. Other provisions of such sections are incorporated in section 1333 of this title.

Changes were made in arrangement and phraseology.

#### CROSS REFERENCES

Amount in controversy immaterial in action under this section, see Reviser's Note under section 1331 of this title.

Diversity of citizenship immaterial in action under this section, see Reviser's Note under section 1332 of this title.

Jurisdiction of—

- Admiralty, maritime and prize cases, see section 1333 of this title.
- Fine, penalty, or forfeiture, see section 1355 of this title.

### § 1357. Injuries under Federal laws

The district courts shall have original jurisdiction of any civil action commenced by any person to recover damages for any injury to his person or property on account of any act done by him, under any Act of Congress, for the protection or collection of any of the revenues, or to enforce the right of citizens of the United States to vote in any State.

(June 25, 1948, ch. 646, 62 Stat. 934.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 41(11) (Mar. 3, 1911, ch. 231, § 24, par. 11, 36 Stat. 1092.)

Words "any civil action" were substituted for "all suits," in view of Rule 2 of the Federal Rules of Civil Procedure.

Minor changes were made in phraseology.

#### CROSS REFERENCES

Amount in controversy immaterial in action under this section, see Reviser's Note under section 1331 of this title.

Diversity of citizenship immaterial in action under this section, see Reviser's Note under section 1332 of this title.

### § 1358. Eminent domain

The district courts shall have original jurisdiction of all proceedings to condemn real estate for the use of the United States or its departments or agencies.

(June 25, 1948, ch. 646, 62 Stat. 935.)

#### HISTORICAL AND REVISION NOTES

Based on section 257 of title 40, U.S.C., 1940 ed., Public Buildings, Property, and Works (Aug. 1, 1888, ch. 728, § 1, 25 Stat. 357; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167).

The venue provisions of section 257 of title 40, U.S.C., 1940 ed., are incorporated in section 1403 of this title.

Other provisions of section 257 of title 40, U.S.C., 1940 ed., are retained in said title 40.

Changes were made in phraseology.

#### CROSS REFERENCES

Amount in controversy immaterial in proceedings under this section, see Reviser's Note under section 1331 of this title.

Armed forces, acquisition of property, see section 2663 of Title 10, Armed Forces.

Coast Guard, acquisition of land, see section 92 of Title 14, Coast Guard.

Condemnation of property, right of Government officials, see section 257 of Title 40, Public Buildings, Property, and Works.

Declaration of taking proceedings in eminent domain, see section 258a et seq. of Title 40.

District of Columbia, procedure in condemnation proceedings, see D.C. Code, § 16-1301 et seq.

Irrigation project, acquisition of land, see section 421 of Title 43, Public Lands.

Lumber production, acquisition of property for, see section 2664 of Title 10, Armed Forces.

Reclamation projects, compensation for rights-of-way, see section 945b of Title 43, Public Lands.

River and harbor improvements, acquisition of land, see section 591 et seq. of Title 33, Navigation and Navigable Waters.

Tennessee Valley Authority, procedure in condemnation proceedings, see section 831x of Title 16, Conservation.

Venue of eminent domain proceedings, see section 1403 of this title.

#### FEDERAL RULES OF CIVIL PROCEDURE

Procedure in condemnation proceedings, see rule 71A, Appendix to this title.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 50 section 167f.

### § 1359. Parties collusively joined or made

A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court.

(June 25, 1948, ch. 646, 62 Stat. 935.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed. §§ 41(1) and 80 (Mar. 3, 1911, ch. 231, §§ 24(1), 37, 36 Stat. 1091, 1098; May 14, 1934, ch. 283, § 1, 48 Stat. 775; Aug. 21, 1937, ch. 726, § 1, 50 Stat. 738; Apr. 20, 1940, ch. 117, 54 Stat. 143).

Other provisions of section 41(1) of title 28, U.S.C., 1940 ed., are incorporated in sections 1331, 1332, 1341, 1342, 1345, and 1354 of this title.

Provisions of section 80 of title 28, U.S.C., 1940 ed., for payment of costs upon dismissal of an action for lack of jurisdiction are incorporated in section 1919 of this title. Other provisions of said section 80 appear in section 1447 of this title.

Provisions of section 80 of title 28, U.S.C., 1940 ed., for dismissal of an action not really and substantially involving a dispute or controversy within the jurisdiction of a district court, were omitted as unnecessary. Any court will dismiss a case not within its jurisdiction when its attention is drawn to the fact, or even on its own motion.

The assignee clause in section 41(1) of title 28, U.S.C., 1940 ed., "is a jumble of legislative jargon." (For further references to the consequences of "its obscure phraseology," see, 35 Ill. Law Rev., January 1941, pp. 569-571.)

The revised section changes this clause by confining its application to cases wherein the assignment is improperly or collusively made to invoke jurisdiction. Furthermore, the difficulty of applying the original clause is overcome and the original purpose of such clause is better served by substantially following section 80 of title 28, U.S.C., 1940 ed.

The assignee clause was incorporated in the original Judiciary Act of 1789. Such section 80 was enacted in 1875. The history of the assignee clause "shows clearly that its purpose and effect, at the time of its enactment were to prevent the conferring of jurisdiction on the Federal courts, on grounds of diversity of citizenship, by assignment, in cases where it would not otherwise exist." (*Sowell* v. *Federal Reserve Bank*, 1925, 45 S.Ct. 528, 529, 268 U.S. 449, 453, 69 L.Ed. 1041, 1048.) Thus the purpose of the assignee clause was to prevent the manufacture of Federal jurisdiction by the device of assignment. It achieves this purpose only partially. For example, the assignee clause excepts two types of choses in action from its coverage: (1) Foreign bill of exchange; and (2) corporate bearer paper. But this does not prevent the use of assignment of these choses in action to create the necessary diversity or alienage for jurisdictional purposes. Such section 80 does, however, prevent that. (See *Bullard* v. *City of Cisco*, 1933, 54 S.Ct. 177, 290 U.S. 179, 78 L.Ed. 254, 93 A.L.R. 141.) Its coverage against collusive jurisdiction is unlimited, and its approach is direct. The assignee clause, on the other hand, prevents the bona fide assignee of a chose in action within its terms from resorting to the Federal courts unless there is jurisdiction to support the assignee-plaintiff's case and a showing that there would have been jurisdiction if the assignor had brought the action in lieu of the assignee-plaintiff. Since the assignee clause deals with the bona fide assignee, there has been much litigation to determine the assignments which should or should not be within the purview of the clause. Thus the courts have thought it advisable to limit the term "chose in action" and exclude from its scope (1) an implied in law duty or promise, and (2) a transfer of a property interest; and to exclude an assignment by operation of law from the coverage of the clause. Intermediate assignments and reassignment also give difficulty.

#### CROSS REFERENCES

Amendment of pleadings to show jurisdiction, see section 1653 of this title.

Costs on dismissal for lack of jurisdiction, see section 1919 of this title.

Removed cases, remand to State court for lack of jurisdiction, see section 1447 of this title.

#### FEDERAL RULES OF CIVIL PROCEDURE

Defenses and objections, pleadings allowed and form of motions, see rules 7 and 12, Appendix to this title.

Parties, see rules 17 to 25.

### § 1360. State civil jurisdiction in actions to which Indians are parties

(a) Each of the States or Territories listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over other civil causes of action, and those civil laws of such State or Territory that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

| *State or Territory of* | *Indian country affected* |
|---|---|
| Alaska | All Indian country within the Territory. |
| California | All Indian country within the State. |
| Minnesota | All Indian country within the State, except the Red Lake Reservation. |
| Nebraska | All Indian country within the State. |
| Oregon | All Indian country within the State, except the Warm Springs Reservation. |
| Wisconsin | All Indian country within the State. |

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

(Added Aug. 15, 1953, ch. 505, § 4, 67 Stat. 589, and amended Aug. 24, 1954, ch. 910, § 2, 68 Stat. 795; Aug. 8, 1958, Pub. L. 85-615, § 2, 72 Stat. 545.)

#### AMENDMENTS

1958—Subsec. (a). Pub. L. 85-615 gave Alaska jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in all Indian country within the Territory of Alaska.

1954—Subsec. (a). Act Aug. 24, 1954, brought the Menominee Tribe within the provisions of this section.

#### ADMISSION OF ALASKA AS STATE

Admission of Alaska into the Union was accomplished Jan. 3, 1959, upon issuance of Proc. No. 3269, Jan. 3, 1959, 24 F.R. 81, 73 Stat. c16, as required by sections 1 and 8(c) of Pub. L. 85-508, July 7, 1958, 72 Stat. 339, set out as notes preceding section 21 of Title 48, Territories and Insular Possessions.

#### AMENDMENT OF STATE CONSTITUTIONS TO REMOVE LEGAL IMPEDIMENT; EFFECTIVE DATE

Section 6 of act Aug. 15, 1953, provided that: "Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act [adding this section and section 1162 of Title 18, Crimes and Criminal Procedure]: *Provided*, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be."

#### CONSENT OF UNITED STATES TO OTHER STATES TO ASSUME JURISDICTION

Act Aug. 15, 1953, ch. 505, § 7, 67 Stat. 590, which gave consent of the United States to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this section and section 1162 of Title 18, Crimes and Criminal Procedure, to assume jurisdiction at such time and in such manner as the people of the State shall, by legislative action, obligate and bind the State to assumption thereof, was repealed by section 403(b) of Pub. L. 90-284, title IV, Apr. 11, 1968, 82 Stat. 79, such repeal not to affect any cession of jurisdiction made pursuant to such section prior to its repeal.

Retrocession of jurisdiction by State acquired by State pursuant to section 7 of Act Aug. 15, 1953, prior to its repeal, see section 1323 of Title 25, Indians.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 25 section 1323.

### § 1361. Action to compel an officer of the United States to perform his duty

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

(Added Pub. L. 87-748, § 1(a), Oct. 5, 1962, 76 Stat. 744.)

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 18 section 923; title 42 section 300j-9.

### § 1362. Indian tribes

The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

(Added Pub. L. 89-635, § 1, Oct. 10, 1966, 80 Stat. 880.)

### § 1363. Construction of references to laws of the United States or Acts of Congress

For the purposes of this chapter, references to laws of the United States or Acts of Congress do not include laws applicable exclusively to the District of Columbia.

(Added Pub. L. 91-358, title I, § 172(c)(1), July 29, 1970, 84 Stat. 590.)

#### EFFECTIVE DATE

Section effective the first day of the seventh calendar month which begins after July 29, 1970, see section 199(a) of Pub. L. 91-358, set out as an Effective Date of 1970 Amendment note under section 1257 of this title.

## CHAPTER 87—DISTRICT COURTS; VENUE

Sec.

1391. Venue generally.
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1401. Stockholder's derivative action.
1402. United States as defendant.
1403. Eminent domain.
1404. Change of venue.
1405. Creation or alteration of district or division.
1406. Cure or waiver of defects.
1407. Multidistrict litigation.

#### AMENDMENTS

1968—Pub. L. 90-296, § 2, Apr. 29, 1968, 82 Stat. 110, added item 1407.

#### CROSS REFERENCES

Criminal cases, venue, see sections 3235 et seq. of Title 18, Crimes and Criminal Procedure.

Jurisdiction of district courts, see sections 1331 et seq. of this title, and Historical and Revision note for section 1332 of this title.

Process, see section 1691 et seq. of this title.

#### FEDERAL RULES OF CRIMINAL PROCEDURE

Venue, see rules 18, 20 to 22, Title 18, Appendix, Crimes and Criminal Procedure.

### § 1391. Venue generally

(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside, or in which the claim arose.

(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law.

(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.

(d) An alien may be sued in any district.

(e) A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action. Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party.

The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.

(f) A civil action against a foreign state as defined in section 1603(a) of this title may be brought—

(1) in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated;

(2) in any judicial district in which the vessel or cargo of a foreign state is situated, if the claim is asserted under section 1605(b) of this title;

(3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title; or

(4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.

(June 25, 1948, ch. 646, 62 Stat. 935; Oct. 5, 1962, Pub. L. 87-748, § 2, 76 Stat. 744; Dec. 23, 1963, Pub. L. 88-234, 77 Stat. 473; Nov. 2, 1966, Pub. L. 89-714, §§ 1, 2, 80 Stat. 1111; Oct. 21, 1976, Pub. L. 94-574, § 3, 90 Stat. 2721; Oct. 21, 1976, Pub. L. 94-583, § 5, 90 Stat. 2897.)

### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§ 111, 112 (Mar. 3, 1911, ch. 231, §§ 50, 51, 36 Stat. 1101; Sept. 19, 1922, ch. 345, 42 Stat. 849; Mar. 4, 1925, ch. 526, § 1, 43 Stat. 1264; Apr. 16, 1936, ch. 230, 49 Stat. 1213).

Section consolidates section 111 of title 28, U.S.C., 1940 ed., with part of section 112 of such title.

The portion of section 112 of title 28, U.S.C., 1940 ed., relating to venue generally constitutes this section and the parts relating to arrest of the defendant, venue and process in stockholders' actions constitute sections 1401, 1693, and 1695 of this title.

Provision in section 111 of title 28, U.S.C., 1940 ed., that a district court may proceed as to parties before it although one or more defendants do not reside in the district, and that its judgment shall be without prejudice to such absent defendants, was omitted as covered by rule 19(b) of the Federal Rules of Civil Procedure.

Word "action" was substituted for "suit" in view of Rule 2 of the Federal Rules of Civil Procedure.

Word "reside" was substituted for "whereof he is an inhabitant" for clarity inasmuch as "inhabitant" and "resident" are synonymous. (See *Ex parte Shaw*, 1892, 12 S.Ct. 935, 145 U.S. 444, 36 L.Ed. 768; *Standard Stoker Co., Inc.* v. *Lower*, D.C., 1931, 46 F.2d 678; *Edgewater Realty Co.* v. *Tennessee Coal, Iron & Railroad Co.*, D.C., 1943, 49 F.Supp. 807.)

Reference to "all plaintiffs" and "all defendants" were substituted for references to "the plaintiff" and "the defendant," in view of many decisions holding that the singular terms were used in a collective sense. (See *Smith* v. *Lyon*, 1890, 10 S.Ct. 303, 133 U.S. 315, 33 L.Ed. 635; *Hooe* v. *Jamieson*, 1897, 17 S.Ct. 596, 166 U.S. 395, 41 L.Ed. 1049; and *Fetzer* v. *Livermore*, D.C., 1926, 15 F.2d 462.)

In subsection (c), references to defendants "found" within a district or voluntarily appearing were omitted. The use of the word "found" made section 111 of title 28, U.S.C., 1940 ed., ambiguous. The argument that an action could be brought in the district where one defendant resided and a nonresident defendant was "found," was rejected in *Camp* v. *Gress*, 1919, 39 S.Ct. 478, 250 U.S. 308, 63 L.Ed. 997. However, this ambiguity will be obviated in the future by the omission of such reference.

Subsection (d) of this section is added to give statutory recognition to the weight of authority concerning a rule of venue as to which there has been a sharp conflict of decisions. (See *Sandusky Foundry & Machine Co.* v. *DeLavand*, 1918, D.C.Ohio, 251 F. 631, 632, and cases cited. See also *Keating* v. *Pennsylvania Co.*, 1917, D.C.Ohio, 245 F. 155 and cases cited.)

Changes were made in phraseology.

### AMENDMENTS

1976—Subsec. (e). Pub. L. 94-574 provided that, in actions against the United States, its agencies, or officers or employees in their official capacities, additional persons may be joined in accordance with the Federal Rules of Civil Procedure and with other venue requirements which would be applicable if the United States, its agencies, or one of its officers or employees were not a party.

Subsec. (f). Pub. L. 94-583 added subsec. (f).

1966—Subsec. (a). Pub. L. 89-714, § 1, authorized a civil action to be brought in the judicial district in which the claim arose.

Subsec. (b). Pub. L. 89-714, § 1, authorized a civil action to be brought in the judicial district in which the claim arose.

Subsec. (f). Pub. L. 89-714, § 2, repealed subsec. (f) which permitted a civil action on a tort claim arising out of the manufacture, assembly, repair, ownership, maintenance, use, or operation of an automobile to be brought in the judicial district wherein the act or omission complained of occurred. Present provisions are now contained in subsecs. (a) and (b) of this section.

1963—Subsec. (f). Pub. L. 88-234 added subsec. (f)

1962—Subsec. (e). Pub. L. 87-748 added subsec. (e).

### EFFECTIVE DATE OF 1976 AMENDMENT

Amendment by Pub. L. 94-583 effective 90 days after Oct. 21, 1976, see section 8 of Pub. L. 94-583, set out as an Effective Date note under section 1602 of this title.

### CROSS REFERENCES

Antitrust laws, actions under, see sections 15 and 22 of Title 15, Commerce and Trade.

Change of venue, see section 1404 of this title.

Diversity of citizenship, jurisdiction of district courts, see section 1332 of this title.

Place of arrest in civil action, see section 1693 of this title.

Process, see sections 1691 et seq. of this title.

Process in stockholder's derivative action, see section 1695 of this title.

Residence—

- Federal National Mortgage Association as resident of District of Columbia, see section 1717 of Title 12, Banks and Banking.
- International Finance Corporation as inhabitant of Federal judicial district in which principal office in United States is located, see section 282f of Title 22, Foreign Relations and Intercourse.
- Saint Lawrence Seaway Development Corporation as resident of northern judicial district of New York, see section 984 of Title 33, Navigation and Navigable Waters.

Waiver of venue, see section 1406 of this title.

### FEDERAL RULES OF CIVIL PROCEDURE

Venue unaffected, see rule 82, Appendix to this title.

### SECTION REFERRED TO IN OTHER SECTION

This section is referred to in title 42 sections 1973aa-2, 1973dd-3.

## § 1392. Defendants or property in different districts in same State

(a) Any civil action, not of a local nature, against defendants residing in different districts in the same State, may be brought in any of such districts.

(b) Any civil action, of a local nature, involving property located in different districts in the same State, may be brought in any of such districts.

(June 25, 1948, ch. 646, 62 Stat. 935.)

### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§ 113, 116 (Mar. 3, 1911, ch. 231, §§ 52, 55, 36 Stat. 1101, 1102).

Section consolidates section 113 of title 28, U.S.C., 1940 ed., with section 116 of such title.

Last sentence of section 113 of title 28, U.S.C., 1940 ed., relating to execution on judgments or decrees, was omitted as covered by section 2001 et seq. of this title.

Words "civil action" were substituted for "suit" in view of Rule 2 of the Federal Rules of Civil Procedure.

Words of said section 113, "against a single defendant, inhabitant of such State, must be brought in the district where he resides" were omitted as covered by section 1391 of this title.

Words of section 116 of title 28, U.S.C., 1940 ed., "land or other subject matter of a fixed character" were deleted and the word "property" substituted for flexibility and uniformity. (See sections 754, 1692, of this title and reviser's notes thereunder.)

Words of said section 116, "and the court in which it is brought shall have jurisdiction to hear and decide it, and to cause mesne or final process to be issued and executed, as fully as if the said subject matter were wholly within the district for which such court is constituted" were omitted as surplusage and fully covered by Rule 4 of the Federal Rules of Civil Procedure. Said rule also covers the following omitted language: "A duplicate writ may be issued against the defendants, directed to the marshal of any other district in which any defendant resides."

Changes were made in phraseology.

### SECTION REFERRED TO IN OTHER SECTION

This section is referred to in title 42 sections 1973aa-2, 1973dd-3.

## § 1393. Divisions; single defendant; defendants in different divisions

(a) Except as otherwise provided, any civil action, not of a local nature, against a single defendant in a district containing more than one division must be brought in the division where he resides.

(b) Any such action, against defendants residing in different divisions of the same district or different districts in the same State, may be brought in any of such divisions.

(June 25, 1948, ch. 646, 62 Stat. 935.)

### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 114 (Mar. 3, 1911, ch. 231, § 53, 36 Stat. 1101).

Second sentence of section 114 of title 28, U.S.C., 1940 ed., relating to mesne and final process was omitted as covered by section 1692 of this title and Rule 4 of the Federal Rules of Civil Procedure.

The third and fourth sentences of section 114 of title 28, U.S.C., 1940 ed., relating to transfer of criminal proceedings from divisions of district courts were omitted as fully covered by Rule 19 of the Federal Rules of Criminal Procedure.

The last sentence of section 114 of title 28, U.S.C., 1940 ed., relating to removal of cases from State to Federal district courts, is incorporated in section 1441 of this title.

Changes were made in phraseology.

### FEDERAL RULES OF CRIMINAL PROCEDURE

Venue and transfer of criminal prosecutions, see rule 18 et seq., and notes of Advisory Committee under the rules, Title 18, Appendix, Crimes and Criminal Procedure.

### SECTION REFERRED TO IN OTHER SECTION

This section is referred to in title 42 sections 1973aa-2, 1973dd-3.

## § 1394. Banking association's action against Comptroller of Currency

Any civil action by a national banking association to enjoin the Comptroller of the Currency, under the provisions of any Act of Congress relating to such associations, may be prosecuted in the judicial district where such association is located.

(June 25, 1948, ch. 646, 62 Stat. 935.)

### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 110 (Mar. 3, 1911, ch. 231, § 49, 36 Stat. 1100).

Words "Any civil action" were substituted for "All proceedings," in view of Rule 2 of the Federal Rules of Civil Procedure.

Changes were made in phraseology.

### EXCEPTION AS TO TRANSFER OF FUNCTIONS

Functions vested by any provision of law in the Comptroller of the Currency, referred to in this section, were not included in the transfer of functions of officers, agencies and employees of the Department of the Treasury to the Secretary of the Treasury, made by Reorg. Plan No. 26 of 1950, § 1, eff. July 31, 1950, 15 F.R. 4935, 64 Stat. 1280, set out in the Appendix to Title 5, Government Organization and Employees.

### CROSS REFERENCES

Jurisdiction of district court in banking association's action against the Comptroller of the Currency, see section 1348 of this title.

## § 1395. Fine, penalty or forfeiture

(a) A civil proceeding for the recovery of a pecuniary fine, penalty or forfeiture may be prosecuted in the district where it accrues or the defendant is found.

(b) A civil proceeding for the forfeiture of property may be prosecuted in any district where such property is found.

(c) A civil proceeding for the forfeiture of property seized outside any judicial district may be prosecuted in any district into which the property is brought.

(d) A proceeding in admiralty for the enforcement of fines, penalties and forfeitures against a vessel may be brought in any district in which the vessel is arrested.

(e) Any proceeding for the forfeiture of a vessel or cargo entering a port of entry closed by the President in pursuance of law, or of goods and chattels coming from a State or section declared by proclamation of the President to be in insurrection, or of any vessel or vehicle conveying persons or property to or from such State or section or belonging in whole or in part to a resident thereof, may be prosecuted in any district into which the property is taken and in which the proceeding is instituted.

(June 25, 1948, ch. 646, 62 Stat. 936.)

### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§ 104, 106, 107, and 108, and section 3745(c) of title 26, U.S.C., 1940 ed., Internal Revenue Code (Mar. 3, 1911, ch. 231, §§ 43, 45, 46, 47, 36 Stat. 1100; Feb. 10, 1939, ch. 2, § 3745(c), 53 Stat. 460).

This section consolidates section 3745(c) of title 26, U.S.C., 1940 ed., with sections 104, 106, 107, and 108 of title 28, U.S.C., 1940 ed., relating to venue in civil proceedings to recover and enforce civil fines, penalties, and forfeitures, pecuniary or otherwise. Subsection (a) is based on said section 104 of title 28 and said section 3745(c) of title 26. Subsections (b) and (c) consolidate such sections 106 and 107 of title 28. Subsection (e) is based on such section 108 of title 28.

Subsection (b) substituted words "may be prosecuted in any district where such property is found" for "shall be prosecuted in the district where the seizure is made," to include not only property seized, but also all other property subject to forfeiture.

Words "civil" and "fine" were inserted to make this section applicable to the many provisions of the United States Code for fines essentially civil. (See reviser's note under section 1355 of this title.)

Provisions of section 3745(c) of title 26, U.S.C., 1940 ed., that such suit may be brought "before any other court of competent jurisdiction" were omitted as misleading surplusage, since United States district courts, under section 1355 of this title, have exclusive jurisdiction.

Subsection (d) was added for completeness and clarity.

Changes were made in phraseology.

#### Senate Revision Amendment

While section 3745(c) of Title 26, U.S.C., Internal Revenue Code, is one of the sources of this section, it was eliminated from the schedule of repeals by Senate amendment. Therefore, such section 3745(c) remains in Title 26. See 80th Congress Senate Report No. 1559.

#### Cross References

Jurisdiction of district court in action to recover fines, penalties, or forfeitures, see section 1355 of this title.

#### Section Referred to in Other Sections

This section is referred to in title 26 section 7408.

### § 1396. Internal revenue taxes

Any civil action for the collection of internal revenue taxes may be brought in the district where the liability for such tax accrues, in the district of the taxpayer's residence, or in the district where the return was filed.

(June 25, 1948, ch. 646, 62 Stat. 936.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 105, and section 3744 of title 26, U.S.C., 1940 ed., Internal Revenue Code (Mar. 3, 1911, ch. 231, § 44, 36 Stat. 1100; Feb. 10, 1939, ch. 2, § 3744, 53 Stat. 460).

Section consolidates section 3744 of title 26, U.S.C., 1940 ed., Internal Revenue Code, with section 105 of title 28, U.S.C., 1940 ed.

Words "or in the district where the return was filed" are new. This extension of venue will permit of an action in a district easily determinable for collection of revenue earned in several districts, or States, but the return for which is filed with one collector.

Changes were made in phraseology.

#### Senate Revision Amendment

While section 3744 of Title 26, U.S.C., Internal Revenue Code [1939], is one of the sources of this section, it was eliminated from the schedule of repeals by Senate amendment. Therefore, it remains in Title 26 [I.R.C. 1939]. See 80th Congress Senate Report No. 1559.

#### Cross References

Jurisdiction of district courts in actions or proceedings under internal-revenue laws, see section 7402 of Title 26, Internal Revenue Code.

#### Section Referred to in Other Sections

This section is referred to in title 26 section 7408.

### § 1397. Interpleader

Any civil action of interpleader or in the nature of interpleader under section 1335 of this title may be brought in the judicial district in which one or more of the claimants reside.

(June 25, 1948, ch. 646, 62 Stat. 936.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 41(26) (Mar. 3, 1911, ch. 231, § 24, par. 26, as added Jan. 20, 1936, ch. 13, § 1, 49 Stat. 1096).

Provisions of section 41(26) of title 28, U.S.C., 1940 ed., relating to jurisdiction are the basis of section 1335 of this title and other provisions thereof are incorporated in section 2361 of this title.

Words "civil action" were substituted for "suit," in view of Rule 2 of the Federal Rules of Civil Procedure.

Changes were made in phraseology.

#### Cross References

Process and procedure in interpleader actions, see section 2361 of this title.

### § 1398. Interstate Commerce Commission's orders

(a) Except as otherwise provided by law, a civil action brought under section 1336(a) of this title shall be brought only in a judicial district in which any of the parties bringing the action resides or has its principal office.

(b) A civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, an order of the Interstate Commerce Commission made pursuant to the referral of a question or issue by a district court or by the Court of Claims, shall be brought only in the court which referred the question or issue.

(June 25, 1948, ch. 646, 62 Stat. 936; Aug. 30, 1964, Pub. L. 88-513, § 2, 78 Stat. 695; Jan. 2, 1975, Pub. L. 93-584, § 2, 88 Stat. 1917.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 43 (Oct. 22, 1913, ch. 32, 38 Stat. 219).

This section is completely rewritten to give effect to changes recommended by the Judicial Conference of the United States.

Section 43 of title 28, U.S.C., 1940 ed., is as follows: "§ 43. Venue of suits relating to orders of Interstate Commerce Commission.

"The venue of any suit brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, except that where the order does not relate to transportation or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office. In case such transportation relates to a through shipment the term 'destination' shall be construed as meaning final destination of such shipment." The amendment of section 207 of title 28, U.S.C., 1940 ed., proposed by the Judicial Conference is:

"Except as otherwise provided in the Act entitled 'An Act to Regulate Commerce', approved February 4, 1887, as amended, the venue of any suit brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties bringing the suit or wherein such party or any of such parties has its principal office."

The revised section substitutes the words "Except as otherwise provided by law" for the words of the conference bill, "in the act entitled 'An Act to Regulate Commerce, approved February 4, 1887, as amended' ". (See section 16 of title 49, U.S.C., 1940 ed., which provides for jurisdiction and venue of actions to enforce Interstate Commerce Commission orders for the payment of money.)

#### Amendments

1975—Subsec. (a). Pub. L. 93-584 substituted provisions that civil actions under section 1336(a) of this title shall be brought only in a judicial district in which any of the parties bringing the action resides or has its principal office, for provisions that civil actions to enforce, suspend, or set aside in whole or in part orders of the Interstate Commerce Commission shall be brought in such judicial district.

1964—Pub. L. 88-513 designated existing provisions as subsec. (a), and added subsec. (b).

### Effective Date of 1975 Amendment

Amendment by Pub. L. 93-584 not applicable to actions commenced on or before the last day of the first month beginning after Jan. 2, 1975, and actions to enjoin or suspend orders of the Interstate Commerce Commission which are pending when this amendment becomes effective shall not be affected thereby, but shall proceed to final disposition under the law existing on the date they were commenced, see section 10 of Pub. L. 93-584, set out as an Effective Date of 1975 Amendment note under section 2321 of this title.

### Cross References

Enforcement and review of Interstate Commerce Commission's orders, see section 2321 et seq. of this title.

Jurisdiction of district courts in actions involving Interstate Commerce Commission's orders, see section 1336 of this title.

## § 1399. Partition action involving United States

Any civil action by any tenant in common or joint tenant for the partition of lands, where the United States is one of the tenants in common or joint tenants, may be brought only in the judicial district where such lands are located or, if located in different districts in the same State, in any of such districts.

(June 25, 1948, ch. 646, 62 Stat. 936.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 41(25) (Mar. 3, 1911, ch. 231, § 24, par. 25, 36 Stat. 1094).

Provisions of section 41(25) of title 28, U.S.C., 1940 ed., relating to jurisdiction are the basis of section 1347 of this title.

Words "civil action" were substituted for "suits in equity," in view of Rule 2 of the Federal Rules of Civil Procedure.

Provision with respect to property in different districts was added to conform with section 1392 of this title.

Changes were made in phraseology.

### Cross References

Jurisdiction of district court in partition action where United States is tenant in common or joint tenant, see section 1347 of this title.

## § 1400. Patents and copyrights

(a) Civil actions, suits, or proceedings arising under any Act of Congress relating to copyrights may be instituted in the district in which the defendant or his agent resides or may be found.

(b) Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.

(June 25, 1948, ch. 646, 62 Stat. 936.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 109, and section 35 of title 17, U.S.C., 1940 ed., Copyrights (Mar. 4, 1909, ch. 320, § 35, 35 Stat. 1084; Mar. 3, 1911, ch. 231, § 48, 36 Stat. 1100).

Section consolidates section 35 of title 17, U.S.C., 1940 ed., with part of section 109 of title 28, U.S.C., 1940 ed., with necessary changes in phraseology.

Subsection (b) is based on section 109 of title 28, U.S.C., 1940 ed., with the following changes:

Words "civil action" were substituted for "suit," and words "in law or in equity," after "shall have jurisdiction" were deleted, in view of Rule 2 of the Federal Rules of Civil Procedure.

Words in subsection (b) "where the defendant resides" were substituted for "of which the defendant is an inhabitant." A corresponding change was made in subsection (a). Words "inhabitant" and "resident," as respects venue, are synonymous. (See reviser's note under section 1391 of this title.)

Words "whether a person, partnership, or corporation" before "has committed" were omitted as surplusage.

The provisions of section 109 of title 28, U.S.C., 1940 ed., relating to process are incorporated in section 1694 of this title.

Jurisdiction and venue of patent suits against residents of foreign countries or persons residing in plurality of districts, see section 72a of title 35, U.S.C., 1940 ed., Patents.

### Senate Revision Amendment

Title 17 of the United States Code was enacted into positive law by act July 30, 1947, ch. 391, 61 Stat. 652, and, in such enactment, section 35 of the prior title became section 111 of the new title, and all Acts from which sections of the prior title had been derived, were repealed. Therefore, this paragraph should read: "Based on Title 28, U.S.C., 1940 ed., § 109 (Mar. 3, 1911, ch. 231, § 48, 36 Stat. 1100), and section 111 of Title 17, U.S.C., 1946 ed., Copyrights." By Senate amendment, section 111 of Title 17 U.S.C., is included in the schedule of repeals. See 80th Congress Senate Report No. 1559.

### Cross References

Jurisdiction and venue of patent suits against residents of foreign countries or persons residing in plurality of districts, see sections 146 and 291 of Title 35, Patents.

Jurisdiction of district courts in patent or copyright actions, see section 1338 of this title.

Jurisdiction and legal remedy for unauthorized use or disclosure of patents and technical information, see section 2356 of Title 22, Foreign Relations and Intercourse.

Process in patent infringement action, see section 1694 of this title.

### Federal Rules of Civil Procedure

Process, see rule 4, Appendix to this title.

## § 1401. Stockholder's derivative action

Any civil action by a stockholder on behalf of his corporation may be prosecuted in any judicial district where the corporation might have sued the same defendants.

(June 25, 1948, ch. 646, 62 Stat. 936.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 112 (part) (Mar. 3, 1911, ch. 231, § 51, 36 Stat. 1101; Sept. 19, 1922, ch. 345, 42 Stat. 849; Mar. 4, 1925, ch. 526, § 1, 43 Stat. 1264; Apr. 16, 1936, ch. 230, 49 Stat. 1213).

For disposition of other provisions of section 112 of title 28, U.S.C., 1940 ed., see reviser's note under section 1391 of this title.

Words "civil action" were substituted for "suit," in view of Rule 2 of the Federal Rules of Civil Procedure.

Words "other than said corporation," after "same defendants," were omitted as superfluous. Obviously a corporation would not be suing itself.

Changes were made in phraseology.

### Cross References

Citizenship of corporations for purposes of diversity of citizenship and removability of actions, see section 1332 of this title.

Process in stockholder's derivative action, see section 1695 of this title.

### § 1402. United States as defendant

(a) Any civil action against the United States under subsection (a) of section 1346 of this title may be prosecuted only:

(1) Except as provided in paragraph (2), in the judicial district where the plaintiff resides;

(2) In the case of a civil action by a corporation under paragraph (1) of subsection (a) of section 1346, in the judicial district in which is located the principal place of business or principal office or agency of the corporation; or if it has no principal place of business or principal office or agency in any judicial district (A) in the judicial district in which is located the office to which was made the return of the tax in respect of which the claim is made, or (B) if no return was made, in the judicial district in which lies the District of Columbia. Notwithstanding the foregoing provisions of this paragraph a district court, for the convenience of the parties and witnesses, in the interest of justice, may transfer any such action to any other district or division.

(b) Any civil action on a tort claim against the United States under subsection (b) of section 1346 of this title may be prosecuted only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred.

(c) Any civil action against the United States under subsection (e) of section 1346 of this title may be prosecuted only in the judicial district where the property is situated at the time of levy, or if no levy is made, in the judicial district in which the event occurred which gave rise to the cause of action.

(d) Any civil action under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States shall be brought in the district court of the district where the property is located or, if located in different districts, in any of such districts.

(June 25, 1948, ch. 646, 62 Stat. 937; Sept. 2, 1958, Pub. L. 85-920, 72 Stat. 1770; Nov. 2, 1966, Pub. L. 89-719, title II, § 202(b), 80 Stat. 1149; Oct. 25, 1972, Pub. L. 92-562, § 2, 86 Stat. 1176.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§ 762, 931(a) (Mar. 3, 1887, ch. 359, § 5, 24 Stat. 506; Aug. 2, 1946, ch. 753, § 410(a), 60 Stat. 843).

Section consolidates the venue provisions of section 762 of title 28, U.S.C., 1940 ed., with the venue provisions of section 931(a) of such title, the latter provisions relating to tort claims cases. The jurisdictional provisions of such section 931(a) are incorporated in section 1346(b) of this title. For other provisions thereof, see Distribution Table.

Provisions of section 762 of title 28, U.S.C., 1940 ed., relating to the verification and contents of a petition filed against the United States were omitted as unnecessary. Section 265 of title 28, U.S.C., 1940 ed., relative to the petition in cases filed in the Court of Claims was also omitted from the revised title. (See, also, Rule 11 of the Federal Rules of Civil Procedure.)

Words "civil action" were substituted for "suit" in view of Rule 2 of the Federal Rules of Civil Procedure.

Changes were made in phraseology.

#### AMENDMENTS

1972—Subsec. (d). Pub. L. 92-562 added subsec. (d).

1966—Subsec. (c). Pub. L. 89-719 added subsec. (c).

1958—Subsec. (a). Pub. L. 85-920 provided for venue and change of venue in tax refund suits by corporation.

#### EFFECTIVE DATE OF 1966 AMENDMENT

Subsec. (c) of this section applicable after Nov. 2, 1966, see section 203 of Pub. L. 89-719, set out as an Effective Date of 1966 Amendment note under section 1346 of this title.

#### CROSS REFERENCES

Actions on war risk insurance claims, see section 1292 of Title 46, Shipping.

Jurisdiction and legal remedy for unauthorized use or disclosure of patents and technical information, see section 2356 of Title 22, Foreign Relations and Intercourse.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 26 section 7429.

### § 1403. Eminent domain

Proceedings to condemn real estate for the use of the United States or its departments or agencies shall be brought in the district court of the district where the land is located or, if located in different districts in the same State, in any of such districts.

(June 25, 1948, ch. 646, 62 Stat. 937.)

#### HISTORICAL AND REVISION NOTES

Based on section 257 of title 40, U.S.C., 1940 ed., Public Buildings, Property, and Works (Aug. 1, 1888, ch. 728, § 1, 25 Stat. 357; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167).

Section constitutes the first clause of the second sentence of section 257, of title 40, U.S.C., 1940 ed. The revised section is expressive of the purpose of such section 257 with necessary changes in phraseology.

The jurisdiction provision of section 257 of title 40, U.S.C., 1940 ed., is incorporated in section 1358 of this title.

The remainder of section 257 of title 40, U.S.C., 1940 ed., is retained in said title 40.

Provision with respect to property in different districts was added to conform with section 1392 of this title.

See, also, section 1392 of this title which fixes venue of an action involving property in different districts in the same State.

#### CROSS REFERENCES

Jurisdiction of district courts in eminent domain proceedings, see section 1358 of this title.

Venue of action involving property in different districts in same state, see section 1392 of this title.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 42 section 2222; title 50 section 167f.

### § 1404. Change of venue

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

(b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any

**other division in the same district. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer.**

**(c) A district court may order any civil action to be tried at any place within the division in which it is pending.**

**(d) As used in this section, "district court" includes the United States District Court for the District of the Canal Zone; and "district" includes the territorial jurisdiction of that court.**

(June 25, 1948, ch. 646, 62 Stat. 937; Oct. 18, 1962, Pub. L. 87-845, § 9, 76A Stat. 699.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., §§ 119, 163 (Mar. 3, 1911, ch. 231, § 58, 36 Stat. 1103; Sept. 8, 1916, ch. 475, § 5, 39 Stat. 851).

Section consolidates sections 119 and 163 of title 28, U.S.C., 1940 ed., with necessary changes in phraseology and substance.

Section 119 of title 28, U.S.C., 1940 ed., related only to transfer of cases from one division to another on stipulation of the parties.

Subsection (a) was drafted in accordance with the doctrine of forum non conveniens, permitting transfer to a more convenient forum, even though the venue is proper. As an example of the need of such a provision, see *Baltimore & Ohio R. Co.* v. *Kepner*, 1941, 62 S.Ct. 6, 314 U.S. 44, 86 L.Ed. 28, which was prosecuted under the Federal Employer's Liability Act in New York, although the accident occurred and the employee resided in Ohio. The new subsection requires the court to determine that the transfer is necessary for convenience of the parties and witnesses, and further, that it is in the interest of justice to do so.

Sections 143, 172, 177, and 181 of title 28, U.S.C., 1940 ed., relating to the district courts of Arizona, Montana, New Mexico, and Ohio, contained special provisions similar to subsection (b), applicable to those States. To establish uniformity, the general language of such subsection has been drafted and the special provisions of those sections omitted.

Subsection (b) is based upon section 163 of title 28, U.S.C., 1940 ed., which applied only to the district of Maine. This revised subsection extends to all judicial districts and permits transfer of cases between divisions. Criminal cases may be transferred pursuant to Rules 19-21 of the new Federal Rules of Criminal Procedure, and the criminal provisions of said section 163 are therefore omitted.

### Amendments

1962—Subsec. (d). Pub. L. 87-845 added subsec. (d).

### Effective Date of 1962 Amendment

Amendment by Pub. L. 87-845 effective Jan. 2, 1963, see section 25 of Pub. L. 87-845, set out as an Effective Date of 1962 Amendment note under section 14 of Title 18, Crimes and Criminal Procedure.

### Cross References

Equal employment opportunity provisions, judicial district of principal office as district in which action might have been brought, see section 2000e-5(f) of Title 42, The Public Health and Welfare.

### Federal Rules of Criminal Procedure

Venue and transfer of criminal prosecutions, see rule 18 et seq., Title 18, Appendix, Crimes and Criminal Procedure.

### Section Referred to in Other Sections

This section is referred to in section 1407 of this title; title 42 section 2000e-5.

## § 1405. Creation or alteration of district or division

**Actions or proceedings pending at the time of the creation of a new district or division or transfer of a county or territory from one division or district to another may be tried in the district or division as it existed at the institution of the action or proceeding, or in the district or division so created or to which the county or territory is so transferred as the parties shall agree or the court direct.**

(June 25, 1948, ch. 646, 62 Stat. 937.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 121 (Mar. 3, 1911, ch. 231, § 59, 36 Stat. 1103).

Enforcement of liens in like circumstances is provided by section 1656 of this title.

Remainder of section 121 of title 28, U.S.C., 1940 ed., is incorporated in section 3240 of revised title 18, Crimes and Criminal Procedure (H.R. 1600, 80th Cong.).

Changes were made in phraseology.

## § 1406. Cure or waiver of defects

**(a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.**

**(b) Nothing in this chapter shall impair the jurisdiction of a district court of any matter involving a party who does not interpose timely and sufficient objection to the venue.**

**(c) If a case within the exclusive jurisdiction of the Court of Claims is filed in a district court, the district court shall, if it be in the interest of justice, transfer such case to the Court of Claims, where the case shall proceed as if it had been filed in the Court of Claims on the date it was filed in the district court.**

**(d) As used in this section, "district court" includes the United States District Court for the District of the Canal Zone; and "district" includes the territorial jurisdiction of that court.**

(June 25, 1948, ch. 646, 62 Stat. 937; May 24, 1949, ch. 139, § 81, 63 Stat. 101; Sept. 13, 1960, Pub. L. 86-770, § 1, 74 Stat. 912; Oct. 18, 1962, Pub. L. 87-845, § 10, 76A Stat. 699.)

### Historical and Revision Notes

#### 1948 Act

Subsection (a) provides statutory sanction for transfer instead of dismissal, where venue is improperly laid.

Subsection (b) is declaratory of existing law. (See *Panama R.R. Co.* v. *Johnson*, 1924, 44 S.Ct. 391, 264 U.S. 375, 68 L.Ed. 748.) It makes clear the intent of Congress that venue provisions are not jurisdictional but may be waived.

#### 1949 Act

This section removes an ambiguity in section 1406(a) of title 28, U.S.C., by substituting "may" for "shall", thus making it clear that the court may decline to transfer a case brought in the wrong district under circumstances where it would not be in the interest of justice to make such transfer.

### Amendments

1962—Subsec. (d). Pub. L. 87-845 added subsec. (d).

1960—Subsec. (c). Pub. L. 86-770 added subsec. (c).

1949—Subsec. (a). Act May 24, 1949, inserted "dismiss, or if it be in the interest of justice".

### Effective Date of 1962 Amendment

Amendment by Pub. L. 87-845 effective Jan. 2, 1962, see section 25 of Pub. L. 87-845, set out as an Effective Date of 1962 Amendment note under section 14 of Title 18, Crimes and Criminal Procedure.

### Effective Date of 1960 Amendment

Section 4 of Pub. L. 86-770 provided in part that: "The amendments made by sections 1 and 2 of this Act [adding subsec. (c) of this section and section 1506 of this title] shall apply to any case or proceeding pending on, or brought after, the date of enactment of this Act [Sept. 13, 1960] in the district courts or the Court of Claims."

### Cross References

Equal employment opportunity provisions, judicial district of principal office as district in which action might have been brought, see section 2000e-5(f) of Title 42, The Public Health and Welfare.

Transfer of cases from Court of Claims to district courts, see section 1506 of this title.

### Section Referred to in Other Sections

This section is referred to in title 42 section 2000e-5.

## § 1407. Multidistrict litigation

(a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: *Provided, however,* That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

(b) Such coordinated or consolidated pretrial proceedings shall be conducted by a judge or judges to whom such actions are assigned by the judicial panel on multidistrict litigation. For this purpose, upon request of the panel, a circuit judge or a district judge may be designated and assigned temporarily for service in the transferee district by the Chief Justice of the United States or the chief judge of the circuit, as may be required, in accordance with the provisions of chapter 13 of this title. With the consent of the transferee district court, such actions may be assigned by the panel to a judge or judges of such district. The judge or judges to whom such actions are assigned, the members of the judicial panel on multidistrict litigation, and other circuit and district judges designated when needed by the panel may exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings.

(c) Proceedings for the transfer of an action under this section may be initiated by—

(i) the judicial panel on multidistrict litigation upon its own initiative, or

(ii) motion filed with the panel by a party in any action in which transfer for coordinated or consolidated pretrial proceedings under this section may be appropriate. A copy of such motion shall be filed in the district court in which the moving party's action is pending.

The panel shall give notice to the parties in all actions in which transfers for coordinated or consolidated pretrial proceedings are contemplated, and such notice shall specify the time and place of any hearing to determine whether such transfer shall be made. Orders of the panel to set a hearing and other orders of the panel issued prior to the order either directing or denying transfer shall be filed in the office of the clerk of the district court in which a transfer hearing is to be or has been held. The panel's order of transfer shall be based upon a record of such hearing at which material evidence may be offered by any party to an action pending in any district that would be affected by the proceedings under this section, and shall be supported by findings of fact and conclusions of law based upon such record. Orders of transfer and such other orders as the panel may make thereafter shall be filed in the office of the clerk of the district court of the transferee district and shall be effective when thus filed. The clerk of the transferee district court shall forthwith transmit a certified copy of the panel's order to transfer to the clerk of the district court from which the action is being transferred. An order denying transfer shall be filed in each district wherein there is a case pending in which the motion for transfer has been made.

(d) The judicial panel on multidistrict litigation shall consist of seven circuit and district judges designated from time to time by the Chief Justice of the United States, no two of whom shall be from the same circuit. The concurrence of four members shall be necessary to any action by the panel.

(e) No proceedings for review of any order of the panel may be permitted except by extraordinary writ pursuant to the provisions of title 28, section 1651, United States Code. Petitions for an extraordinary writ to review an order of the panel to set a transfer hearing and other orders of the panel issued prior to the order either directing or denying transfer shall be filed only in the court of appeals having jurisdiction over the district in which a hearing is to be or has been held. Petitions for an extraordinary writ to review an order to transfer or orders subsequent to transfer shall be filed only in the court of appeals having jurisdiction over the transferee district. There shall be no appeal or review of an order of the panel denying a motion to transfer for consolidated or coordinated proceedings.

(f) The panel may prescribe rules for the conduct of its business not inconsistent with Acts of Congress and the Federal Rules of Civil Procedure.

(g) Nothing in this section shall apply to any action in which the United States is a complainant arising under the antitrust laws. "Antitrust laws" as used herein include those acts referred to in the Act of October 15, 1914, as amended (38 Stat. 730; 15 U.S.C. 12), and also include the Act of June 19, 1936 (49 Stat. 1526; 15 U.S.C. 13, 13a, and 13b) and the Act of September 26, 1914, as added March 21, 1938 (52 Stat. 116, 117;

15 U.S.C. 56); but shall not include section 4A of the Act of October 15, 1914, as added July 7, 1955 (69 Stat. 282; 15 U.S.C. 15a).

(h) Notwithstanding the provisions of section 1404 or subsection (f) of this section, the judicial panel on multidistrict litigation may consolidate and transfer with or without the consent of the parties, for both pretrial purposes and for trial, any action brought under section 4C of the Clayton Act.

(Added Pub. L. 90-296, § 1, Apr. 29, 1968, 82 Stat. 109, and amended Pub. L. 94-435, title III, § 303, Sept. 30, 1976, 90 Stat. 1396.)

### REFERENCES IN TEXT

Section 4C of the Clayton Act, referred to in subsec. (h), is section 4C of act Oct. 15, 1914, ch. 323, as added by Pub. L. 94-435, title III, § 301, Sept. 30, 1976, 90 Stat. 1394, which is classified to section 15c of Title 15, Commerce and Trade.

### AMENDMENTS

1976—Pub. L. 94-435 added subsec. (h).

### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 15 section 78u; title 45 section 719.

## RULES OF PROCEDURE OF THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

EFFECTIVE FEBRUARY 14, 1975

As amended to January 1, 1977

Rule

1. Definitions.
2. Place of Keeping Records and Files.
3. Admission to Practice Before the Panel and Representation in Transferred Actions.
4. Place and Manner of Filing Papers.
5. Service of Papers Filed.
6. Form of Papers Filed.
7. Motion Practice.
8. Show Cause Orders.
9. Conditional Transfer Orders for "Tag-Along Actions".
10. Miscellaneous Provisions Concerning "Tag-Along Actions".
11. Termination and Remand.
12. Application for Extensions of Time.
13. Hearings.
14. Matters Submitted on the Brief.
15. Failure to Comply with Rules.
16. Effect of the Pendency of an Action Before the Panel.
17. Transfer of Files.
18. Practice.

### Rule 1. Definitions

As used in these Rules "Panel" means all available but not less than four members of the Judicial Panel on Multidistrict Litigation appointed by the Chief Justice of the United States pursuant to Section 1407, Title 28, United States Code.

"Clerk" means the official appointed by the Panel to act as Clerk of the Panel and shall include those deputized by the Clerk to perform or assist in the performance of the duties of the Clerk of the Panel.

"Chairman" means the Chairman of the Judicial Panel on Multidistrict-Litigation appointed by the Chief Justice of the United States pursuant to Section 1407, or the member of the Panel designated by the Panel to act as Chairman in the absence or inability of the appointed Chairman.

A "tag-along action" refers to a civil action apparently sharing common questions of fact with actions previously transferred under Section 1407.

### Rule 2. Place of Keeping Records and Files

The records and files of the Panel shall be kept by the Clerk of the Panel at the offices of the Panel. Records and files may be temporarily or permanently removed to such places at such times as the Panel or the Chairman of the Panel shall direct. The Clerk of the Panel may release records or files for a limited time for the purpose of duplicating.

### Rule 3. Admission To Practice Before the Panel and Representation in Transferred Actions

Every member in good standing of the Bar of any district court of the United States is entitled without condition to practice before the Judicial Panel on Multidistrict Litigation. Any attorney of record in any action transferred under Section 1407 may continue to represent his client in any district court of the United States to which such action is transferred. Parties to any action transferred under Section 1407 are not required to obtain local counsel in the district to which such action is transferred.

### Rule 4. Place and Manner of Filing of Papers

(a) All papers filed for consideration by the Panel shall be filed with the Clerk of the Panel by mailing or delivering to:

Clerk of the Panel
Judicial Panel on Multidistrict Litigation
1030 15th Street, N.W.
320 Executive Building
Washington, D.C. 20005

No papers shall be left with or mailed to a Judge of the Panel or his chambers for filing.

(b) An original and ten copies of each paper, other than an application for extension of time, a proof of service or a notice of opposition pursuant to Rules 9 and 11 of these Rules, shall be filed with the Clerk of the Panel. The Clerk of the Panel may require that additional copies also be filed.

(c) When papers are submitted for filing in compliance with the provisions of these Rules, the Clerk of the Panel shall endorse thereon the date of filing.

(d) Copies of motions for transfer of an action or actions pursuant to 28 U.S.C. § 1407 shall be filed in each district court in which an action is pending that will be affected by the motion.

### Rule 5. Service of Papers Filed

(a) All papers filed with the Clerk of the Panel shall be accompanied by proof of service on all other parties in all actions involved in the litigation. Service and proof of service shall be made as provided in Rules 5 and 6 of the Federal Rules of Civil Procedure. The proof of service shall indicate the name and address of each person served and shall indicate the party represented by each. If a party is not represented by counsel, the proof of service shall indicate the name of the party and his last known address. The original proof of service shall be filed with the Clerk of the Panel and copies thereof shall be sent to each person included within the proof of service.

(b) The proof of service pertaining to motions for the transfer of actions pursuant to 28 U.S.C. § 1407 shall certify that copies of the motions have been mailed or otherwise delivered for filing to the clerk of each district court in which an action is pending that will be affected by the motion.

(c) Within ten days of filing of a motion to transfer, an order to show cause or a conditional transfer order, each party or designated attorney shall notify the Clerk of the Panel, in writing, of the name and address of the attorney designated to receive service of all pleadings, notices, orders and other papers relating to practice before the Judicial Panel on Multidistrict Litigation. Only one attorney shall be designated for each party. Any party not represented by counsel will be served by mailing such pleadings to that party's last known address.

(d) In order to facilitate compliance with subsection (a) of this Rule, the Clerk of the Panel will prepare and serve on all counsel and parties not represented by counsel a "Panel Service List" containing the names and addresses of the designated attorneys and the party or parties they represent and the names and addresses of the parties not represented by counsel.

(e) If following transfer of any group of multidistrict litigation, the transferee court appoints liaison counsel, this Rule will be satisfied by serving each party in each affected action and all liaison counsel. Liaison counsel designated by the transferee court will receive copies of all Panel orders concerning their particular litigation and shall be responsible for distribution to the parties for whom he serves as liaison counsel.

### Rule 6. Form of Papers Filed

(a) Averments in any motion seeking action by the Panel shall be made in numbered paragraphs, each of which shall be limited, as far as practicable, to a statement of a single factual averment. Responses to averments in motions shall be made in numbered paragraphs, each of which shall correspond to the number of the paragraph of the motion to which the responsive paragraph is directed. Each responsive paragraph shall admit or deny wholly or in part the averment of the motion, and shall contain the respondent's version of the subject matter when the averment of the motion is not wholly admitted.

(b) Each document filed shall be flat and unfolded, shall be plainly written, typed in double space, printed or prepared by means of a duplicating process, without erasures or interlineations which materially deface it, on opaque, unglazed, white paper approximately 8½ × 11 inches in size, and shall be secured on the left margin. Each document shall bear the identification "MDL Docket No. —" and the appropriate descriptive title of the litigation involved, and on the final page thereof shall contain the name, address and telephone number of the attorney in active charge of the case.

### Rule 7. Motion Practice

All requests for action by the Panel shall be made by written motion. Every motion shall be accompanied by (1) a brief in support thereof in which the background of the litigation and the factual and legal contentions of the movant shall be concisely stated in separate portions of the brief with citation of applicable authorities; and (2) a schedule giving complete captions of each action involved, noting the district court in which each action is pending, the civil action number of each, and the name of the judge assigned each action, if known. Within fifteen days after filing of a motion, all other parties shall file a response thereto. The movant may, within five days after the lapse of the time period for filing responsive briefs, file a single brief in reply to any opposition. Failure of a party to respond to a motion shall be deemed as that party's acquiescence to the action requested in the motion. Motions, responses, and replies shall also be governed by Rules 4, 5 and 6 of these Rules.

### Rule 8. Show Cause Orders

When transfer of multidistrict litigation is being considered on the initiative of the Panel pursuant to 28 U.S.C. § 1407(c)(i), an order will be filed by the Clerk of the Panel directing the parties to show cause why the action or actions should not be transferred for coordinated or consolidated pretrial proceedings. Any party may file a response to the show cause order within fifteen days of the filing of said order unless otherwise provided for in the order. Within five days after the lapse of the time period for filing a response, any party may file a reply limited to new matters. Responses and replies shall be filed and served in conformity with Rules 4, 5, 6, and 7 of these Rules.

### Rule 9. Conditional Transfer Orders for "Tag-Along Actions"

(a) Upon learning of the pendency of a "tag-along action," an order may be entered by the Clerk of the Panel transferring that "tag-along action" to the previously designated transferee court on the basis of the prior hearing or hearings and for the reasons expressed in previous opinions and orders of the Panel in the litigation. The Clerk of the Panel shall serve this order on each party to the litigation but, in order to afford all parties the opportunity to oppose transfer, shall not send the order to the clerk of the transferee court for fifteen days from the entry thereof.

(b) Any party opposing the transfer shall file a Notice of Opposition with the Clerk of the Panel within the fifteen-day period. If a Notice of Opposition is received by the Clerk of the Panel within this fifteen-day period, the Clerk of the Panel shall not transmit said order to the clerk of the transferee court until further order of the Panel.

(c) Within fifteen days of the filing of its Notice of Opposition, the party opposing transfer shall file a motion to vacate the conditional transfer order and brief in support thereof. The Clerk of the Panel shall set the motion for hearing at the next appropriate session of the Panel. Failure to file and serve a motion and brief shall be deemed withdrawal of the opposition and the Clerk of the Panel shall forthwith transmit the order of the clerk of the transferee court.

(d) Conditional transfer orders do not become effective unless and until they are filed with the clerk of the transferee court.

(e) Notices of opposition and motions to vacate orders of the Panel and responses thereto shall be governed by Rules 4, 5, 6 and 7 of these Rules.

### Rule 10. Miscellaneous Provisions Concerning "Tag-Along Actions"

(a) "Tag-along actions" filed in the transferee district require no action on the part of the Panel and requests for assignment of such actions to the Section 1407 transferee judge should be made in accordance with local rules for the assignment of related actions.

(b) Upon learning of the pendency of a "tag-along action" and having reasonable anticipation of opposition to transfer of that action, the Panel may direct the Clerk of the Panel to file a show cause order, in accordance with Rule 8 of these Rules, instead of a conditional transfer order.

(c) Failure to serve one or more of the defendants in a "tag-along action" with the complaint and summons as required by Rule 4 of the Federal Rules of Civil Procedure does not preclude transfer of such actions under Section 1407. Such failure, however, may be submitted by such a defendant as a basis for opposing the proposed transfer. The inability of the Clerk of the Panel to serve a conditional transfer order on all defendants or their counsel shall not render the transfer of the action void but can be submitted by such a defendant as a basis for moving to remand as to such defendant.

(d) A civil action apparently sharing common questions of fact with actions under consideration by the Panel for transfer under Section 1407, which was filed or came to the attention of the Panel either after the initial hearing before it or too late to be included in the initial hearing, will be treated by the Panel as a potential "tag-along action."

### Rule 11. Termination and Remand

In the absence of unusual circumstances—

(a) Actions terminated in the transferee court by valid judgment, including but not limited to summary judgment, judgment of dismissal and judgment upon stipulation, shall not be remanded by the Panel and shall be dismissed by the transferee court. The clerk of the transferee court shall send a copy of the order terminating the action to the Clerk of the Panel and to the clerk of the transferor court but shall retain the original files and records unless otherwise directed by the transferee judge or by the Panel.

(b) Each transferred action that has not been terminated in the transferee court will be remanded by the Panel to the transferor district for trial, unless ordered transferred by the transferee judge to the transferee or other district under 28 U.S.C. § 1404(a) or 28 U.S.C. § 1406. In the event that the transferee judge transfers an action under 28 U.S.C. §§ 1404(a) or 1406, no further action of the Panel shall be necessary to authorize further proceedings including trial.

(c) The Panel shall consider remand of each transferred action or any separable claim, cross-claim or third-party claim at or before the conclusion of coordinated or consolidated pretrial proceedings on

(i) motion of any party,

(ii) suggestion of the transferee court, or

(iii) its own initiative, by entry of an order to show cause, a conditional remand order or other appropriate order.

(d) If remand is sought by motion of a party, the motion shall be accompanied by:

(i) an affidavit reciting that all common discovery and other pretrial proceedings have been completed in the action sought to be remanded and that all orders of the transferee court have been satisfactorily complied with or that remand is otherwise appropriate; and

(ii) a copy of the transferee court's final pretrial order, where such order has been entered.

Motions to remand and responses thereto shall be governed by Rules 4, 5, 6, and 7 of these Rules.

(e) When an order to show cause why an action or actions should not be remanded is entered pursuant to subsection (c), paragraph (iii) of this Rule, any party may file a response within fifteen days of the filing of said order unless otherwise provided for in the order. Within five days of filing of a party's response, any party may file a reply brief limited to new matters. Responses and replies shall be filed and served in conformity with Rules 4, 5, 6, and 7 of these Rules.

(f) Conditional Remand Orders

(i) When the Panel has been advised by the transferee judge that pretrial proceedings in the litigation assigned to him are concluded or that remand of an action or actions is otherwise appropriate, an order may be entered by the Clerk of the Panel remanding the action or actions to the transferor court. The Clerk of the Panel shall serve this order on each party to the litigation but, in order to afford all parties the opportunity to oppose remand, shall not send the order to the clerk of the transferee court for fifteen days from the entry thereof.

(ii) Any party opposing the remand shall file a Notice of Opposition with the Clerk of the Panel within the fifteen-day period. If a Notice of Opposition is received by the Clerk of the Panel within this fifteen-day period, the Clerk of the Panel shall not transmit said order to the clerk of the transferee court until further order of the Panel.

(iii) Within fifteen days of the filing of its Notice of Opposition, the party opposing remand shall file a motion to vacate the conditional remand order and brief in support thereof. The Clerk of the Panel shall set the motion for hearing at the next appropriate session of the Panel. Failure to file and serve a motion and brief shall be deemed a withdrawal of the opposition and the Clerk of the Panel shall forthwith transmit the order to the clerk of the transferee court.

(iv) Conditional remand orders do not become effective unless and until they are filed with the clerk of the transferee court.

(v) Notices of opposition and motions to vacate such orders of the Panel and responses thereto shall be governed by Rules 4, 5, 6, and 7 of these Rules.

(g) Upon receipt of an order to remand from the Clerk of the Panel, the parties shall furnish forthwith to the transferee clerk a stipulation or designation of the contents of the record or part thereof to be remanded and furnish the transferee clerk all necessary copies of any pleading or other matter filed so as to enable the transferee clerk to comply with the order of remand.

### Rule 12. Applications for Extensions of Time

Any application for an extension of time to file a pleading or perform an act required by these Rules may be acted upon by the Clerk of the Panel. Any party aggrieved by the Clerk's action on such application may submit its objections to the Panel for consideration.

### Rule 13. Hearings

(a) Hearings shall be held as ordered by the Panel. The Panel shall convene whenever and wherever desirable or necessary in the judgment of the Chairman. The Chairman shall determine which matters shall be set for hearing at each session and the Clerk of the Panel shall give notice to counsel for all parties involved in the litigation of the time, place, and subject matter of such hearing.

(b) No action shall be ordered transferred or remanded by the Panel over the objection of any party unless a hearing has been held or unless the matter has been submitted on the briefs in accordance with Rule 14 of these Rules. Unless otherwise ordered by the Panel, all other requests for action by the Panel shall be considered and determined upon the basis of the papers filed.

(c) Except for leave of the Panel on a showing of good cause, only those parties who have filed a motion or written response to a motion or order shall be permitted to appear before the Panel and present argument.

(d) Counsel for those supporting transfer or remand under Section 1407 and counsel for those opposing such transfer or remand are to confer separately prior to the hearing for the purpose of organizing their arguments and selecting spokesmen to present all views without duplication.

(e) Unless otherwise ordered by the Panel, a maximum of one hour will be alloted for argument in each new group of actions being considered for Section 1407 treatment and a maximum of one-half hour will be alloted for arguments in all other matters. The time shall be divided equally among those with varying viewpoints. Counsel for the moving party or parties will generally be heard first.

(f) So far as practicable and consistent with the purposes of Section 1407 the offering of oral testimony before the Panel shall be avoided. Accordingly, oral testimony shall not be received except upon notice motion and order of the Panel expressly providing for it. Proof may be submitted as provided in the Federal Rules of Civil Procedure.

(g) After an action or group of actions has been set for hearing, it may only be continued by order of the Panel on good cause shown.

### Rule 14. Matters Submitted on the Briefs

When the Panel has set a matter for hearing and a party intends to waive oral argument, it must communicate this fact, in writing, to the Clerk of the Panel in advance of the date of hearing. If all parties to the matter to be heard decide to waive oral argument, the matter will be submitted for decision by the Panel on the basis of the papers filed. Likewise, if a matter is scheduled to be heard and none of the parties is present when the matter is called at the hearing, the matter will not be rescheduled and will be deemed submitted for decision by the Panel on the basis of the papers filed, unless otherwise ordered by the Panel.

### Rule 15. Failure to Comply With Rules

The Clerk of the Panel may, when a paper submitted for filing is not in compliance with the provisions of these Rules, refuse to file such paper until full compliance is accomplished.

### Rule 16. Effect of the Pendency of an Action Before the Panel

The pendency of a motion or order to show cause before the Panel concerning transfer of an action pursuant to 28 U.S.C. § 1407 does not affect or suspend orders and pretrial proceedings in the district court in which the action is pending and does not in any way limit the pretrial jurisdiction of that court. A transfer shall be effective when the transfer order is filed in the office of the clerk of the district court of the transferee district.

### Rule 17. Transfer of Files

(a) Upon receipt of a certified copy of a transfer order from the clerk of the transferee court, the clerk of the transferor court shall forward to the clerk of the transferee court the complete original file and a certified copy of the docket sheet for each transferred action.

(b) If an appeal is pending, or a notice of appeal has been filed, or leave to appeal has been sought under 28 U.S.C. § 1292(b) or a petition for an extraordinary writ is pending, in any action included in an order of transfer, and the original file or parts thereof have been forwarded to the court of appeals, the clerk of the transferor court shall notify the clerk of the court of appeals of the order of transfer and secure the original file long enough to prepare and transmit to the clerk of the transferee court a certified copy of all papers contained in the original file and a certified copy of the docket sheet.

(c) If the transfer order provides for the separation and simultaneous remand of any claim, cross-claim, counterclaim, or third-party claim, the clerk of the transferor court shall retain the original file and shall prepare and transmit to the clerk of the transferee court a certified copy of the docket sheet and copies of all papers except those relating exclusively to separated and remanded claims.

(d) Upon receipt of an order to remand from the Clerk of the Panel, the transferee court shall prepare and send to the clerk of the transferor court the following:

(i) a certified copy of the individual docket sheet for each action being remanded;

(ii) a certified copy of the master docket sheet, if applicable;

(iii) the entire file for each action being remanded;

(iv) a certified copy of the final pretrial order, if applicable; and

(v) a "record on remand" to be composed of those parts of the files and records produced during coordinated or consolidated pretrial proceedings which have been stipulated to or designated by counsel as being necessary for any or all proceedings to be conducted following remand. It shall be the responsibility of counsel originally preparing or filing any document to be included in the "record on remand" to furnish on request sufficient copies to the clerk of the transferee court.

(e) The Clerk of the Panel shall be notified when any files have been transmitted pursuant to this Rule.

### Rule 18. Practice

Where not fixed by statute or rule, the practice shall be that heretofore customarily followed by the Panel.

## CHAPTER 89—DISTRICT COURTS; REMOVAL OF CASES FROM STATE COURTS

Sec.
1441. Actions removable generally.
1442. Federal officers sued or prosecuted.
1442a. Members of armed forces sued or prosecuted.
1443. Civil rights cases.
1444. Foreclosure action against United States.
1445. Nonremovable actions.
1446. Procedure for removal.
1447. Procedure after removal generally.
1448. Process after removal.
1449. State court record supplied.
1450. Attachment or sequestration; securities.
1451. Definitions.

#### Amendments

1970—Pub. L. 91-358, title I, § 172(d)(2), July 29, 1970, 84 Stat. 591, added item 1451.

1958—Pub. L. 85-554, § 5(b), July 25, 1958, 72 Stat. 416, substituted "Nonremovable actions" for "Carriers; non-removable actions" in item 1445.

1956—Act Aug. 10, 1956, ch. 1041, § 19(b), 70A Stat. 627, inserted item 1442a.

#### Cross References

Puerto Rico, removal of causes to United States District Court of Puerto Rico, see section 864 of Title 48, Territories and Insular Possessions.

#### Chapter Referred to in Other Section

This chapter is referred to in title 15 section 766; title 39 section 409.

#### Chapter Referred to in D.C. Code

This chapter is referred to section 11-503 of the District of Columbia Code.

### § 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(June 25, 1948, ch. 646, 62 Stat. 937; Oct. 21, 1976, Pub. L. 94-583, § 6, 90 Stat. 2898.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., §§ 71, 114 (Mar. 3, 1911, ch. 231, §§ 28, 53, 36 Stat. 1094, 1101; Jan. 20, 1914, ch. 11, 38 Stat. 278; Jan. 31, 1928, ch. 14, § 1, 45 Stat. 54).

Section consolidates removal provisions of sections 71 and 114 of title 28, U.S.C., 1940 ed., and is intended to resolve ambiguities and conflicts of decisions.

Phrases such as "in suits of a civil nature, at law or in equity," the words "case," "cause," "suit," and the like have been omitted and the words "civil action" substituted in harmony with Rules 2 and 81(c) of the Federal Rules of Civil Procedure.

Ambiguous phrases such as "the District Court of the United States for the proper district" have been clarified by the substitution of the phrase "the district and division embracing the place where such action is pending." (See *General Investment Co.* v. *Lake Shore & M.S. Ry. Co.*, 1922, 43 S.Ct. 107, 112, 260 U.S. 261, 67 L.Ed. 244 and cases cited therein.)

All the provisions with reference to removal of controversies between citizens of different States because of inability, from prejudice or local influence, to obtain justice, have been discarded. These provisions, born of the bitter sectional feelings engendered by the Civil War and the Reconstruction period, have no place in the jurisprudence of a nation since united by three wars against foreign powers. Indeed, the practice of removal for prejudice or local influence has not been employed much in recent years.

Subsection (c) has been substituted for the provision in section 71 of title 28, U.S.C., 1940 ed., "and when in any suit mentioned in this section, there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the district court of the United States."

This quoted language has occasioned much confusion. The courts have attempted to distinguish between separate and separable controversies, a distinction which is sound in theory but illusory in substance. (See 41 Harv. L. Rev. 1048; 35 Ill. L. Rev. 576.)

Subsection (c) permits the removal of a separate cause of action but not of a separable controversy unless it constitutes a separate and independent claim or cause of action within the original jurisdiction of United States District Courts. In this respect it will somewhat decrease the volume of Federal litigation.

Rules 18, 20, and 23 of the Federal Rules of Civil Procedure permit the most liberal joinder of parties, claims, and remedies in civil actions. Therefore there will be no procedural difficulty occasioned by the removal of the entire action. Conversely, if the court so desires, it may remand to the State court all nonremovable matters.

The provisions of section 71 of title 28, U.S.C., 1940 ed., with respect to removal of actions under the Federal Employer's Liability Act (U.S.C., 1940 ed., title 45, Railroads, §§ 51-60) and actions against a carrier for loss, damage, or delay to shipments under section 20 of title 49, U.S.C., 1940 ed., Transportation, are incorporated in section 1445 of this title.

#### AMENDMENTS

1976—Subsec. (d). Pub. L. 94-583 added subsec. (d).

#### EFFECTIVE DATE OF 1976 AMENDMENT

Amendment by Pub. L. 94-583 effective 90 days after Oct. 21, 1976, see section 8 of Pub. L. 94-583, set out as an Effective Date note under section 1602 of this title.

#### CROSS REFERENCES

Asian Development Bank, removal of actions against, see section 285f of Title 22, Foreign Relations and Intercourse.

Citizenship of corporations for purposes of this section, see section 1332 of this title.

Federal Reserve banks and banking transactions, removal of actions involving, see section 632 of Title 12, Banks and Banking.

Inter-American Development Bank, removal of actions against, see section 283f of Title 22, Foreign Relations and Intercourse.

International Finance Corporation, removal of actions against, see section 282f of Title 22.

International Monetary Fund and International Bank for Reconstruction and Development, removal of actions against, see section 286g of Title 22.

International or foreign banking, removal of suits arising out of, see section 632 of Title 12, Banks and Banking.

Securities Act, cases not removable, see section 77v of Title 15, Commerce and Trade.

Stay of State court proceedings, see section 2283 of this title.

#### FEDERAL RULES OF CIVIL PROCEDURE

Application of Rules of Civil Procedure, see rule 81, Appendix to this title.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1332 of this title.

### § 1442. Federal officers sued or prosecuted

**(a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:**

**(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.**

**(2) A property holder whose title is derived from any such officer, where such action or prosecution affects the validity of any law of the United States.**

**(3) Any officer of the courts of the United States, for any act under color of office or in the performance of his duties;**

**(4) Any officer of either House of Congress, for any act in the discharge of his official duty under an order of such House.**

**(b) A personal action commenced in any State court by an alien against any citizen of a State who is, or at the time the alleged action accrued was, a civil officer of the United States and is a nonresident of such State, wherein jurisdiction is obtained by the State court by personal service of process, may be removed by the defendant to the district court of the United States for the district and division in which the defendant was served with process.**

(June 25, 1948, ch. 646, 62 Stat. 938.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§ 76 and 77 (Mar. 3, 1911, ch. 231, §§ 33, 34, 36 Stat. 1097, 1098; Aug. 23, 1916, ch. 399, 39 Stat. 532).

Section consolidates sections 76 and 77 of title 28, U.S.C., 1940 ed.

The revised subsection (a)(1) is extended to apply to all officers and employees of the United States or any agency thereof. Section 76 of title 28, U.S.C., 1940 ed., was limited to revenue officers engaged in the enforcement of the criminal or revenue laws.

The procedural provisions of section 76 of title 28, U.S.C., 1940 ed., are incorporated in sections 1446 and 1447 of this title. (See reviser's notes under those sections.)

Changes were made in phraseology.

#### CROSS REFERENCES

Senate or House, suits against officers of, removal provisions applicable, see section 118 of Title 2, The Congress.

Stay of State court proceedings, see section 2283 of this title.

#### FEDERAL RULES OF CIVIL PROCEDURE

Application of Rules of Civil Procedure to removed actions, see rule 81, Appendix to this title.

Continuation of section under rule 81, see note by Advisory Committee under rule 81.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 12 section 1452.

### § 1442a. Members of armed forces sued or prosecuted

**A civil or criminal prosecution in a court of a State of the United States against a member of the armed forces of the United States on account of an act done under color of his office or status, or in respect to which he claims any right, title, or authority under a law of the United States respecting the armed forces thereof, or under the law of war, may at any time before the trial or final hearing thereof be**

removed for trial into the district court of the United States for the district where it is pending in the manner prescribed by law, and it shall thereupon be entered on the docket of the district court, which shall proceed as if the cause had been originally commenced therein and shall have full power to hear and determine the cause.

(Added Aug. 10, 1956, ch. 1041, § 19(a), 70A Stat. 626.)

### Derivation

Section was from the Uniform Code of Military Justice, act May 5, 1950, ch. 169, § 9, 64 Stat. 146, which was based on Article 117, Articles of War, act June 4, 1920, ch. 227, subch. II, § 1, 41 Stat. 811, as amended June 24, 1948, ch. 625, title II, § 242, 62 Stat. 642.

## § 1443. Civil rights cases

Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.

(June 25, 1948, ch. 646, 62 Stat. 938.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 74 (Mar. 3, 1911, ch. 231, § 31, 36 Stat. 1096).

Other provisions of section 74 of title 28, U.S.C., 1940 ed., are incorporated in sections 1446 and 1447 of this title.

Words "or in the part of the State where such suit or prosecution is pending" after "courts of such States," were omitted as unnecessary.

Changes were made in phraseology.

### Cross References

Stay of State court proceedings, see section 2283 of this title.

### Federal Rules of Civil Procedure

Application of rules, see rule 81, Appendix to this title.

Continuation of section under rule 81, see note by Advisory Committee under rule 81.

### Section Referred to in Other Sections

This section is referred to in section 1447 of this title.

## § 1444. Foreclosure action against United States

Any action brought under section 2410 of this title against the United States in any State court may be removed by the United States to the district court of the United States for the district and division in which the action is pending.

(June 25, 1948, ch. 646, 62 Stat. 938; May 24, 1949, ch. 139, § 82, 63 Stat. 101.)

### Historical and Revision Notes

#### 1948 Act

Based on title 28, U.S.C., 1940 ed., § 903 (Mar. 4, 1931, ch. 515, § 3, 46 Stat. 1529).

The procedural provisions of section 903 of title 28, U.S.C., 1940 ed., were omitted as covered by section 1446 of this title.

Changes were made in phraseology.

#### 1949 Act

This section corrects typographical errors in section 1444 of title 28, U.S.C.

### Amendments

1949—Act May 24, 1949, inserted "court" between "State" and "may", and substituted "division" for "divisions".

### Cross References

Actions affecting property on which United States has a lien, see section 2410 of this title.

Stay of State court proceedings, see section 2283 of this title.

### Section Referred to in Other Sections

This section is referred to in section 2410 of this title; title 26 section 7424.

## § 1445. Nonremovable actions

(a) A civil action in any State court against a railroad or its receivers or trustees, arising under sections 51–60 of Title 45, may not be removed to any district court of the United States.

(b) A civil action in any State court against a common carrier or its receivers or trustees to recover damages for delay, loss, or injury of shipments, arising under section 20 of Title 49, may not be removed to any district court of the United States unless the matter in controversy exceeds $3,000, exclusive of interest and costs.

(c) A civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States.

(June 25, 1948, ch. 646, 62 Stat. 939; July 25, 1958, Pub. L. 85–554, § 5, 72 Stat. 415.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 71 (Mar. 3, 1911, ch. 231, § 28, 36 Stat. 1094; Jan. 20, 1914, ch. 11, 38 Stat. 278; Jan. 31, 1928, ch. 14, § 1, 45 Stat. 54).

The words "or its receivers or trustees" were inserted in both subsections to make clear that nonremovable actions against a carrier do not become removable under section 1442 of this title when filed against court receivers or trustees.

This was the unquestioned rule prior to the act of Aug. 23, 1916, ch. 399, 39 Stat. 532, amending section 76 of title 28, U.S.C., 1940 ed., and permitting removal of actions against officers of United States courts. The cases are in conflict as to whether under that amendment the case becomes removable when the carrier is in receivership or undergoing reorganization. The revised section resolves the conflict by denying the right of removal to receivers and trustees where it would be nonexistent if the carrier were the party defendant. Thus the subject matter rather than legalistic distinctions as to the identity of the parties is made determinative consideration.

A reference in section 71 of title 28, U.S.C., 1940 ed., to sections 51–59 of title 45, U.S.C., 1940 ed., Railroads, was changed to "51–60." Such sections 51–59 embraced all of chapter 2 of said title 45 when the law on which such section 71 is based was enacted, but a new section (60) was added in 1939.

Other provisions of section 71 of title 28, U.S.C., 1940 ed., appear in section 1441 of this title.

Changes were made in phraseology.

### AMENDMENTS

1958—Pub. L. 85-554 substituted "Nonremovable actions" for "Carriers; nonremovable actions" in the catchline, and added subsec. (c).

### EFFECTIVE DATE OF 1958 AMENDMENT

Amendment by Pub. L. 85-554 applicable only in the case of actions commenced after July 25, 1958, see section 3 of Pub. L. 85-554, set out as an Effective Date of 1958 Amendment note under section 1331 of this title.

### CROSS REFERENCES

Reorganization of railroads engaged in interstate commerce as ground for removal, see section 205A of Title 11, Bankruptcy.

Stay of State court proceedings, see section 2283 of this title.

## § 1446. Procedure for removal

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitle him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action.

(b) The petition for removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a petition for removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

(c) The petition for removal of a criminal prosecution may be filed at any time before trial.

(d) Each petition for removal of a civil action or proceeding, except a petition in behalf of the United States, shall be accompanied by a bond with good and sufficient surety conditioned that the defendant or defendants will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.

(e) Promptly after the filing of such petition and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

(f) If the defendant or defendants are in actual custody on process issued by the State court, the district court shall issue its writ of habeas corpus, and the marshal shall thereupon take such defendant or defendants into his custody and deliver a copy of the writ to the clerk of such State court.

(June 25, 1948, ch. 646, 62 Stat. 939; May 24, 1949, ch. 139, § 83, 63 Stat. 101; Sept. 29, 1965, Pub. L. 89-215, 79 Stat. 887.)

### HISTORICAL AND REVISION NOTES

#### 1948 ACT

Based on title 28, U.S.C., 1940 ed., §§ 72, 74, 75, 76 (May 3, 1911, ch. 231, §§ 29, 31, 32, 33, 36 Stat. 1095, 1097; Aug. 23, 1916, ch. 399, 39 Stat. 532).

Section consolidates portions of sections 74, 75, and 76 with section 72 of title 28, U.S.C., 1940 ed., with important changes of substance and phraseology.

Subsection (a), providing for the filing of the removal petition in the district court, is substituted for the requirement of sections 72 and 74 of title 28, U.S.C., 1940 ed., that the petition be filed in the State court. This conforms to the method prescribed by section 76 of title 28, U.S.C., 1940 ed., and to the recommendation of United States District Judges Calvin W. Chesnut and T. Waties Warring approved by the Committee of the Judicial Conference on the Revision of the Judicial Code.

Subsection (b) makes uniform the time for filing petitions to remove all civil actions within twenty days after commencement of action or service of process whichever is later, instead of "at any time before the defendant is required by the laws of the State or the rule of the State court in which such suit is brought to answer or plead" as required by section 72 of title 28, U.S.C., 1940 ed. As thus revised, the section will give adequate time and operate uniformly throughout the Federal jurisdiction. The provisions of sections 74 and 76 of title 28, U.S.C., 1940 ed., for filing at any time "before trial or final hearing" in civil rights cases and cases involving revenue officers, court officers and officers of either House of Congress were omitted.

Subsection (c) embodies the provisions of sections 74 and 76 of title 28, U.S.C., 1940 ed., for filing the removal petition before trial and makes them applicable to all criminal prosecutions but not to civil actions. This provision was retained to protect Federal officers enforcing revenue or criminal laws from being rushed to trial in State courts before petition for removal could be filed. Words "or final hearing" following the words "before trial," were omitted for purposes of clarity and simplification of procedure.

The provision of said section 76 of title 28, U.S.C., 1940 ed., for certificate of counsel that he has examined the proceedings and carefully inquired into all matters set forth in the petition and believes them to be true, was omitted as unnecessary and inconsistent with Rule 11 of the Federal Rules of Civil Procedure.

Subsection (d) is derived from sections 72 and 74 of title 28, U.S.C., 1940 ed., but the requirement for cost bond is limited to civil actions in conformity with the more enlightened trend of modern procedure to remove all unnecessary impediments to the administration of criminal justice. Provisions of said section 72 as to the conditions of the bond were rewritten because inappropriate when the petition for removal is filed in the Federal court.

Subsection (e) provides for notice to the adverse parties and for the filing in the State court of a copy of the petition for removal in substitution for the requirements of sections 72 and 74 of title 28, U.S.C., 1940 ed., for the filing of the removal petition in the State court. The last sentence of subsection (e) is derived from sections 72, 74 and 76 of title 28, U.S.C., 1940 ed.

Subsection (f) is derived from sections 75 and 76 of title 28, U.S.C., 1940 ed.

Since the procedure in removal cases is now governed by the Federal Rules of Civil Procedure [Rule 81(c)] and Federal Rules of Criminal Procedure [Rule 54(b)], the detailed directions of the various sections with respect to such procedure were omitted as unnecessary.

Thus the provision of section 72 of title 28, U.S.C., 1940 ed., with respect to appearance, special bail and filing the record were omitted as covered by the Federal Rules of Civil Procedure, Rules 64, 81(c).

The provisions of section 74 of title 28, U.S.C., 1940 ed., as to the effect of security and other proceedings and remedies in the State court were omitted as covered by section 1450 of this title.

The requirements of section 74 of title 28, U.S.C., 1940 ed., that the clerk of the State court shall furnish copies of pleadings and proceedings to the petitioner and that the petitioner shall file the same in the district court are covered by section 1447 of this title.

The provisions of section 74 of title 28, U.S.C., 1940 ed., requiring the adverse parties to plead anew in the district court were omitted as unnecessary in view of Federal Rules of Civil Procedure, Rule 81(c). The last sentence of such section was omitted as covered by section 1447(d) of this title.

### 1949 ACT

Subsection (b) of section 1446 of title 28, U.S.C., as revised, has been found to create difficulty in those States, such as New York, where suit is commenced by the service of a summons and the plaintiff's initial pleading is not required to be served or filed until later.

The first paragraph of the amendment to subsection (b) corrects this situation by providing that the petition for removal need not be filed until 20 days after the defendant has received a copy of the plaintiff's initial pleading.

This provision, however, without more, would create further difficulty in those States, such as Kentucky, where suit is commenced by the filing of the plaintiff's initial pleading and the issuance and service of a summons without any requirement that a copy of the pleading be served upon or otherwise furnished to the defendant. Accordingly the first paragraph of the amendment provides that in such cases the petition for removal shall be filed within 20 days after the service of the summons.

The first paragraph of the amendment conforms to the amendment of rule 81(c) of the Federal Rules of Civil Procedure, relating to removed actions, adopted by the Supreme Court on December 29, 1948, and reported by the Court to the present session of Congress.

The second paragraph of the amendment to subsection (b) is intended to make clear that the right of removal may be exercised at a later stage of the case if the initial pleading does not state a removable case but its removability is subsequently disclosed. This is declaratory of the existing rule laid down by the decisions. (See for example, *Powers* v. *Chesapeake etc., Ry. Co.*, 169 U.S. 92.)

In addition, this amendment clarifies the intent of section 1446(e) of title 28, U.S.C., to indicate that notice need not be given simultaneously with the filing, but may be given promptly thereafter.

### AMENDMENTS

1965—Subsec. (b). Pub. L. 89-215 substituted "thirty days" for "twenty days" wherever appearing.

1949—Subsec. (b). Act May 24, 1949, § 83(a), provided that the petition for removal need not be filed until 20 days after the defendant has received a copy of the plaintiff's initial pleading, and provided that the petition for removal shall be filed within 20 days after the service of summons.

Subsec. (e). Act May 24, 1949, § 83(b), indicated that notice need not be given simultaneously with the filing, but may be made promptly thereafter.

### CROSS REFERENCES

Stay of State court proceedings, see section 2283 of this title.

### FEDERAL RULES OF CIVIL PROCEDURE

Application of Rules of Civil Procedure, see rule 81, Appendix to this title.

Continuation of section under rule 81, see note by Advisory Committee under rule 81.

### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1441 of this title; title 25 sections 487, 610c, 642, 670.

## § 1447. Procedure after removal generally

**(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.**

**(b) It may require the petitioner to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.**

**(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.**

**(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.**

**(June 25, 1948, ch. 646, 62 Stat. 939; May 24, 1949, ch. 139, § 84, 63 Stat. 102; July 2, 1964, Pub. L. 88-352, title IX, § 901, 78 Stat. 266.)**

### HISTORICAL AND REVISION NOTES

### 1948 ACT

Based on title 28, U.S.C., 1940 ed., §§ 71, 72, 74, 76, 80, 81 and 83 (Mar. 3, 1911, ch. 231, §§ 28, 29, 31, 33, 37 and 38, 36 Stat. 1094-1098; Jan. 20, 1914, ch. 11, 39 Stat. 278; Aug. 23, 1916, ch. 399, 39 Stat. 532; Apr. 16, 1920, ch. 146, 41 Stat. 554; Jan. 31, 1928, ch. 14, § 1, 45 Stat. 54).

Section consolidates procedural provisions of sections 71, 72, 74, 76, 80, 81 and 83 of title 28, U.S.C., 1940 ed., with important changes in substance and phraseology.

Subsection (a) is derived from sections 72, 76, 81 and 83 of title 28, U.S.C., 1940 ed. The remaining provisions of said section 83 are the basis of section 1448 of this title.

Subsection (b) is derived from sections 72, 74, 76 and 83 of title 28, U.S.C., 1940 ed., which have been rewritten to provide the utmost simplicity and flexibility of procedure in bringing the State court record to the district court.

[*Editorial Note.*—Subsecs. (c), (d) and (e) as originally revised and incorporated in this section read as follows:

"(c) It may order the pleadings recast and the parties realigned according to their real interest.

"(d) If any party fails to comply with its lawful orders, the district court may enter such further orders and judgments as justice requires.

"(e) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case."]

Subsections (c) and (d) are substituted for unnecessary and inconsistent procedural provisions.

Subsection (e) [now subsec. (c)] is derived from sections 71 and 80 of title 28, U.S.C., 1940 ed. Such subsection is rewritten to eliminate the cumbersome procedure of remand. Under this chapter as revised, the petition for removal under section 1446 of this chapter will be filed in the Federal court in the first instance and the right of removal determined in that court before the petition is granted.

The provisions in section 80 of title 28, U.S.C., 1940 ed., relating to actions commenced in district courts, as distinguished from actions removed thereto, are incorporated in section 1359 of this title. Other provisions of said section 80 appear in section 1919 of this title.

#### 1949 ACT

This section strikes out subsections (c) and (d) of section 1447 of title 28, U.S.C., as covered by the Federal Rules of Civil Procedure, and adds a new subsection to such section 1447 to remove any doubt that the former law as to the finality of an order of remand to a State court is continued. This section also amends renumbered subsection (c) to remove any doubt that the former law authorizing the district court upon remand to order payment of costs is continued.

#### AMENDMENTS

1964—Subsec. (d). Pub. L. 88-352 added the exception provision.

1949—Subsec. (c). Act May 24, 1949, § 84(a), struck out former subsecs. (c) and (d), renumbered former subsec. (e) to be subsec. (c) and added at end of first sentence of new subsec. (c) "and may order the payment of just costs".

Subsec. (d). Act May 24, 1949, § 84(b) added subsec. (d).

#### EXCEPTION TO SUBSECTION (d)

Act Aug. 4, 1947, ch. 458, § 3(c), 61 Stat. 732, provides in part that the United States shall have the right to appeal from any order of remand entered in any case removed to a United States district court pursuant to the provisions of act Apr. 12, 1926, ch. 115, 44 Stat. 239. These acts referred to herein relate to restrictions on land of the Five Civilized Tribes of Oklahoma and are set out as notes under section 355 of Title 25, Indians.

#### CROSS REFERENCES

Amendment of pleadings to show jurisdiction, see section 1653 of this title.

Parties collusively joined or made, see section 1359 of this title.

Stay of State court proceedings, see section 2283 of this title.

#### FEDERAL RULES OF CIVIL PROCEDURE

Application of Rules, see rule 81, Appendix to this title.

### § 1448. Process after removal

In all cases removed from any State court to any district court of the United States in which any one or more of the defendants has not been served with process or in which the service has not been perfected prior to removal, or in which process served proves to be defective, such process or service may be completed or new process issued in the same manner as in cases originally filed in such district court.

This section shall not deprive any defendant upon whom process is served after removal of his right to move to remand the case.

(June 25, 1948, ch. 646, 62 Stat. 940.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 83 (Apr. 16, 1920, ch. 146, 41 Stat. 554).

Words "district court of the United States" were substituted for "United States Court," because only the district courts now possess jurisdiction over removed civil and criminal cases.

Changes were made in phraseology.

#### CROSS REFERENCES

Power of district court to bring before it proper parties, whether or not served with State court process, see section 1447 of this title.

#### FEDERAL RULES OF CIVIL PROCEDURE

Application of Rules, see rule 81, Appendix to this title.

### § 1449. State court record supplied

Where a party is entitled to copies of the records and proceedings in any suit or prosecution in a State court, to be used in any district court of the United States, and the clerk of such State court, upon demand, and the payment or tender of the legal fees, fails to deliver certified copies, the district court may, on affidavit reciting such facts, direct such record to be supplied by affidavit or otherwise. Thereupon such proceedings, trial, and judgment may be had in such district court, and all such process awarded, as if certified copies had been filed in the district court.

(June 25, 1948, ch. 646, 62 Stat. 940; May 24, 1949, ch. 139, § 85, 63 Stat. 102.)

#### HISTORICAL AND REVISION NOTES

#### 1948 ACT

Based on title 28, U.S.C., 1940 ed., § 78 (Mar. 3, 1911, ch. 231, § 35, 36 Stat. 1098).

Changes were made in phraseology.

#### 1949 ACT

This section corrects a typographical error by eliminating from section 1449 of title 28, U.S.C., the words "any attachment or sequestration of the", which had been inadvertently included, and inserting in lieu thereof the words, "and the clerk of such State court, upon".

#### AMENDMENTS

1949—Act May 24, 1949, substituted "and the clerk of such State court, upon" for "any attachment or sequestration of the".

#### CROSS REFERENCES

Writs of certiorari to State courts, see section 1447 of this title.

#### FEDERAL RULES OF CIVIL PROCEDURE

Continuation of former sections 78 and 82, see note by Advisory Committee under rule 81, Appendix to this title.

### § 1450. Attachment or sequestration; securities

Whenever any action is removed from a State court to a district court of the United States, any attachment or sequestration of the goods or estate of the defendant in such action in the State court shall hold the goods or estate to answer the final judgment or decree in the same manner as they would have been held to answer final judgment or decree had it been rendered by the State court.

**All bonds, undertakings, or security given by either party in such action prior to its removal shall remain valid and effectual notwithstanding such removal.**

**All injunctions, orders, and other proceedings had in such action prior to its removal shall remain in full force and effect until dissolved or modified by the district court.**

**(June 25, 1948, ch. 646, 62 Stat. 940.)**

### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 79 (Mar. 3, 1911, ch. 231, § 36, 36 Stat. 1098).

Changes were made in phraseology.

### FEDERAL RULES OF CIVIL PROCEDURE

Attachment or sequestration in federal court after removal, see rule 64, Appendix to this title.

Continuation of section, see note by Advisory Committee under rule 81.

Jury trial in removal actions, see rule 81.

## § 1451. Definitions

**For purposes of this chapter—**

**(1) The term "State court" includes the Superior Court of the District of Columbia.**

**(2) The term "State" includes the District of Columbia.**

**(Added Pub. L. 91-358, title I, § 172(d)(1), July 29, 1970, 84 Stat. 591.)**

### EFFECTIVE DATE

Section effective the first day of the seventh calendar month which begins after July 29, 1970, see section 199(a) of Pub. L. 91-358, set out as an Effective Date of 1970 Amendment note under section 1257 of this title.

# CHAPTER 91—COURT OF CLAIMS

Sec.
1491. Claims against United States generally; actions involving Tennessee Valley Authority.
1492. Congressional reference cases.
[1493. Repealed.]
1494. Accounts of officers, agents or contractors.
1495. Damages for unjust conviction and imprisonment; claim against United States.
1496. Disbursing officers' claims.
1497. Oyster growers' damages from dredging operations. [1]
1498. Patent and copyright cases.
1499. Penalties imposed against contractors under eight hour law. [1]
1500. Pendency of claims in other courts.
1501. Pensions.
1502. Treaty cases.
1503. Set-offs.
1504. Tort claims.
1505. Indian claims.
1506. Transfer to cure defect of jurisdiction.
1507. Jurisdiction for certain declaratory judgments.

### HISTORICAL AND REVISION NOTES

### 1949 ACT

This section inserts in the analysis of chapter 91 of title 28, U.S.C., item 1505, corresponding to new section 1505.

### AMENDMENTS

1976—Pub. L. 94-455, title XIII, § 1306(b)(9)(B), Oct. 4, 1976, 90 Stat. 1720, added item 1507.

1960—Pub. L. 86-770, § 2(b), Sept. 13, 1960, 74 Stat. 912, added item 1506.

Pub. L. 86-726, § 4, Sept. 8, 1960, 74 Stat. 856, substituted "Patent and copyright cases" for "Patent cases", in item 1498.

1954—Act Sept. 3, 1954, ch. 1263, § 43, 68 Stat. 1241, added "; actions involving Tennessee Valley Authority" to item 1491, and struck out item 1493.

1949—Act May 24, 1949, ch. 139, § 86, 63 Stat. 102, inserted item 1505.

### CROSS REFERENCES

District courts, concurrent jurisdiction of actions or claims not exceeding $10,000, see section 1346 of this title.

Methods of review of cases by Supreme Court, see section 1255 of this title.

Organization of Court of Claims, see section 171 et seq. of this title.

Procedure in Court of Claims, see section 2501 et seq. of this title.

### RULES OF THE UNITED STATES COURT OF CLAIMS

See Appendix to this title.

## § 1491. Claims against United States generally; actions involving Tennessee Valley Authority

**The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States. To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just.**

**Nothing herein shall be construed to give the Court of Claims jurisdiction in suits against, or founded on actions of, the Tennessee Valley Authority, nor to amend or modify the provisions of the Tennessee Valley Authority Act of 1933, as amended, with respect to suits by or against the Authority.**

**(June 25, 1948, ch. 646, 62 Stat. 940; July 28, 1953, ch. 253, § 7, 67 Stat. 226; Sept. 3, 1954, ch. 1263, § 44(a), (b), 68 Stat. 1241; July 23, 1970, Pub. L. 91-350, § 1(b), 84 Stat. 449; Aug. 29, 1972, Pub. L. 92-415, § 1, 86 Stat. 652.)**

### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 250(1) (Mar. 3, 1911, ch. 231; § 145, 36 Stat. 1136).

District courts are given concurrent jurisdiction of certain claims against the United States under section 1346 of this title. (See also reviser's note under that section and section 1621 of this title relating to jurisdiction of the Tax Court.)

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[1] So in original. Does not conform to section catchline.

The proviso in section 250(1) of title 28, U.S.C., 1940 ed., relating to claims growing out of the Civil War, commonly known as "war claims," and other claims which had been reported adversely before March 3, 1887 by any court, department, or commission authorized to determine them, were omitted as obsolete.

The exception in section 250(1) of title 28, U.S.C., 1940 ed., as to pension claims appears in section 1501 of this title.

Words "in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty, if the United States were suable" were omitted as unnecessary since the Court of Claims manifestly, under this section will determine whether a petition against the United States states a cause of action. In any event, the Court of Claims has no admiralty jurisdiction, but the Suits in Admiralty Act, sections 741–752 of title 46, U.S.C., 1940 ed., Shipping, vests exclusive jurisdiction over suits in admiralty against the United States in the district courts. *Sanday & Co.* v. *U.S.*, 1932, 76 Ct.Cl. 370.

For additional provisions respecting jurisdiction of the court of claims in war contract settlement cases see section 114b of Title 41, U.S.C., 1940 ed., Public Contracts.

Changes were made in phraseology.

### References in Text

The Tennessee Valley Authority Act of 1933, as amended, referred to in text, is act May 18, 1933, ch. 32, 48 Stat. 58, as amended, which is classified generally to chapter 12A (§ 831 et seq.) of Title 16, Conservation. For complete classification of this Act to the Code, see Tables volume.

### Amendments

1972—Pub. L. 92-415 added provisions authorizing the court to issue orders directing restoration to office or position, placement in appropriate duty or retirement status and correction of applicable records and to issue such orders to any United States official and to remand appropriate matters to administrative and executive bodies with proper directions.

1970—Pub. L. 91-350 specified that the term "express or implied contracts with the United States" includes express or implied contracts with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration.

1954—Act Sept. 3, 1954, added "; actions involving Tennessee Valley Authority" to the catchline and altered the form of the first par. to spell out the general jurisdiction of the Court in paragraph form rather than as clauses of the par.

1953—Act July 28, 1953, substituted "United States Court of Claims" for "Court of Claims" near beginning of section, and added last par.

### Effective Date of 1972 Amendment

Section 2 of Pub. L. 92-415 provided that: "This Act [amending this section] shall be applicable to all judicial proceedings pending on or instituted after the date of its enactment [Aug. 29, 1972]."

### Effective Date of 1970 Amendment

Amendment by Pub. L. 91-350 applicable to claims and civil actions dismissed before or pending on July 23, 1970, if the claim or civil action was based upon a transaction, omission, or breach that occurred not more than six years prior to July 23, 1970, notwithstanding a determination or judgment made prior to July 23, 1970, that the United States district courts or the United States Court of Claims did not have jurisdiction to entertain a suit on an express or implied contract with a nonappropriated fund instrumentality of the United States, see section 2 of Pub. L. 91-350, set out as an Effective Date of 1970 Amendment note under section 1346 of this title.

### Cross References

Admiralty suits against United States, jurisdiction of district courts, see sections 741 et seq. and 781 et seq. of Title 46, Shipping.

Costs, where United States is party, see section 2412 of this title.

District courts, concurrent jurisdiction of actions or claims not exceeding $10,000, see section 1346 of this title.

Limitation of actions, see section 2501 of this title.

Procedure in Court of Claims, see section 2501 et seq. of this title.

Railroads, government-aided, action to recover freight withheld, see section 87 of Title 45, Railroads.

Tax Court jurisdiction, see section 7441 et seq. of Title 26, Internal Revenue Code.

Tennessee Valley Authority, use of patents by, see section 831r of Title 16, Conservation.

Tort claims against United States, appellate jurisdiction of Court of Claims, see section 1504 of this title.

War contracts, jurisdiction and procedure to enforce termination claim, see sections 113, 114 of Title 41, Public Contracts.

### Rules of the United States Court of Claims

See Appendix to this title.

### Section Referred to in Other Sections

This section is referred to in section 2409a of this title; title 16 section 79c; title 25 section 70a; title 42 section 4654; title 46 section 1242; title 47 section 606.

## § 1492. Congressional reference cases

Any bill, except a bill for a pension, may be referred by either House of Congress to the chief commissioner of the Court of Claims for a report in conformity with section 2509 of this title.

(June 25, 1948, ch. 646, 62 Stat. 941; Oct. 15, 1966, Pub. L. 89-681, § 1, 80 Stat. 958.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 257 (Mar. 3, 1911, ch. 231, § 151, 36 Stat. 1138).

This section contains only the jurisdictional provision of section 257 of title 28, U.S.C., 1940 ed. The procedural provisions are incorporated in section 2509 of this title.

Changes were made in phraseology.

### Amendments

1966—Pub. L. 89-681 substituted provisions allowing any bill, except a bill for a pension, to be referred by either House of Congress to the chief commissioner of the Court of Claims for a report in conformity with section 2509 of this title for provisions giving the Court of Claims jurisdiction to report to either House of Congress on any bill referred by such House, except a bill for a pension, and to render judgment if the claim against the United States represented by the referred bill was one over which the court had jurisdiction under other Acts of Congress.

### Section Referred to in Other Sections

This section is referred to in section 2509 of this title.

## [§ 1493. Repealed. July 28, 1953, ch. 253, § 8, 67 Stat. 226]

Section, act June 25, 1948, ch. 646, 62 Stat. 941, authorized the Court of Claims to give legal advice to the heads of executive departments in matters referred to it by the heads, if the Court had jurisdiction over the matters.

### § 1494. Accounts of officers, agents or contractors

The Court of Claims shall have jurisdiction to determine the amount, if any, due to or from the United States by reason of any unsettled account of any officer or agent of, or contractor with, the United States, or a guarantor, surety or personal representative of any such officer, agent or contractor, and to render judgment thereof,[1] where—

(1) claimant or the person he represents has applied to the proper department of the Government for settlement of the account;

(2) three years have elapsed from the date of such application without settlement; and

(3) no suit upon the same has been brought by the United States.

(June 25, 1948, ch. 646, 62 Stat. 941; July 28, 1953, ch. 253, § 9, 67 Stat. 226; Sept. 3, 1954, ch. 1263, § 44(c), 68 Stat. 1242.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 287 (Mar. 3, 1911, ch. 231, § 180, 36 Stat. 1141; Feb. 13, 1925, ch. 229, § 3, 43 Stat. 939).

Only the jurisdictional provisions of section 287 of title 28, U.S.C., 1940 ed., are contained in this section. The procedural provisions are incorporated in section 2511 of this title.

Changes were made in phraseology.

#### AMENDMENTS

1954—Act Sept. 3, 1954, eliminated "United States" from name of Court of Claims.

1953—Act July 28, 1953, substituted "United States Court of Claims" for "Court of Claims", inserted "to or from" after "due", and inserted "and to render judgment thereon," all in opening par.

#### CROSS REFERENCES

Procedure on accounts of officers, agents, or contractors, see section 2511 of this title.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 2511 of this title.

### § 1495. Damages for unjust conviction and imprisonment; claim against United States

The Court of Claims shall have jurisdiction to render judgment upon any claim for damages by any person unjustly convicted of an offense against the United States and imprisoned.

(June 25, 1948, ch. 646, 62 Stat. 941.)

#### HISTORICAL AND REVISION NOTES

Based on section 729 of title 18, U.S.C., 1940 ed., Crimes and Criminal Procedure (May 24, 1938, ch. 266, §§ 1-4, 52 Stat. 438).

Only the jurisdictional provision of section 729 of title 18, U.S.C., 1940 ed., appears in this section. The remainder is incorporated in section 2513 of this title.

Changes were made in phraseology.

#### CROSS REFERENCES

Procedure on claims for damages for unjust conviction and imprisonment, see section 2513 of this title.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 2513 of this title.

### § 1496. Disbursing officers' claims

The Court of Claims shall have jurisdiction to render judgment upon any claim by a disbursing officer of the United States or by his administrator or executor for relief from responsibility for loss, in line of duty, of Government funds, vouchers, records or other papers in his charge.

(June 25, 1948, ch. 646, 62 Stat. 941.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 250(3) (Mar. 3, 1911, ch. 231, § 145, 36 Stat. 1136; June 10, 1921, ch. 18, § 304, 42 Stat. 24).

Words "paymaster, quartermaster, commissary of subsistence, or other," preceding "disbursing officer of the United States," were omitted. See *Henderson* v. *United States*, 1907, 42 Ct.Cl. 449 and *Hobbs* v. *United States*, 1881, 17 Ct.Cl. 189, holding that the term "other disbursing officer" extends to any disbursing officer of the executive departments of the Government.

Words "by capture or otherwise" were omitted as surplusage.

Words "and for which such officer was and is held responsible," at the end of section 250(3) of title 28, U.S.C., 1940 ed., were omitted as surplusage.

Changes were made in phraseology.

#### CROSS REFERENCES

Allowance of credit in settlement of disbursing officers' accounts, see section 2512 of this title.

### § 1497. Oyster growers, damages from dredging operations

The Court of Claims shall have jurisdiction to render judgment upon any claim for damages to oyster growers on private or leased lands or bottoms arising from dredging operations or use of other machinery and equipment in making river and harbor improvements authorized by Act of Congress.

(June 25, 1948, ch. 646, 62 Stat. 941.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 250a (Aug. 30, 1935, ch. 831, § 13, 49 Stat. 1049; July 13, 1943, ch. 231, 57 Stat. 553).

The proviso at the end of section 250a of title 28, U.S.C., 1940 ed., is incorporated in section 2501 of this title.

Words "river and harbor improvements" were substituted for "such improvements", in view of Dixon v. U.S., 103 Ct. Cl. 160, holding that words, "such improvements" were not limited to the specific improvements listed in the 1935 act, but applied to any river and harbor improvements.

Changes were made in phraseology.

#### CROSS REFERENCES

Time for filing petition by oyster growers, see section 2501 of this title.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 2501 of this title.

### § 1498. Patent and copyright cases

(a) Whenever an invention described in and covered by a patent of the United States is used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same, the owner's remedy shall be by action against the

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[1] So in original. Probably should read "thereon".

United States in the Court of Claims for the recovery of his reasonable and entire compensation for such use and manufacture.

For the purposes of this section, the use or manufacture of an invention described in and covered by a patent of the United States by a contractor, a subcontractor, or any person, firm, or corporation for the Government and with the authorization or consent of the Government, shall be construed as use or manufacture for the United States.

The court shall not award compensation under this section if the claim is based on the use or manufacture by or for the United States of any article owned, leased, used by, or in the possession of the United States prior to July 1, 1918.

A Government employee shall have the right to bring suit against the Government under this section except where he was in a position to order, influence, or induce use of the invention by the Government. This section shall not confer a right of action on any patentee or any assignee of such patentee with respect to any invention discovered or invented by a person while in the employment or service of the United States, where the invention was related to the official functions of the employee, in cases in which such functions included research and development, or in the making of which Government time, materials or facilities were used.

(b) Hereafter, whenever the copyright in any work protected under the copyright laws of the United States shall be infringed by the United States, by a corporation owned or controlled by the United States, or by a contractor, subcontractor, or any person, firm, or corporation acting for the Government and with the authorization or consent of the Government, the exclusive remedy of the owner of such copyright shall be by action against the United States in the Court of Claims for the recovery of his reasonable and entire compensation as damages for such infringement, including the minimum statutory damages as set forth in section 101(b) of title 17, United States Code: *Provided*, That a Government employee shall have a right of action against the Government under this subsection except where he was in a position to order, influence, or induce use of the copyrighted work by the Government: *Provided, however*, That this subsection shall not confer a right of action on any copyright owner or any assignee of such owner with respect to any copyrighted work prepared by a person while in the employment or service of the United States, where the copyrighted work was prepared as a part of the official functions of the employee, or in the preparation of which Government time, material, or facilities were used: *And provided further*, That before such action against the United States has been instituted the appropriate corporation owned or controlled by the United States or the head of the appropriate department or agency of the Government, as the case may be, is authorized to enter into an agreement with the copyright owner in full settlement and compromise for the damages accruing to him by reason of such infringement and to settle the claim administratively out of available appropriations.

Except as otherwise provided by law, no recovery shall be had for any infringement of a copyright covered by this subsection committed more than three years prior to the filing of the complaint or counterclaim for infringement in the action, except that the period between the date of receipt of a written claim for compensation by the Department or agency of the Government or corporation owned or controlled by the United States, as the case may be, having authority to settle such claim and the date of mailing by the Government of a notice to the claimant that his claim has been denied shall not be counted as a part of the three years, unless suit is brought before the last-mentioned date.

(c) The provisions of this section shall not apply to any claim arising in a foreign country.

(d) Hereafter, whenever a plant variety protected by a certificate of plant variety protection under the laws of the United States shall be infringed by the United States, by a corporation owned or controlled by the United States, or by a contractor, subcontractor, or any person, firm, or corporation acting for the Government, and with the authorization and consent of the Government, the exclusive remedy of the owner of such certificate shall be by action against the United States in the Court of Claims for the recovery of his reasonable and entire compensation as damages for such infringement: *Provided*, That a Government employee shall have a right of action against the Government under this subsection except where he was in a position to order, influence, or induce use of the protected plant variety by the Government: *Provided, however*, That this subsection shall not confer a right of action on any certificate owner or any assignee of such owner with respect to any protected plant variety made by a person while in the employment or service of the United States, where such variety was prepared as a part of the official functions of the employee, or in the preparation of which Government time, material, or facilities were used: *And provided further*, That before such action against the United States has been instituted, the appropriate corporation owned or controlled by the United States or the head of the appropriate agency of the Government, as the case may be, is authorized to enter into an agreement with the certificate owner in full settlement and compromise, for the damages accrued to him by reason of such infringement and to settle the claim administratively out of available appropriations.

(June 25, 1948, ch. 646, 62 Stat. 941; May 24, 1949, ch. 139, § 87, 63 Stat. 102; Oct. 31, 1951, ch. 655, § 50(c), 65 Stat. 727; July 17, 1952, ch. 930, 66 Stat. 757; Sept. 8, 1960, Pub. L. 86-726, §§ 1, 4, 74 Stat. 855, 856; Dec. 24, 1970, Pub. L. 91-577, title III, § 143(d), 84 Stat. 1559.)

### AMENDMENT EFFECTIVE JANUARY 1, 1978

*Subsec. (b) of this section amended effective Jan. 1, 1978, by Pub. L. 94-533, §§ 102, 105(c), Oct. 19, 1976, 90 Stat. 2598, 2599, by substituting "section 504(c) of title 17" for "section 101(b) of title 17".*

### Historical and Revision Notes

### 1948 Act

Based on section 68 of title 35, U.S.C., 1940 ed., Patents (June 25, 1910, ch. 423, 36 Stat. 851; July 1, 1918, ch. 114, 40 Stat. 705).

Provisions contained in the second proviso of section 68 of title 35, U.S.C., 1940 ed., relating to right of the United States to any general or special defense available to defendants in patent infringement suits were omitted as unnecessary. In the absence of statutory restriction, any defense available to a private party is equally available to the United States.

Changes in phraseology were made.

### 1949 Act

This amendment clarifies section 1498 of title 28, U.S.C., by restating its first paragraph to conform more closely with the original law.

### References in Text

The copyright laws of the United States, referred to in subsec. (b), are classified generally to Title 17, Copyrights.

"Hereafter", referred to in subsec. (b), probably means after the date of enactment of Pub. L. 91-577, which was approved on Dec. 24, 1970.

### Amendments

1970—Subsec. (d). Pub. L. 91-577 added subsec. (d).

1960—Pub. L. 86-726, § 4, substituted "Patent and copyright cases" for "Patent cases", in the catchline.

Pub. L. 86-726, § 1, designated existing provisions as subsec. (a), and added subsecs. (b) and (c).

1952—Act July 17, 1952, allowed Government employees to maintain patent suits against the United States in certain instances.

1951—Act Oct. 31, 1951, inserted what is now the second par.

1949—Act May 29, 1949, conformed first par. of section to the original law.

### Effective Date of 1976 Amendment

Amendment by Pub. L. 94-553 effective Jan. 1, 1978, see section 102 of Pub. L. 94-553, set out as an Effective Date note preceding section 101 of Title 17, Copyrights.

### Effective Date of 1970 Amendment

Amendment by Pub. L. 91-577 effective Dec. 24, 1970, see section 141 of Pub. L. 91-577, set out as an Effective Date note under section 2321 of Title 7, Agriculture.

### Waiver of Immunity for Members of Congress

Section 2 of Pub. L. 86-726 provided that: "Nothing in this Act [amending this section and section 2386 of Title 10, Armed Forces] shall be construed to in any way waive any immunity provided for Members of Congress under article I of section 6 of the Constitution of the United States."

### Cross References

Actions for unauthorized use of patents or disclosure of information, see section 2356 of Title 22, Foreign Relations and Intercourse.

Government interests in patents, see section 267 of Title 35, Patents.

Use of patents by Tennessee Valley Authority, see section 831r of Title 16, Conservation.

### Section Referred to in Other Sections

This section is referred to in title 17 section 502; title 19 section 1337; title 22 section 2356; title 35 section 183.

## § 1499. Liquidated damages withheld from contractors under Contract Work Hours Standards Act

The Court of Claims shall have jurisdiction to render judgment upon any claim for liquidated damages withheld from a contractor or subcontractor under section 104 of the Contract Work Hours Standards Act.

(June 25, 1948, ch. 646, 62 Stat. 942; Aug. 13, 1962, Pub. L. 87-581, title II, § 202(a), 76 Stat. 360.)

### Historical and Revision Notes

Based on section 324 of title 40, U.S.C., 1940 ed., Public Buildings, Property and Works (June 19, 1912, ch. 174, § 1, 37 Stat. 137).

This section contains only the jurisdictional provision in the last clause of section 324 of title 40, U.S.C., 1940 ed.

Changes in phraseology were made.

### References in Text

Contract Work Hours Standards Act, referred to in text, is title I of Pub. L. 87-581, Aug. 13, 1962, 76 Stat. 357, as amended, which is classified generally to subchapter II (§ 327 et seq.) of chapter 5 of Title 40, Public Buildings, Works, and Property, and which was redesignated the Contract Work Hours and Safety Standards Act by Pub. L. 91-54, § 2, Aug. 9, 1969, 83 Stat. 96. Section 104 of such act is classified to section 330 of Title 40. For complete classification of this Act to the Code, see Short Title note set out under section 327 of Title 40 and Tables volume.

### Amendments

1962—Pub. L. 67-581 substituted "Liquidated damages withheld from contractors under Contract Work Hours Standards Act" for "Penalties imposed against contractors under eight hour law" in the section catchline, and "liquidated damages withheld from a contractor or subcontractor under section 104 of the Contract Work Hour Standards Act" for "a penalty withheld from a contractor or subcontractor under section 324 of Title 40", in the text.

### Effective Date of 1962 Amendment

Amendment by Pub. L. 87-581 effective 60 days after Aug. 13, 1962, but shall not affect contracts existing or thereafter entered into pursuant to invitations for bids outstanding on Aug. 13, 1962, see section 204 of Pub. L. 87-581, set out as an Effective Date note under section 327 of Title 40, Public Buildings, Property, and Works.

### Continued Jurisdiction Upon Claims Under Section 324 of Title 40

Section 202(b) of Pub. L. 87-581 provided that: "The Court of Claims shall continue to have jurisdiction to render judgment upon any claim for a penalty withheld from a contractor or subcontractor under section 324 of title 40, United States Code, in connection with any contract subject to said section existing on the effective date of this Act [see Effective Date note set out under section 327 of Title 40, Public Buildings, Property, and Works], or thereafter entered into pursuant to invitations for bids that are outstanding at the time of the enactment of this Act [Aug. 13, 1962]."

### Cross References

Time for filing claim, see section 330 of Title 40, Public Buildings, Property, and Works.

## § 1500. Pendency of claims in other courts

The Court of Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the

**United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.**

(June 25, 1948, ch. 646, 62 Stat. 942.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 260 (Mar. 3, 1911, ch. 231, § 154, 36 Stat. 1138).

Words "or in the Supreme Court on appeal therefrom" were omitted as unnecessary.

Changes were made in phraseology.

### § 1501. Pensions

**The Court of Claims shall not have jurisdiction of any claim for a pension.**

(June 25, 1948, ch. 646, 62 Stat. 942.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 250(1) (Mar. 3, 1911, ch. 231, § 145, 36 Stat. 1136).

Section constitutes the exception in section 250(1) of title 28, U.S.C., 1940 ed.

Changes were made in phraseology.

### § 1502. Treaty cases

**Except as otherwise provided by Act of Congress, the Court of Claims shall not have jurisdiction of any claim against the United States growing out of or dependent upon any treaty entered into with foreign nations.**

(June 25, 1948, ch. 646, 62 Stat. 942; May 24, 1949, ch. 139, § 88, 63 Stat. 102.)

#### HISTORICAL AND REVISION NOTES

#### 1948 ACT

Based on title 28, U.S.C., 1940 ed., § 259 (Mar. 3, 1911, ch. 231, § 153, 36 Stat. 1138).

Phrase "Except as otherwise provided by enactment of Congress" was inserted to cover cases where special Acts confer jurisdiction. (See *Sioux Tribe of Indians* v. *United States*, 1943, 97 Ct.Cl. 613, certiorari denied 63 S.Ct. 992, 318 U.S. 789, 87 L.Ed. 1155, and *In re United States*, 1873, 17 Wall. 439, 443, 21 L.Ed. 696.)

Words "not pending therein on December 1, 1862," were omitted as obsolete.

Changes in phraseology were made.

#### 1949 ACT

This section, in amending section 1502 of title 28, U.S.C., conforms with the provisions of act of August 13, 1946 (ch. 959, § 25, 60 Stat. 1056), which affected section 153 of the Judicial Code of 1911 by striking therefrom the words "or with Indian tribes." Such section 153 of the Judicial Code was the source of such section 1502.

#### AMENDMENTS

1949—Act May 24, 1949, struck out "or with Indian tribes" following "foreign nations".

#### CROSS REFERENCES

Jurisdiction of—
- Court over Indian claims after Aug. 13, 1946, see section 1505 of this title.
- Indian Claims Commission over claims accruing prior to Aug. 13, 1946, see sections 70a and 70k of Title 25, Indians.

Review of determinations of Indian Claims Commission on Indian claims accruing before Aug. 13, 1946, see section 70s of Title 25.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 26 section 7422.

### § 1503. Set-offs

**The Court of Claims shall have jurisdiction to render judgment upon any set-off or demand by the United States against any plaintiff in such court.**

(June 25, 1948, ch. 646, 62 Stat. 942.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 250(2) (Mar. 3, 1911, ch. 231, § 145, 36 Stat. 1136).

The second subsection of section 250 of title 28, U.S.C., 1940 ed., is incorporated in this section. The proviso, relating to suits for fees due officers of the United States, has been incorporated in section 2501 of this title.

Changes were made in phraseology.

#### RULES OF THE UNITED STATES COURT OF CLAIMS

Counterclaims, see rule 40, Appendix to this title.

### § 1504. Tort claims

**The Court of Claims shall have jurisdiction to review by appeal final judgments in the district courts in civil actions based on tort claims brought under section 1346(b) of this title if the notice of appeal filed in the district court has affixed thereto the written consent on behalf of all the appellees that the appeal be taken to the Court of Claims.**

(June 25, 1948, ch. 646, 62 Stat. 942.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 933(a)(2) (Aug. 2, 1946, ch. 753, § 412(a)(2), 60 Stat. 844).

Last sentence of section 933(a)(2) of title 28, U.S.C., 1940 ed., was omitted. It provided that in tort claims appeals to the Court of Claims, such court should have the same powers and duties as those of a court of appeals. Such powers and duties are inherent in the provisions of this section conferring appellate jurisdiction.

Subsection (b) of section 933 of title 28, U.S.C., 1940 ed., providing that the provisions of law governing review by the Supreme Court of cases in the courts of appeals and the Court of Claims shall apply to review of tort claims cases, was omitted as covered by section 1254 and 1255 of this revised title.

For remainder of section 933(a)(2) of title 28, U.S.C., 1940 ed., see Distribution Table.

Changes were made in phraseology.

#### SENATE REVISION AMENDMENT

The provisions of Title 28, U.S.C., § 933(a)(2), which related to application of the Federal Rules of Civil Procedure, were originally set out in section 2676 of this revised title, but such section 2676 was eliminated by Senate amendment. See 80th Congress Senate Report No. 1559, amendment No. 61.

#### CROSS REFERENCES

Courts of appeals, jurisdiction to review final decisions of district courts, see section 1291 of this title.

Time for appeal to Court of Claims in tort claims cases, see section 2110 of this title.

#### RULES OF THE UNITED STATES COURT OF CLAIMS

Fees in cases appealed to United States Court of Claims, see rules 221 to 224, Appendix to this title.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 2110 of this title.

### § 1505. Indian claims

The Court of Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Claims if the claimant were not an Indian tribe, band or group.

(Added May 24, 1949, ch. 139, § 89(a), 63 Stat. 102.)

#### HISTORICAL AND REVISION NOTES

#### 1949 Act

Section 1505 is added to title 28, U.S.C., by this amendment to incorporate the act of August 13, 1946 (ch. 959, § 24, 60 Stat. 1055), which was originally classified to title 28, U.S.C., but was later transferred to title 25 of such code. Since such section 24 deals with jurisdiction of the Court of Claims it should be in title 28.

This amendatory section omits as surplusage all provisions of said section 24 except the first sentence, as being fully covered by the express provisions of sections 1503 and 2501 and other provisions of chapter 165 of title 28, U.S.C., relating to Court of Claims procedure.

The proviso of such section 24 is omitted as unnecessary since the provision conferring jurisdiction cannot in any view alter the relationship of the Government with its Indians.

The omitted language is as follows: "In any suit brought under the jurisdiction conferred by this section the claimant shall be entitled to recover in the same manner, to the same extent, and subject to the same conditions and limitations, and the United States shall be entitled to the same defenses, both at law and in equity, and to the same offsets, counterclaims, and demands, as in cases brought in the Court of Claims under section 250 of this title: *Provided, however,* That nothing contained in this section shall be construed as altering the fiduciary or other relations between the United States and the several Indian tribes, bands, or groups."

#### CROSS REFERENCES

Jurisdiction of Indian Claims Commission over claims accruing prior to Aug. 13, 1946, see sections 70a and 70k of Title 25, Indians.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 25 sections 70v, 640d-17.

### § 1506. Transfer to cure defect of jurisdiction

If a case within the exclusive jurisdiction of the district courts is filed in the Court of Claims, the Court of Claims shall, if it be in the interest of justice, transfer such case to any district court in which it could have been brought at the time such case was filed, where the case shall proceed as if it had been filed in the district court on the date it was filed in the Court of Claims.

(Added Pub. L. 86-770, § 2(a), Sept. 13, 1960, 74 Stat. 912.)

#### EFFECTIVE DATE

Section applicable to any case or proceeding pending on, or brought after, Sept. 13, 1960, in the Court of Claims, see section 4 of Pub. L. 86-770, set out in part as an Effective Date of 1960 Amendment note under section 1406 of this title.

#### CROSS REFERENCES

Transfer of cases from district courts to Court of Claims, see section 1406 of this title.

### § 1507. Jurisdiction for certain declaratory judgments

The Court of Claims shall have jurisdiction to hear any suit for and issue a declaratory judgment under section 7428 of the Internal Revenue Code of 1954.

(Added Pub. L. 94-455, title XIII, § 1306(b)(9)(A), Oct. 4, 1976, 90 Stat. 1720.)

#### EFFECTIVE DATE

Section applicable with respect to pleadings filed with the United States Tax Court, the district court of the United States for the District of Columbia, or the United States Court of Claims more than 6 months after Oct. 4, 1976, but only with respect to determinations (or requests for determinations) made after Jan. 1, 1976, see section 1306(c) of Pub. L. 94-455, set out as an Effective Date note under section 7428 of Title 26, Internal Revenue Code.

## CHAPTER 93—COURT OF CUSTOMS AND PATENT APPEALS

Sec.
1541. Appeals from Customs Court decisions.
1542. Patent Office decisions.
1543. Tariff Commission decisions.
1544. Certain findings by Secretary of Commerce.
1545. Decision of the Plant Variety Protection Office. [1]

#### AMENDMENTS

1970—Pub. L. 91-271, title I, § 123(b), June 2, 1970, 84 Stat. 282 substituted "Appeals from Customs Court decisions" for "Customs Court decisions" in item 1541.

1966—Pub. L. 89-651, § 8(c)(2), Oct. 14, 1966, 80 Stat. 901, added item 1544.

#### CROSS REFERENCES

Procedure in Court of Customs and Patent Appeals, see chapter 167 of this title.

#### RULES OF THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

See Title 35, Appendix, Patents.

### § 1541. Appeals from Customs Court decisions

(a) The Court of Customs and Patent Appeals has jurisdiction of appeals from all final judgments or orders of the United States Customs Court.

(b) When the chief judge of the Customs Court issues an order under the provisions of section 256(b) of this title; or when any judge in the Customs Court, in issuing any other interlocutory order, includes in the order a statement that a controlling question of law is involved as to which there is substantial ground for difference of opinion and that an immediate appeal from its order may materially advance the ultimate termination of the litigation, the Court of Customs and Patent Appeals may, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That neither the application for nor the granting of an appeal hereunder stays proceedings in the Customs Court unless a stay is ordered by a judge of the Customs Court or by the Court of Customs and Patent Appeals or a judge of that court.

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[1] Item 1545 is editorially inserted. Section 1545 was enacted by Pub. L. 91-577, title III, § 143(a), Dec. 24, 1970, 84 Stat. 1558, without amending analysis to include such item.

(June 25, 1948, ch. 646, 62 Stat. 942; June 2, 1970, Pub. L. 91-271, title I, § 102, 84 Stat. 274.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 308 (Mar. 3, 1911, ch. 231, § 195, 36 Stat. 1145; Aug. 22, 1914, ch. 267, 38 Stat. 703; Sept. 6, 1916, ch. 448, § 6, 39 Stat. 727; Feb. 13, 1925, ch. 229, § 8, 43 Stat. 940; May 28, 1926, ch. 411, § 1, 44 Stat. 669; Jan. 31, 1928, ch. 14, § 1, 45 Stat. 54; Mar. 2, 1929, ch. 488, § 1, 45 Stat. 1475; June 17, 1930, ch. 497, § 647, 46 Stat. 762).

Provisions of title 28, U.S.C., 1940 ed., § 308, relating to review by the Supreme Court of decisions of the Court of Customs and Patent Appeals are the basis of section 1256 of this title.

Provision in section 308 of title 28, U.S.C., 1940 ed., that judgments and decrees of the Court of Customs and Patent Appeals shall be final in the cases therein enumerated, was omitted as covered by section 2601 of this title.

Procedural provisions governing review of decisions of the Customs Court by the Court of Customs and Patent Appeals are incorporated in section 2601 of this title.

For appeals from the determination of the appraiser under the Anti-Dumping Law (sections 160-171 of title 19, U.S.C., 1940 ed.), see section 169 of such title 19 providing that the Court of Customs and Patent Appeals shall have the same jurisdiction as in appeals and protests relating to customs duties under existing law.

Words "exclusive appellate" preceding "jurisdiction" were omitted as inaccurate in view of section 1252 of this title providing for direct review of certain decisions of the Customs Court by the Supreme Court.

Changes were made in phraseology.

### Prior History of Court

From 1890 to 1909, the United States circuit courts had jurisdiction over appeals from the former Board of General Appraisers under section 15 of the Customs Administrative Act of June 10, 1890, ch. 407, 26 Stat. 138.

Exclusive jurisdiction over all appeals from final decisions of the former Board of General Appraisers was conferred upon the Court of Customs Appeals established by the Payne-Aldrich Tariff Act of Aug. 5, 1909, ch. 36, § 29, 36 Stat. 105.

By the terms of that act, no other court had jurisdiction of appeals from final decisions of the Board of General Appraisers but the then established Court of Customs Appeals, and all pending cases in any circuit court of appeals, circuit, district, or territorial court within the jurisdiction of such court were to be transferred to it for decision.

On April 2, 1929, the name of such court was changed to the Court of Customs and Patent Appeals and additional jurisdiction over decisions of the tribunals of the Patent Office was conferred by the terms. Act Mar. 2, 1929, ch. 488, §§ 1-4, 44 Stat. 1475.

### Amendments

1970—Pub. L. 91-271 substituted in the section catchline "Appeals from Customs Court decisions" for "Customs Court decisions", reorganized existing provisions into lettered subsecs. (a) and (b), and expanded the jurisdiction of the Court of Customs and Patent Appeals from authority to review questions of law and fact in all final decisions of the Customs Court concerning classification of merchandise and questions of law in all final decisions of the Customs Court concerning the collection of customs revenues to authority to review all final judgments or orders of the Customs Court, and authority to review interlocutory orders of the Customs Court under specified conditions.

### Effective Date of 1970 Amendment

Section 122 of Pub. L. 91-271 provided that:

"(a) This title [see Short Title note set out under section 1 of this title] shall become effective on October 1, 1970, and shall thereafter apply to all actions and proceedings in the Customs Court and the Court of Customs and Patent Appeals except those involving merchandise entered before the effective date for which trial has commenced by such effective date.

"(b) An appeal for reappraisement timely filed with the Bureau of Customs before the effective date, but as to which trial has not commenced by such date, shall be deemed to have had a summons timely and properly filed under this title. When the judgment or order of the United States Customs Court has become final in this appeal, the papers shall be returned to the appropriate customs officer to decide any remaining matters relating to the entry in accordance with section 500 of the Tariff Act of 1930, as amended [section 1500 of Title 19, Customs Duties]. A protest or summons filed after final decision on an appeal for reappraisement shall not include issues which were raised or could have been raised on the appeal for reappraisement.

"(c) A protest timely filed with the Bureau of Customs before the effective date of enactment of this Act, which is disallowed before that date, and as to which trial has not commenced by such date, shall be deemed to have had a summons timely and properly filed under this title.

"(d) All other provisions of this Act [see Short Title notes set out under section 1 of this title and section 1500 of title 19] shall apply to appeals and disallowed protests deemed to have had summonses timely and properly filed under this section."

### Cross References

Direct appeals to Supreme Court from decisions invalidating Acts of Congress, see section 1252 of this title.

Finality of decisions of Court of Customs and Patent Appeals, and procedure on appeal, see section 2601 of this title.

Jurisdiction of Customs Court, see section 1582 of this title.

Precedence of cases in Court of Customs and Patent Appeals, see section 2602 of this title.

Procedure on appeal to Court of Customs and Patent Appeals, see section 2601 of this title.

Protests from determination of appropriate customs offices under Anti-Dumping Law, see section 169 of Title 19, Customs Duties.

Review by Supreme Court of Court of Customs and Patent Appeal cases, see section 1256 of this title.

Taxes affecting jurisdiction of Court of Customs and Patent Appeals, see section 1528 of Title 19, Customs Duties.

### Rules of the United States Court of Customs and Patent Appeals

Rules applicable to customs cases, see rules 3.1 to 3.3, Title 35, Appendix, Patents.

### Section Referred to in Other Sections

This section is referred to in section 256 of this title.

## § 1542. Patent Office decisions

The Court of Customs and Patent Appeals shall have jurisdiction of appeals from decisions of:

(1) the Board of Appeals and the Board of Interference Examiners of the Patent Office as to patent applications and interferences, at the instance of an applicant for a patent or any party to a patent interference, and such

appeal by an applicant shall waive his right to proceed under section 63 of Title 35; and

(2) the Commissioner of Patents as to trademark applications and proceedings as provided in section 1071 of Title 15.

(June 25, 1948, ch. 646, 62 Stat. 942; May 24, 1949, ch. 139, § 89(b), 63 Stat. 102.)

### HISTORICAL AND REVISION NOTES

Based on section 89 of title 15, U.S.C., 1940 ed., Commerce and Trade, title 28, U.S.C., 1940 ed., § 309a and section 59a of title 35, U.S.C., 1940 ed., Patents (R.S. § 4911; Feb. 20, 1905, ch. 592, § 6, 33 Stat. 726; Mar. 2, 1907, ch. 2573, § 2, 34 Stat. 1252; Mar. 2, 1927, ch. 273, § 8, 44 Stat. 1336; Mar. 2, 1929, ch. 488, § 2, 45 Stat. 1476; June 7, 1934, ch. 426, 48 Stat. 926; Aug. 5, 1939, ch. 451, § 3, 53 Stat. 1212).

Section 309a of title 28, U.S.C., 1940 ed., provided that the Court of Customs and Patent Appeals should have the jurisdiction vested prior to April 1, 1929, in the Court of Appeals for the District of Columbia as respects appeals from the Patent Office in patent and trade-mark cases. Section 59a of title 35, U.S.C., 1940 ed., and section 89 of title 15, U.S.C., 1940 ed., contain the jurisdictional provisions referred to by such section 309a.

Said sections 89 and 59a, of titles 15 and 35, respectively, are being retained in said titles to preserve the statutory right of appeal and the procedural provisions.

Time for appeal in patent and trade-mark cases, see section 89 of title 15 and section 60 of title 35, both of U.S.C., 1940 ed., and Rule 25 of the Rules of the Court of Customs and Patent Appeals.

Changes were made in phraseology.

### REFERENCES IN TEXT

Section 63 of Title 35, referred to in par. (1), was repealed by act July 19, 1952, ch. 950, § 5, 66 Stat. 794, and is now covered by sections 145 and 146 of Title 35, Patents.

### AMENDMENTS

1949—Par. (2). Act May 24, 1949, omitted references to "interferences and cancellations".

### CHANGE OF NAME

"Patent Office" and "Commissioner of Patents" redesignated "Patent and Trademark Office" and "Commissioner of Patents and Trademarks", respectively, by section 3 of Pub. L. 93-596, Jan. 2, 1975, 88 Stat. 1949, set out as a note under section 1 of Title 35, Patents.

### TRANSFER OF FUNCTIONS

The functions of all officers of the Department of Commerce and all functions of all agencies and employees of such Department, were, with a few exceptions, transferred to the Secretary of Commerce, with power vested in him to authorize their performance or the performance of any of his functions by any of such officers, agencies, and employees, by Reorg. Plan No. 5 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3174, 64 Stat. 1263, set out in the Appendix to Title 5, Government Organization and Employees. The Patent Office, referred to in this section, is an agency of the Department of Commerce, and the Commissioner of Patents, referred to in this section, is an officer of such Department.

### PRIOR HISTORY OF COURT

For prior history of Court of Customs and Patent Appeals, see note set out under section 1541 of this title.

### CROSS REFERENCES

Civil action to obtain patent and trademark, and in interferences, see sections 145 and 146 of Title 35, Patents, and section 1071 of Title 15, Commerce and Trade, respectively.

Jurisdiction of district courts of patent and trademark actions, see section 1338 of this title.

Procedure on appeals from decisions of Board of Appeals or Board of Interference Examiners, see sections 141 to 144 of Title 35, Patents.

Procedure on appeal from trademark decision of Commissioner of Patents and Trademarks, see section 1071 of Title 15, Commerce and Trade.

Trademark case, appellate jurisdiction, see section 1121 of Title 15.

### RULES OF THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Rules applicable to appeals from the Patent and Trademark Office, see rules 4.1 and 4.2, Title 35, App., Patents.

## § 1543. Tariff Commission decisions

The Court of Customs and Patent Appeals shall have jurisdiction to review, by appeal on questions of law only, the findings of the United States Tariff Commission as to unfair practices in import trade, made under section 1337 of Title 19.

(June 25, 1948, ch. 646, 62 Stat. 943.)

### HISTORICAL AND REVISION NOTES

This jurisdictional section is in conformity with section 1337(c) of title 19, U.S.C., 1940 ed., Customs Duties, which provides for the right of appeal on questions of law to the Court of Customs and Patent Appeals from findings of the United States Tariff Commission, as to unfair practices in import trade, and prescribes the procedure therefor.

### PRIOR HISTORY OF COURT

For prior history of Court of Customs and Patent Appeals, see note under section 1541 of this title.

### CHANGE OF NAME

The United States Tariff Commission was renamed the United States International Trade Commission by Pub. L. 93-618, title I, § 171, Jan. 3, 1975, 88 Stat. 2009, which is classified to section 2231 of Title 19, Customs Duties.

### RULES OF THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Rule applicable to appeal from the United States International Trade Commission, see rule 3.1, Title 35, App., Patents.

## § 1544. Certain findings by Secretary of Commerce

The Court of Customs and Patent Appeals shall have jurisdiction to review, by appeal on questions of law only, findings of the Secretary of Commerce under headnote 6 to schedule 8, part 4, of the Tariff Schedules of the United States (relating to importation of instruments or apparatus).

(Added Pub. L. 89-651, § 8(c)(1), Oct. 14, 1966, 80 Stat. 901.)

## § 1545. Decision of the Plant Variety Protection Office

The Court of Customs and Patent Appeals shall have nonexclusive jurisdiction of appeals under section 71 of the Plant Variety Protection Act.

(Added Pub. L. 91-577, title III, § 143(a), Dec. 24, 1970, 84 Stat. 1558.)

#### REFERENCES IN TEXT

The Plant Variety Protection Act, referred to in text, is Pub. L. 91-577, Dec. 24, 1970, 84 Stat. 1542, which is classified principally to chapter 57 (§ 2321 et seq.) of Title 7, Agriculture. Section 71 of such act is classified to section 2461 of Title 7. For complete classification of this Act to the Code, see Short Title note set out under section 2321 of Title 7 and Tables volume.

#### EFFECTIVE DATE

Section effective Dec. 24, 1970, see section 141 of Pub. L. 91-577, set out as an Effective Date note under section 2321 of Title 7, Agriculture.

## CHAPTER 95—CUSTOMS COURT

Sec.
1581. Powers generally.
1582. Jurisdiction of the Customs Court.
[1583. Repealed.]

#### AMENDMENTS

1970—Pub. L. 91-271, title I, § 123(c), June 2, 1970, 84 Stat. 282, substituted "Jurisdiction of the Customs Court" for "Review of reappraisement; remission of duties" in item 1582, and struck out item 1583 "Review of decisions on protests".

#### CROSS REFERENCES

Procedure in Customs Court, see section 2631 et seq. of this title.

#### RULES OF THE UNITED STATES CUSTOMS COURT

See Appendix to this title.

### § 1581. Powers generally

The Customs Court and each judge thereof shall possess all the powers of a district court of the United States for preserving order, compelling the attendance of witnesses and the production of evidence.

(June 25, 1948, ch. 646, 62 Stat. 943.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 296 (Mar. 3, 1911, ch. 231, § 187 (a), as added Oct. 10, 1940, ch. 843, § 1, 54 Stat. 1101).

Only a part of section 296 of title 28, U.S.C., 1940 ed., appears in this section. Other provisions of such section are incorporated in sections 251-254, 455, 2071, 2639 and 2640 of this title.

Provision authorizing the Customs Court to punish for contempt was omitted as covered by H.R. 1600, § 401, 80th Congress, for Revision of the Criminal Code.

Changes were made in phraseology.

#### PRIOR HISTORY OF COURT

The predecessor of the present United States Customs Court was the Board of General Appraisers which was created by the Customs Administrative Act of June 10, 1890. The Board was under the administrative supervision of the Secretary of the Treasury.

From 1890 to 1926, the Board of General Appraisers had jurisdiction over all protests from decisions of the collectors of customs and appeals for reappraisement under sections 13 and 14 of the Customs Administrative Act of June 10, 1890, ch. 407, 26 Stat. 136.

The Customs Court was established by act May 28, 1926, ch. 411, §§ 1, 2, 44 Stat. 669, sections 405a and 405b of Title 19, Customs Duties, and said act transferred to it all the jurisdiction and powers of the former Board of General Appraisers. The Tariff Act of June 1930, ch. 497, title IV, § 518, 46 Stat. 737, section 1518 of Title 19, continued the Customs Court as constituted on June 17, 1930 with, however, several important changes.

#### CROSS REFERENCES

Power of court to issue writs, see section 1651 of this title.

Protests from determinations of appropriate customs officer under Anti-Dumping Law, jurisdiction of Customs Court, see section 169 of Title 19, Customs Duties.

Punishment for contempt, see section 401 of Title 18, Crimes and Criminal Procedure.

#### RULES OF THE UNITED STATES CUSTOMS COURT

Commissions, letters rogatory, and depositions, see rule 7.7, Appendix to this title.

### § 1582. Jurisdiction of the Customs Court

(a) The Customs Court shall have exclusive jurisdiction of civil actions instituted by any person whose protest pursuant to the Tariff Act of 1930, as amended, has been denied, in whole or in part, by the appropriate customs officer, where the administrative decision, including the legality of all orders and findings entering into the same, involves: (1) the appraised value of merchandise; (2) the classification and rate and amount of duties chargeable; (3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury; (4) the exclusion of merchandise from entry or delivery under any provisions of the customs laws; (5) the liquidation or reliquidation of an entry, or a modification thereof; (6) the refusal to pay a claim for drawback; or (7) the refusal to reliquidate an entry under section 520(c) of the Tariff Act of 1930, as amended.

(b) The Customs Court shall have exclusive jurisdiction of civil actions brought by American manufacturers, producers, or wholesalers pursuant to section 516 of the Tariff Act of 1930, as amended.

(c) The Customs Court shall not have jurisdiction of an action unless (1) either a protest has been filed, as prescribed by section 514 of the Tariff Act of 1930, as amended, and denied in accordance with the provisions of section 515 of the Tariff Act of 1930, as amended, or if the action relates to a decision under section 516 of the Tariff Act of 1930, as amended, all remedies prescribed therein have been exhausted, and (2) except in the case of an action relating to a decision under section 516 of the Tariff Act of 1930, as amended, all liquidated duties, charges or exactions have been paid at the time the action is filed.

(d) Only one civil action may be brought in the Customs Court to contest the denial of a single protest. However, any number of entries of merchandise involving common issues may be included in a single civil action. Actions may be consolidated by order of the court or by request of the parties, with approval of the court, if there are common issues.

(June 25, 1948, ch. 646, 62 Stat. 943; June 2, 1970, Pub. L. 91-271, title I, § 110, 84 Stat. 278.)

#### HISTORICAL AND REVISION NOTES

Based on section 1501(a) of title 19, U.S.C., 1940 ed., Customs Duties (June 17, 1930, ch. 497, title IV, § 501, 46 Stat. 730).

Word "exclusive" was inserted before "jurisdiction" on authority of *Patchogue-Plymouth Mills Corp.* v. *Durning*, C.C.A.N.Y. 1939, 101 F.2d 41 and *David L.*

*Moss Co., Inc.* v. *U.S.*, Cust. & Pat.App. 1939, 103 F.2d 395 and cases cited therein.

The provisions of section 1501 (a) of title 19, U.S.C., 1940, ed., relating to procedure in the Customs Court are incorporated in sections 2631-2634 of this title.

For appeals from the determination of the appraiser under the Anti-Dumping Law (sections 160-171 of title 19, U.S.C., 1940 ed.), see section 169 of said title 19 providing that the Customs Court and Court of Customs and Patent Appeals shall have the same jurisdiction as in appeals and protests relating to Customs Duties under existing law.

Changes were made in phraseology.

#### Prior History of Court

For prior history of Customs Court see note set out under section 1581 of this title.

#### References in Text

The Tariff Act of 1930, as amended, referred to in subsec. (a), is act June 17, 1930, ch. 497, 46 Stat. 590, as amended, which is classified principally to chapter 4 (§ 1202 et seq.) of Title 19, Customs Duties. For complete classification of this Act to the Code, see section 1654 of Title 19 and Tables volume.

Section 514 of the Tariff Act of 1930, as amended, referred to in subsec. (c), is classified to section 1514 of Title 19.

Section 515 of the Tariff Act of 1930, as amended, referred to in subsec. (c), is classified to section 1515 of Title 19.

Section 516 of the Tariff Act of 1930, as amended, referred to in subsecs. (b) and (c), is classified to section 1516 of Title 19.

Section 520(c) of the Tariff Act of 1930, as amended, referred to in subsec. (a), is classified to section 1520(c) of Title 19.

#### Amendments

1970—Pub. L. 91-271 substituted in the section catchline "Jurisdiction of the Customs Court" for "Review of reappraisement; remission of duties" and redefined the jurisdictional basis of the Customs Court.

#### Effective Date of 1970 Amendment

Amendment by Pub. L. 91-271 effective on Oct. 1, 1970, see section 122 of Pub. L. 91-271, set out as an Effective Date of 1970 Amendment note under section 1541 of this title.

#### Cross References

Additional duties for failure to mark article or container of foreign origin, see section 1304 of Title 19, Customs Duties.

Appeals—
  By American manufacturers, producers, or wholesalers on value of classification, see section 1516 of Title 19.
  Decisions of Customs Court, see section 1541 of this title.
  Protests from determination of appropriate customs officer under Anti-Dumping Law, see section 169 of Title 19, Customs Duties.
  Procedure on appeal, see section 2631 et seq. of this title.

Finality of decision of Customs Court, see section 2637 of this title.

Liability of consignee for additional or increased duties, see section 1485 of Title 19, Customs Duties.

#### Section Referred to in Other Sections

This section is referred to in section 2631 of this title; title 19 section 1515.

**[§ 1583. Repealed. Pub. L. 91-271, title I, § 111, June 2, 1970, 84 Stat. 278]**

Section, act June 25, 1948, ch. 646, 62 Stat. 943, provided that the Customs Court have exclusive jurisdiction to review on protest the decisions of any collector of customs as to rate and amount of duties chargeable and all exactions within the jurisdiction of the Secretary of the Treasury, decisions excluding any merchandise from entry or delivery, and the liquidation or reliquidation of any entry, or the refusal to pay any claim for drawback or to reliquidate an entry for a clerical error as provided by the customs laws. See section 1582 of this title.

#### Effective Date of Repeal

Repeal by Pub. L. 91-271 effective Oct. 1, 1970, see section 122 of Pub. L. 91-271, set out as an Effective Date of 1970 Amendment note under section 1541 of this title.

## CHAPTER 97—JURISDICTIONAL IMMUNITIES OF FOREIGN STATES

Sec.

1602. Findings and declaration of purpose.
1603. Definitions.
1604. Immunity of a foreign state from jurisdiction.
1605. General exceptions to the jurisdictional immunity of a foreign state.
1606. Extent of liability.
1607. Counterclaims.
1608. Service; time to answer default.[1]
1609. Immunity from attachment and execution of property of a foreign state.
1610. Exceptions to the immunity from attachment or execution.
1611. Certain types of property immune from execution.

### § 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

(Added Pub. L. 94-583, § 4(a), Oct. 21, 1976, 90 Stat. 2892.)

#### Effective Date

Section 8 of Pub. L. 94-583 provided that: "This Act [enacting this chapter and section 1330 of this title, amending sections 1332, 1391, and 1441 of this title, and enacting provisions set out as notes under this section and section 1 of this title] shall take effect ninety days after the date of its enactment [Oct. 21, 1976]."

#### Short Title

Pub. L. 94-583, which enacted this chapter, authorized to be cited as the "Foreign Sovereign Immunities Act of 1976", see section 1 of Pub. L. 94-583, set out as a note under section 1 of this title.

#### Separability of Provisions

Section 7 of Pub. L. 94-583 provided that: "If any provision of this Act [enacting this chapter and section 1330 of this title, amending sections 1332, 1391, and 1441 of this title, and enacting provisions set out as notes under this section and section 1 of this title] or the application thereof to any foreign state is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable."

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[1] So in original. Does not conform to section catchline.

### § 1603. Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (d) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

(Added Pub. L. 94-583, § 4(a), Oct. 21, 1976, 90 Stat. 2892.)

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1330, 1332, 1391, 1441, 1610 of this title.

### § 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

(Added Pub. L. 94-583, § 4(a), Oct. 21, 1976, 90 Stat. 2892.)

#### REFERENCES IN TEXT

The time of enactment of this Act, referred to in text, probably means the time of enactment of Pub. L. 94-583, which was approved on Oct. 21, 1976.

### § 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue; or

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or ommission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided*, That—

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; but such notice shall not be deemed to have been delivered, nor may it thereafter be delivered, if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit—unless the party was unaware that the vessel or cargo of a foreign state was involved, in which event the service of process of arrest shall be deemed to constitute valid delivery of such notice; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in subsection (b)(1) of this section or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

Whenever notice is delivered under subsection (b)(1) of this section, the maritime lien shall thereafter be deemed to be an in personam claim against the foreign state which at that time owns the vessel or cargo involved: *Provided*, That a court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose, such value to be determined as of the time notice is served under subsection (b)(1) of this section.

(Added Pub. L. 94-583, § 4(a), Oct. 21, 1976, 90 Stat. 2892.)

### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1330, 1391, 1604, 1606, 1607, 1610 of this title.

## § 1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

(Added Pub. L. 94-583, § 4(a), Oct. 21, 1976, 90 Stat. 2894.)

### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1330, 1604 of this title.

## § 1607. Counterclaims

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim—

(a) for which a foreign state would not be entitled to immunity under section 1605 of this chapter had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

(Added Pub. L. 94-583, § 4(a), Oct. 21, 1976, 90 Stat. 2894.)

### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1330, 1604, 1606 of this title.

## § 1608. Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state—

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made—

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

(Added Pub. L. 94-583, § 4(a), Oct. 21, 1976, 90 Stat. 2894.)

### Section Referred to in Other Sections

This section is referred to in sections 1330, 1603, 1605, 1610 of this title.

## § 1609. Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

(Added Pub. L. 94-583, § 4(a), Oct. 21, 1976, 90 Stat. 2895.)

### References in Text

The time of enactment of this Act, referred to in text, probably means the time of enactment of Pub. L. 94-583, which was approved on Oct. 21, 1976.

## § 1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property—

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: *Provided,* That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), or (5), or 1605(b) of this chapter, regardless of whether the property is or was used for the activity upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if—

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

(Added Pub. L. 94-583, § 4(a), Oct. 21, 1976, 90 Stat. 2896.)

#### REFERENCES IN TEXT

The effective date of this Act, referred to in subsecs. (a) and (b), is 90 days after Oct. 21, 1976, see section 8 of Pub. L. 94-583, set out as an Effective Date note under section 1602 of this title.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1609, 1611 of this title

### § 1611. Certain types of property immune from execution

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if—

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

(Added Pub. L. 94-583, § 4(a), Oct. 21, 1976, 90 Stat. 2897.)

#### REFERENCES IN TEXT

The International Organizations Immunities Act, referred to in subsec. (a), is act Dec. 29, 1945, ch. 652, title I, 59 Stat. 669, as amended, which is classified principally to subchapter XVIII (§ 288 et seq.) of chapter 7 of Title 22, Foreign Relations and Intercourse. For complete classification of this Act to the Code, see Short Title note set out under section 288 of Title 22 and Tables volume.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1609 of this title.

## PART V—PROCEDURE

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## CHAPTER 111—GENERAL PROVISIONS

Sec.
1651. Writs.
1652. State laws as rules of decision.
1653. Amendment of pleadings to show jurisdiction.
1654. Appearance personally or by counsel.
1655. Lien enforcement; absent defendants.
1656. Creation of new district or division or transfer of territory; lien enforcement.

#### CROSS REFERENCES

Criminal procedure, see section 3001 et seq. of Title 18, Crimes and Criminal Procedure.

Removal of cases from State courts, procedure, see section 1446 of this title.

### § 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

(June 25, 1948, ch. 646, 62 Stat. 944; May 24, 1949, ch. 139, § 90, 63 Stat. 102.)

#### HISTORICAL AND REVISION NOTES

#### 1948 ACT

Based on title 28, 1948 ACT U.S.C., 1940 ed., §§ 342, 376, 377 (Mar. 3, 1911, ch. 231, §§ 234, 261, 262, 36 Stat. 1156, 1162).

Section consolidates sections 342, 376, and 377 of title 28, U.S.C., 1940 ed., with necessary changes in phraseology.

Such section 342 provided:

"The Supreme Court shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction; and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States, or to persons holding office under the authority of the United States, where a State, or an ambassador, or other public minister, or a consul, or vice consul is a party."

Such section 376 provided:

"Writs of ne exeat may be granted by any justice of the Supreme Court, in cases where they might be granted by the Supreme Court; and by any district judge, in cases where they might be granted by the district court of which he is a judge. But no writ of ne exeat shall be granted unless a suit in equity is commenced, and satisfactory proof is made to the court or judge granting the same that the defendant designs quickly to depart from the United States."

Such section 377 provided:

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[1] So in original. Does not conform to chapter catchline.

"The Supreme Court and the district courts shall have power to issue writs of scire facias. The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

The special provisions of section 342 of title 28, U.S.C., 1940 ed., with reference to writs of prohibition and mandamus, admiralty courts and other courts and officers of the United States were omitted as unnecessary in view of the revised section.

The revised section extends the power to issue writs in aid of jurisdiction, to all courts established by Act of Congress, thus making explicit the right to exercise powers implied from the creation of such courts.

The provisions of section 376 of title 28, U.S.C., 1940 ed., with respect to the powers of a justice or judge in issuing writs of ne exeat were changed and made the basis of subsection (b) of the revised section but the conditions and limitations on the writ of ne exeat were omitted as merely confirmatory of well-settled principles of law.

The provision in section 377 of title 28, U.S.C., 1940 ed., authorizing issuance of writs of scire facias, was omitted in view of rule 81(b) of the Federal Rules of Civil Procedure abolishing such writ. The revised section is expressive of the construction recently placed upon such section by the Supreme Court in *U.S. Alkali Export Assn.* v. *U.S.*, 65 S.Ct. 1120, 325 U.S. 196, 89 L.Ed. 1554, and *De Beers Consol. Mines* v. *U.S.*, 65 S.Ct. 1130, 325 U.S. 212, 89 L.Ed. 1566.

#### 1949 Act

This section corrects a grammatical error in subsection (a) of section 1651 of title 28, U.S.C.

#### Amendments

1949—Subsec. (a). Act May 24, 1949, inserted "and" between "jurisdictions" and "agreeable".

#### Writ of Error

Act Jan. 31, 1928, ch. 14, § 2, 45 Stat. 54, as amended Apr. 26, 1928, ch. 440, 45 Stat. 466; June 25, 1948, ch. 646, § 23, 62 Stat. 990, provided that: "All Acts of Congress referring to writs of error shall be construed as amended to the extent necessary to substitute appeal for writ of error."

#### Cross References

Mandamus; statutory provisions giving district courts jurisdiction to grant relief in the nature of writs of mandamus include—

- Bridges over navigable waters, removal of, see sections 495 and 519 of Title 33, Navigation and Navigable Waters.
- Federal Communications Act and orders of Commission, enforcement of, see sections 11, 401, and 406 of Title 47, Telegraphs, Telephones, and Radiotelegraphs.
- Federal Power Act, and orders thereunder, enforcement and prevention of violations, see sections 820 and 825m of Title 16, Conservation.
- Federal Trade Commission Act, and orders thereunder, enforcement of, see section 49 of Title 15, Commerce and Trade.
- Interstate Commerce Act, enforcement of, see sections 19a, 20 and 23 of Title 49, Transportation.
- National Railroad Adjustment Board, enforcement of orders, see section 153 of Title 45, Railroads.
- Securities and Public Utilities Holding Companies Acts and orders of Securities and Exchange Commission, enforcement of, see sections 77t, 78u, and 79r of Title 15, Commerce and Trade.
- Stockyards Act, adopting by reference section 49 of Title 15, see section 222 of Title 7, Agriculture.
- Tariff Act and orders of Tariff Commission, enforcement of, see section 1333 of Title 19, Customs Duties.

Union Pacific Railroad, operation of, see section 88 of Title 45, Railroads.

Puerto Rico, power of supreme and district courts to grant mandamus, see section 872 of Title 48, Territories and Insular Possessions.

#### Rules of the Supreme Court of the United States

Extraordinary writs—
- Considerations governing issuance, see rule 30, Appendix to this title.
- Procedure on applications, see rule 31.

#### Federal Rules of Civil Procedure

Remedies for seizure of person and property, including arrest, attachment, garnishment, replevin, and sequestration, see rule 64, Appendix to this title.

Writs of coram nobis, coram vobis, audita querela, bills of review, and bills in the nature of bills of review abolished, see rule 60.

Writs of mandamus and scire facias abolished in district courts, see rule 81.

#### Section Referred to in Other Sections

This section is referred to in section 1407 of this title.

### § 1652. State laws as rules of decision

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

(June 25, 1948, ch. 646, 62 Stat. 944.)

#### Historical Revision Notes

Based on title 28, U.S.C., 1940 ed., § 725 (R.S. § 721).

"Civil actions" was substituted for "trials at common law" to clarify the meaning of the Rules of Decision Act in the light of the Federal Rules of Civil Procedure. Such Act has been held to apply to suits in equity.

Changes were made in phraseology.

### § 1653. Amendment of pleadings to show jurisdiction

Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.

(June 25, 1948, ch. 646, 62 Stat. 944.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 399 (Mar. 3, 1911, ch. 231, § 274c, as added Mar. 3, 1915, ch. 90, 38 Stat. 956).

Section was extended to permit amendment of all jurisdictional allegations instead of merely allegations of diversity of citizenship as provided by section 399 of title 28, U.S.C., 1940 ed.

Changes were made in phraseology.

#### Federal Rules of Civil Procedure

Amended and supplemental pleadings, see rules 12 and 15, Appendix to this title.

### § 1654. Appearance personally or by counsel

In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.

(June 25, 1948, ch. 646, 62 Stat. 944; May 24, 1949, ch. 139, § 91, 63 Stat. 103.)

### Historical Revision Notes

#### 1948 Act

Based on title 28, U.S.C., 1940 ed., § 394 (Mar. 3, 1911, ch. 231, § 272, 36 Stat. 1164).

Words "as, by the rules of the said courts respectively, are permitted to manage and conduct causes therein," after "counsel," were omitted as surplusage. The revised section and section 2071 of this title effect no change in the procedure of the Tax Court before which certain accountants may be admitted as counsel for litigants under Rule 2 of the Tax Court.

Changes were made in phraseology.

#### 1949 Act

This section restores in section 1654 of title 28, U.S.C., language of the original law.

### Amendments

1949—Act May 24, 1949, added "as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein".

## § 1655. Lien enforcement; absent defendants

In an action in a district court to enforce any lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to, real or personal property within the district, where any defendant cannot be served within the State, or does not voluntarily appear, the court may order the absent defendant to appear or plead by a day certain.

Such order shall be served on the absent defendant personally if practicable, wherever found, and also upon the person or persons in possession or charge of such property, if any. Where personal service is not practicable, the order shall be published as the court may direct, not less than once a week for six consecutive weeks.

If an absent defendant does not appear or plead within the time allowed, the court may proceed as if the absent defendant had been served with process within the State, but any adjudication shall, as regards the absent defendant without appearance, affect only the property which is the subject of the action. When a part of the property is within another district, but within the same state, such action may be brought in either district.

Any defendant not so personally notified may, at any time within one year after final judgment, enter his appearance, and thereupon the court shall set aside the judgment and permit such defendant to plead on payment of such costs as the court deems just.

(June 25, 1948, ch. 646, 62 Stat. 944.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 118 (Mar. 3, 1911, ch. 231, § 57, 36 Stat. 1102).

Word "action" was substituted for "suit," in view of Rule 2 of the Federal Rules of Civil Procedure.

In view of Rule 4 (f) of the Federal Rules of Civil Procedure permitting service of process anywhere within the territorial limits of the States, the word "State" was substituted for "district" in the first and third paragraphs.

Changes were made in phraseology.

### Federal Rules of Civil Procedure

Process and relief from judgment or order, see rules 4 and 60, Appendix to this title.

## § 1656. Creation of new district or division or transfer of territory; lien enforcement

The creation of a new district or division or the transfer of any territory to another district or division shall not affect or divest any lien theretofore acquired in a district court upon property within such district, division or territory.

To enforce such lien, the clerk of the court in which the same is acquired, upon the request and at the cost of the party desiring the same, shall make a certified copy of the record thereof, which, when filed in the proper court of the district or division in which such property is situated after such creation or transfer shall be evidence in all courts and places equally with the original thereof; and, thereafter like proceedings shall be had thereon, and with the same effect, as though the case or proceeding had been originally instituted in such court.

(June 25, 1948, ch. 646, 62 Stat. 944.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 122 (Mar. 3, 1911, ch. 231, § 60, 36 Stat. 1103).

A provision as to creation of a new district or division or transfer of territory before March 3, 1911, was omitted as obsolete.

Words descriptive of the lien were omitted as unnecessary.

Changes were made in phraseology.

### Federal Rules of Civil Procedure

Effect of rule 69 on this section, see note by Advisory Committee under rule 69, Appendix to this title.

# CHAPTER 113—PROCESS

Sec.
1691. Seal and teste of process.
1692. Process and orders affecting property in different districts.
1693. Place of arrest in civil action.
1694. Patent infringement action.
1695. Stockholder's derivative action.
1696. Service in foreign and international litigation.

### Amendments

1964—Pub. L. 88-619, § 4(b), Oct. 3, 1964, 78 Stat. 996, added item 1696.

### Federal Rules of Civil Procedure

Process, see Rule 4, Appendix to this title.

### Cross References

Virgin Islands, process of district court, see section 1405z of Title 48, Territories and Insular Possessions.

## § 1691. Seal and teste of process

All writs and process issuing from a court of the United States shall be under the seal of the court and signed by the clerk thereof.

(June 25, 1948, ch. 646, 62 Stat. 945.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 721 (R.S. § 911; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167).

Provisions as to teste of process issuing from the district courts were omitted as superseded by Rule 4 (b) of the Federal Rules of Civil Procedure. Provision for teste of the Chief Justice of writs and process was omitted as unnecessary.

A provision requiring the United States to bear the expense of providing seals was omitted as unnecessary and obsolete.

Changes were made in phraseology.

#### Immunity From Seizure Under Judicial Process of Cultural Objects Imported for Temporary Exhibition or Display

Presidential determination of cultural significance of objects and exhibition or display thereof in the national interest, see section 2459 of Title 22, Foreign Relations and Intercourse.

#### Cross References

Forms of process, writs, etc. in the district courts and courts of appeals of the United States in civil actions, power of Supreme Court to prescribe by general rules, see section 2072 of this title.

Habeas corpus, see section 2241 of this title.

Power of courts to issue writs, see section 1651 of this title.

Virgin Islands, process of district court, see section 1405z of Title 48, Territories and Insular Possessions.

Writs venire facias abolished, see Historical and Revision note under section 1867 of this title.

#### Federal Rules of Civil Procedure

Assistance, attachment, or sequestration, see rule 70, Appendix to this title.

Execution, see rule 69.

Form of summons, see rule 4.

Injunction, see rule 65.

Process, see rule 4.

Subpoenas, see rule 45.

Summons, see rule 4.

Writs of scire facias and mandamus abolished, see rule 81.

### § 1692. Process and orders affecting property in different districts

In proceedings in a district court where a receiver is appointed for property, real, personal, or mixed, situated in different districts, process may issue and be executed in any such district as if the property lay wholly within one district, but orders affecting the property shall be entered of record in each of such districts.

(June 25, 1948, ch. 646, 62 Stat. 945.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 117 (Mar. 3, 1911, ch. 231, § 56, 36 Stat. 1102).

Provisions of section 117 of title 28, U.S.C., 1940 ed., as to jurisdiction and control of a receiver of property in several districts are the basis of section 754 of this title.

For explanation of revision of section 117 of title 28, U.S.C., 1940 ed., and its extension to include property, not only in the same judicial circuit, but in any judicial circuit. (See reviser's note under section 754 of this title.)

Changes were made in phraseology.

#### Cross References

Receivers of property in different districts, see section 754 of this title.

### § 1693. Place of arrest in civil action

Except as otherwise provided by Act of Congress, no person shall be arrested in one district for trial in another in any civil action in a district court.

(June 25, 1948, ch. 646, 62 Stat. 945.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 112 (Mar. 3, 1911, ch. 231, § 51, 36 Stat. 1101; Sept. 19, 1922, ch. 345, 42 Stat. 849; Mar. 4, 1925, ch. 526, § 1, 43 Stat. 1264; Apr. 16, 1936, ch. 230, 49 Stat. 1213).

Venue provisions of section 112 of title 28, U.S.C., 1940 ed., appear in sections 1391 and 1401 of this title. Other provisions are incorporated in section 1695 of this title.

The exception at the beginning of the section was substituted for "Except as provided in sections 113-117 of this title."

Changes were made in phraseology.

#### Cross References

Venue generally, see section 1391 of this title.

Waiver of venue, see section 1406 of this title.

### § 1694. Patent infringement action

In a patent infringement action commenced in a district where the defendant is not a resident but has a regular and established place of business, service of process, summons or subpoena upon such defendant may be made upon his agent or agents conducting such business.

(June 25, 1948, ch. 646, 62 Stat. 945.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 109 (Mar. 3, 1911, ch. 231, § 48, 36 Stat. 1100).

Venue provisions of section 109 of title 28, U.S.C., 1940 ed., appear in section 1400 of this title.

Changes were made in phraseology.

#### Cross References

Venue in patent infringement action, see section 1400 of this title.

### § 1695. Stockholder's derivative action

Process in a stockholder's action in behalf of his corporation may be served upon such corporation in any district where it is organized or licensed to do business or is doing business.

(June 25, 1948, ch. 646, 62 Stat. 945.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 112 (Mar. 3, 1911, ch. 231, § 51, 36 Stat. 1101; Sept. 19, 1922, ch. 345, 42 Stat. 849; Mar. 4, 1925, ch. 526, § 1, 43 Stat. 1264; Apr. 16, 1936, ch. 230, 49 Stat. 1213).

The phrase "is organized or licensed to do business or is doing business" was substituted for the words "resides or is found," as more specific and to conform to section 1391 of this title.

Venue provisions of section 112 of title 28, U.S.C., 1940 ed., appear in section 1391 and 1401 of this title. Other provisions are incorporated in section 1693 of this title.

Changes were made in phraseology.

#### Cross References

Venue in stockholder's derivative action, see section 1401 of this title.

### § 1696. Service in foreign and international litigation

(a) The district court of the district in which a person resides or is found may order service upon him of any document issued in connection with a proceeding in a foreign or international tribunal. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon application of any interested person and shall direct the manner of service. Service pursuant to this subsection does not, of itself, require the recognition or enforcement in the United States of a judgment, decree, or order rendered by a foreign or international tribunal.

(b) This section does not preclude service of such a document without an order of court.

(Added Pub. L. 88-619, § 4(a), Oct. 3, 1964, 78 Stat. 995.)

## CHAPTER 115—EVIDENCE; DOCUMENTARY

Sec.
1731. Handwriting.
1732. Record made in regular course of business; photographic copies.
1733. Government records and papers; copies.
1734. Court record lost or destroyed generally. [1]
1735. Court record lost or destroyed where United States interested.
1736. Congressional Journals.
1737. Copy of officer's bond.
1738. State and Territorial statutes and judicial proceedings; full faith and credit.
1739. State and Territorial nonjudicial records; full faith and credit.
1740. Copies of consular papers.
1741. Foreign official documents.
1742. [Repealed].
1743. Demand on postmaster.
1744. Copies of patent office documents generally. [1]
1745. Copies of foreign patent documents.
1746. Unsworn declarations under penalty of perjury.

### AMENDMENTS

1976—Pub. L. 94-550, § 1(b), Oct. 18, 1976, 90 Stat. 2534, added item 1746.

1964—Pub. L. 88-619, §§ 5(b), 6(b), 7(b), Oct. 3, 1964, 78 Stat. 996, substituted "official documents" for "documents generally; copies" in item 1741, inserted "[Repealed]." in item 1742, and substituted "documents" for "specifications and drawings" in item 1745.

1951—Act Aug. 28, 1951, ch. 351, § 2, 65 Stat. 206, inserted "; photographic copies" in item 1732.

1949—Act May 24, 1949, ch. 139, § 92(a), 63 Stat. 103, struck out former item 1745, "Printed copies of patient specifications and drawings" and renumbered former item "1746" as "1745".

### FEDERAL RULES OF CIVIL PROCEDURE

Civil cases—
- Proof of official record, see rule 44, Appendix to this title.
- Subpoena for production of documentary evidence, see rule 45.

### FEDERAL RULES OF CRIMINAL PROCEDURE

Criminal cases—
- Proof of official record, see rule 27, Title 18, Appendix, Crimes and Criminal Procedure.
- Subpoena for production of documentary evidence, see rule 17.

## § 1731. Handwriting

The admitted or proved handwriting of any person shall be admissible, for purposes of comparison, to determine genuineness of other handwriting attributed to such person.

(June 25, 1948, ch. 646, 62 Stat. 945.)

### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 638 (Feb. 26, 1913, ch. 79, 37 Stat. 683).

Words "as a basis for comparison by witnesses, or by the jury, court, or officer conducting such proceeding", were omitted as superfluous.

Changes were made in phraseology.

### FEDERAL RULES OF CIVIL PROCEDURE

Evidence, civil actions, see rule 43, Appendix to this title.

### FEDERAL RULES OF CRIMINAL PROCEDURE

Criminal proceedings, see rule 26, Title 18, Appendix, Crimes and Criminal Procedure.

## § 1732. Record made in regular course of business; photographic copies

If any business, institution, member of a profession or calling, or any department or agency of government, in the regular course of business or activity has kept or recorded any memorandum, writing, entry, print, representation or combination thereof, of any act, transaction, occurrence, or event, and in the regular course of business has caused any or all of the same to be recorded, copied, or reproduced by any photographic, photostatic, microfilm, micro-card, miniature photographic, or other process which accurately reproduces or forms a durable medium for so reproducing the original, the original may be destroyed in the regular course of business unless its preservation is required by law. Such reproduction, when satisfactorily identified, is as admissible in evidence as the original itself in any judicial or administrative proceeding whether the original is in existence or not and an enlargement or facsimile of such reproduction is likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of court. The introduction of a reproduced record, enlargement, or facsimile does not preclude admission of the original. This subsection shall not be construed to exclude from evidence any document or copy thereof which is otherwise admissible under the rules of evidence.

(June 25, 1948, ch. 646, 62 Stat. 945; Aug. 28, 1951, ch. 351, §§ 1, 3, 65 Stat. 206; Aug. 30, 1961, Pub. L. 87-183, 75 Stat. 413; Jan. 2, 1975, Pub. L. 93-595, § 2(b), 88 Stat. 1949.)

### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 695 (June 20, 1936, ch. 640, § 1, 49 Stat. 1561).

Changes in phraseology were made.

### AMENDMENTS

1975—Pub. L. 93-595 struck out subsec. (a) which had made admissible as evidence writings or records made as a memorandum or record of any act, transaction, occurrence, or event if made in the regular course of business, and struck out the designation "(b)" preceding remainder of section. See Federal Rules of Evidence set out in the Appendix to this title.

1961—Subsec. (b). Pub. L. 87-183 deleted "unless held in a custodial or fiduciary capacity or" which followed "may be destroyed in the regular course of business".

1951—Act Aug. 29, 1951, § 3, inserted reference to photographic copies in the catchline.

Subsec. (a). Act Aug. 28, 1951, § 1, designated the former entire section as subsec. (a).

Subsec. (b). Act Aug. 28, 1951, § 1, added subsec. (b).

### FEDERAL RULES OF CIVIL PROCEDURE

Proof of official records, see rule 44, Appendix to this title.

Effect of rule 44 on former section 695 of this title, see note by Advisory Committee under rule 44.

### FEDERAL RULES OF CRIMINAL PROCEDURE

Proof of official records, see rule 27 and note of the Advisory Committee under rule 27, Title 18, Appendix, Crimes and Criminal Procedure.

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[1] So in original. Does not conform to section catchline.

### Section Referred to in Other Sections

This section is referred to in title 26 section 5555.

## § 1733. Government records and papers; copies

(a) Books or records of account or minutes of proceedings of any department or agency of the United States shall be admissible to prove the act, transaction or occurrence as a memorandum of which the same were made or kept.

(b) Properly authenticated copies or transcripts of any books, records, papers or documents of any department or agency of the United States shall be admitted in evidence equally with the originals thereof.

(c) This section does not apply to cases, actions, and proceedings to which the Federal Rules of Evidence apply.

(June 25, 1948, ch. 646, 62 Stat. 946; Jan. 2, 1975, Pub. L. 93-595, § 2(c), 88 Stat. 1949.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., §§ 661-667, 671 (R.S. §§ 882-886, 889; July 31, 1894, ch. 174, §§ 17, 22, 28 Stat. 210; Mar. 2, 1895, ch. 177, § 10, 28 Stat. 809; June 10, 1921, ch. 18, §§ 301, 302, 304, 310, 42 Stat. 23-25; May 10, 1934, ch. 277, § 512, 48 Stat. 758; June 19, 1934, ch. 653, § 6(a), 48 Stat. 1109).

The consolidation of sections 661-667 and 671 of title 28, U.S.C., 1940 ed., permitted omission of obsolete, unnecessary and repetitive provisions in such sections. For example, the provision in section 665 of title 28, U.S.C., 1940 ed., authorizing the court to require production of documents on a plea of non est factum, was omitted. Such plea is obsolete in Federal practice.

Numerous provisions with respect to authentication were omitted as covered by Rule 44 of the Federal Rules of Civil Procedure.

Likewise the provision that official seals shall be judicially noticed was omitted as unnecessary. Seals of Federal agencies are judicially noticed by States and Federal courts without statutory mandate. *Gardner* v. *Barney*, 1867, 6 Wall. 499, 73 U.S.C. 499, 18 L.Ed. 890, 31 C.J.S. 599 n. 27-30 and 23 C.J.S. 99 n. 41. The same principle unquestionably will apply to seals of Government corporations.

Words "of any corporation all the stock of which is beneficially owned by the United States, either directly or indirectly", in section 661 of title 28, U.S.C., 1940 ed., were omitted as covered by "or agency". The revised section was broadened to apply to "any department or agency". (See reviser's note under section 1345 of this title.)

Changes were made in phraseology.

### Amendments

1975—Subsec. (c). Pub. L. 93-595 added subsec. (c).

### Cross References

Authenticated and certified copy of Government record by Administrator of General Services admissible in evidence, see section 2112 of Title 44, Public Printing and Documents.

Authentication—
  Copies of documents, etc., in the office of the Commissioner of Indian Affairs is made by section 6 of Title 25, Indians.
  Original papers on file in the Bureau of Land Management are provided for by section 13 of Title 43, Public Lands.
  Records by Secretary of the Interior, see section 1460 of Title 43.
  Records of the Postal Service, see section 207 of Title 39, Postal Service.

Certified copies of—
  Records or other documents of General Accounting Office admissible in evidence, see section 46 of Title 31, Money and Finance.
  Schedules and tariffs of rates, etc., copies as evidence, see section 16 of Title 49, Transportation.

Judicial notice of seals—
  Departments of Commerce and Labor, see sections 1501 of Title 15, Commerce and Trade, and 551 of Title 29, Labor.
  Department of the Air Force, see section 8011 of Title 10, Armed Forces.

Provisions relating to the requisites of the certificates of national banks, and the acknowledgment and filing thereof, are made by sections 22 and 23 of Title 12, Banks and Banking.

Secretary of the Interior is authorized to furnish transcripts of records in district land offices for individuals, and such transcripts, when duly certified, are made admissible as evidence by section 83 of Title 43, Public Lands.

Verification of official documents by Secretary of Agriculture, see section 2203 of Title 7, Agriculture.

### Federal Rules of Civil Procedure

Proof of official record, see rule 44, Appendix to this title.

Subpoena for production of documentary evidence, see rule 45.

### Federal Rules of Criminal Procedure

Proof of official record, see rule 27, Title 18, Appendix, Crimes and Criminal Procedure.

Subpoena for production of documentary evidence, see rule 17.

### Section Referred to in Other Sections

This section is referred to in title 31 section 46.

## § 1734. Court record lost or destroyed, generally

(a) A lost or destroyed record of any proceeding in any court of the United States may be supplied on application of any interested party not at fault, by substituting a copy certified by the clerk of any court in which an authentic copy is lodged.

(b) Where a certified copy is not available, any interested person not at fault may file in such court a verified application for an order establishing the lost or destroyed record.

Every other interested person shall be served personally with a copy of the application and with notice of hearing on a day stated, not less than sixty days after service. Service may be made on any nonresident of the district anywhere within the jurisdiction of the United States or in any foreign country.

Proof of service in a foreign country shall be certified by a minister or consul of the United States in such country, under his official seal.

If, after the hearing, the court is satisfied that the statements contained in the application are true, it shall enter an order reciting the substance and effect of the lost or destroyed record. Such order, subject to intervening rights of third persons, shall have the same effect as the original record.

(June 25, 1948, ch. 646, 62 Stat. 946.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., §§ 681, 682, 683, and 684 (R.S. §§ 899, 900, 901, 902; Jan. 31, 1879, ch. 39, § 1, 20 Stat. 277).

Sections 681, 682, and 684 of title 28, U.S.C., 1940 ed., contained repetitious language which was eliminated by the consolidation.

Section 683 of title 28, U.S.C., 1940 ed., applied only to cases removed to the Supreme Court, and was revised so as to be applicable to cases transmitted to other courts not in existence in 1871 when the section was originally enacted.

Changes were made in phraseology.

#### Federal Rules of Civil Procedure

Effect of rule 44 on former section 681 of this title, see note by Advisory Committee under rule 44, Appendix to this title.

Proof of official records, see rule 44.

#### Federal Rules of Criminal Procedure

Proof of official records, see rule 27, and note of the Advisory Committee under rule 27, Title 18, Appendix, Crimes and Criminal Procedure.

### § 1735. Court record lost or destroyed where United States interested

(a) When the record of any case or matter in any court of the United States to which the United States is a party, is lost or destroyed, a certified copy of any official paper of a United States attorney, United States marshal or clerk or other certifying or recording officer of any such court, made pursuant to law, on file in any department or agency of the United States and relating to such case or matter, shall, on being filed in the court to which it relates, have the same effect as an original paper filed in such court. If the copy so filed discloses the date and amount of a judgment or decree and the names of the parties thereto, the court may enforce the judgment or decree as though the original record had not been lost or destroyed.

(b) Whenever the United States is interested in any lost or destroyed records or files of a court of the United States, the clerk of such court and the United States attorney for the district shall take the steps necessary to restore such records or files, under the direction of the judges of such court.

(June 25, 1948, ch. 646, 62 Stat. 946.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., §§ 685, 686 (R.S. §§ 903, 904; Jan. 31, 1879, ch. 39, §§ 2, 3, 20 Stat. 277).

A provision of section 686 of title 28, U.S.C., 1940 ed., relating to allowances to clerks and United States attorneys for their services, and disbursements incidental to restoring lost records under such section was deleted as obsolete, in view of sections 508, 509, and 604 of this title, placing such officers on a salary basis and providing for their expenses.

Words "And in all cases where any of the files, papers, or records of any court of the United States have been or shall be lost or destroyed, the files, records and papers which, pursuant to law, may have been or may be restored or supplied in place of such records, files, and papers, shall have the same force and effect, to all intents and purposes, as the originals thereof would have been entitled to," at the end of section 685 of title 28, U.S.C., 1940 ed., were omitted as fully covered by the remainder of this section and by section 1734 of this title.

Words "or agency of the United States" were substituted for "of the Government" so as to eliminate any possible ambiguity as to the scope of this section. See definitive section 451 of this title.

The phrase "so far as the judges of such courts respectively shall deem it essential to the interests of the United States that such records and files be restored or supplied," was omitted as unnecessary.

Changes were made in phraseology.

#### Federal Rules of Civil Procedure

Proof of official records, see rule 44, Appendix to this title.

Effect of rule 44 on former section 685 of this title, see note by Advisory Committee under rule 44.

#### Federal Rules of Criminal Procedure

Proof of official records, see rule 27, and note of the Advisory Committee under rule 27, Title 18, Appendix, Crimes and Criminal Procedure.

### § 1736. Congressional Journals

Extracts from the Journals of the Senate and the House of Representatives, and from the Executive Journal of the Senate when the injunction of secrecy is removed, certified by the Secretary of the Senate or the Clerk of the House of Representatives shall be received in evidence with the same effect as the originals would have.

(June 25, 1948, ch. 646, 62 Stat. 947.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 676 (R.S. § 895).

Changes in phraseology were made.

#### Federal Rules of Civil Procedure

Proof of official records, see rule 44, Appendix to this title.

Effect of rule 44 on former section 676 of this title, see note by Advisory Committee under rule 44.

#### Federal Rules of Criminal Procedure

Proof of official records, see rule 27, and note of the Advisory Committee under rule 27, Title 18, Appendix, Crimes and Criminal Procedure.

### § 1737. Copy of officer's bond

Any person to whose custody the bond of any officer of the United States has been committed shall, on proper request and payment of the fee allowed by any Act of Congress, furnish certified copies thereof, which shall be prima facie evidence in any court of the execution, filing and contents of the bond.

(June 25, 1948, ch. 646, 62 Stat. 947.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., §§ 326, 499, 513, and 514 (R.S. §§ 783, 795; Feb. 22, 1875, ch. 95, § 3, 18 Stat. 333; Mar. 3, 1911, ch. 231, §§ 220, 291, 36 Stat. 1152, 1167).

Sections 326, 499, 513, and 514 of title 28, U.S.C., 1940 ed., were consolidated. They related to the bonds of particular officers, namely the Clerk of the Supreme Court, the United States marshals, and the clerks of the district courts. The revised section eliminates all inconsistent provisions of such sections.

The requirement that certified copies be furnished is new.

The other provisions of sections 326, 499, 513, and 514 of title 28, U.S.C., 1940 ed., are now incorporated in sections 544 and 952 of this title.

Changes were made in phraseology.

### § 1738. State and Territorial statutes and judicial proceedings; full faith and credit

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

(June 25, 1948, ch. 646, 62 Stat. 947.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 687 (R.S. § 905).

Words "Possession of the United States" were substituted for "of any country subject to the jurisdiction of the United States".

Words "or copies thereof" were added in three places. Copies have always been used to prove statutes and judicial proceedings under section 687 of title 28, U.S.C., 1940 ed. The added words will cover expressly such use.

Words "and its Territories and Possessions" were added in two places so as to make this section and section 1739 of this title uniform, the basic section of the latter having provided that nonjudicial records or books of any State, Territory, or "country subject to the jurisdiction of the United States" should be admitted in any court or office in any other State, Territory, or "such country."

Words "a judge of the court" were substituted for "the judge, chief justice or presiding magistrate" without change of substance.

At the beginning of the last paragraph, words "Such Acts" were substituted for "And the said". This follows the language of Article IV, section 1 of the Constitution.

For additional provisions as to authentication, see Rule 44 of the Federal Rules of Civil Procedure.

Changes were made in phraseology.

### Cross References

Full faith and credit, see U.S. Const., art. 4, § 1.

### Federal Rules of Civil Procedure

Authentication of copy of official record, see rule 44, Appendix to this title.

Effect of rule 44 on former section 687 of this title, see note by Advisory Committee under rule 44.

### Federal Rules of Criminal Procedure

Criminal cases, proof of official record, see rule 27, Title 18, Appendix, Crimes and Criminal Procedure.

## § 1739. State and Territorial nonjudicial records; full faith and credit

All nonjudicial records or books kept in any public office of any State, Territory, or Possession of the United States, or copies thereof, shall be proved or admitted in any court or office in any other State, Territory, or Possession by the attestation of the custodian of such records or books, and the seal of his office annexed, if there be a seal, together with a certificate of a judge of a court of record of the county, parish, or district in which such office may be kept, or of the Governor, or secretary of state, the chancellor or keeper of the great seal, of the State, Territory, or Possession that the said attestation is in due form and by the proper officers.

If the certificate is given by a judge, it shall be further authenticated by the clerk or prothonotary of the court, who shall certify, under his hand and the seal of his office, that such judge is duly commissioned and qualified; or, if given by such Governor, secretary, chancellor, or keeper of the great seal, it shall be under the great seal of the State, Territory, or Possession in which it is made.

Such records of books, or copies thereof, so authenticated, shall have the same full faith and credit in every court and office within the United States and its Territories and Possessions as they have by law or usage in the courts or offices of the State, Territory, or Possession from which they are taken.

(June 25, 1948, ch. 646, 62 Stat. 947.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 688 (R.S. § 906).

Words "Possession of the United States" were substituted for "or any country subject to the jurisdiction of the United States."

Words "or copies thereof" were added in two places. Copies have always been used to prove records and books under section 688 of title 28, U.S.C., 1940 ed., and the addition of these words clarifies the former implied meaning of such section.

In the first paragraph of the revised section words "a judge of a court of record" were substituted for words "the presiding justice of the court" and in the second paragraph "judge" was substituted for "presiding justice" for convenience and without change of substance.

Words "and its Territories and Possessions" were added after "United States", near the end of the section, in view of provisions of section 688 of title 28, U.S.C., 1940 ed., for the admission of records and books in any court or office in any other State, Territory, or "in any such country." (Changed to "Possession" in this section.)

See also Rule 44 of the Federal Rules of Civil Procedure.

Changes were made in phraseology.

### Federal Rules of Civil Procedure

Authentication of copy of official record, see rule 44, Appendix to this title.

Effect of rule 44 on former section 688 of this title, see note by Advisory Committee under rule 44.

### Federal Rules of Criminal Procedure

Criminal cases, proof of official record, see rule 27, Title 18, Appendix, Crimes and Criminal Procedure.

## § 1740. Copies of consular papers

Copies of all official documents and papers in the office of any consul or vice consul of the United States, and of all official entries in the books or records of any such office, authenticated by the consul or vice consul, shall be admissible equally with the originals.

(June 25, 1948, ch. 646, 62 Stat. 947.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 677 (R.S. § 896; Apr. 5, 1906, ch. 1366, § 3, 34 Stat. 100).

Words "authenticated by the consul or vice consul" were substituted for "certified under the hand and seal of such officer", for clarity. Words "in the courts of the United States", were omitted after "admissible". Such papers should be so admitted in all courts consistently with sections 1738 and 1739 of this title.

See also Rule 44 of the Federal Rules of Civil Procedure.

Changes were made in phraseology.

### Federal Rules of Civil Procedure

Authentication of copy of official record see rule 44 Appendix to this title.

Effect of rule 44 on former section 677 of this title, see note by Advisory Committee under rule 44.

### Federal Rules of Criminal Procedure

Criminal cases, proof of official record, see rule 27, Title 18, Appendix, Crimes and Criminal Procedure.

## § 1741. Foreign official documents

An official record or document of a foreign country may be evidenced by a copy, summary, or excerpt authenticated as provided in the Federal Rules of Civil Procedure.

(June 25, 1948, ch. 646, 62 Stat. 948; May 24, 1949, ch. 139, § 92(b), 63 Stat. 103; Oct. 3, 1964, Pub. L. 88-619, § 5(a) 78 Stat. 996.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 695e (June 20, 1936, ch. 640, § 6, 49 Stat. 1563).

Words "Nothing contained in this section shall be deemed to alter, amend, or repeal section 689 of this title," at the end of section 695e of title 28, U.S.C., 1940 ed., were omitted. Although significant in the original Act, such words are unnecessary in a revision wherein both sections in question, as revised, are enacted at the same time.

See also Rule 44 of the Federal Rules of Civil Procedure.

Section 695e-1 of title 28, U.S.C., 1940 ed., providing for certification of Vatican City Documents will be incorporated in title 22, U.S.C., Foreign Relations and Intercourse.

Changes were made in phraseology.

### 1949 Act

This section corrects a typographical error in section 1741 of title 28, U.S.C.

### Amendments

1964—Pub. L. 88-619 substituted "An official record or document of a foreign country may be evidenced by a copy, summary, or excerpt authenticated as provided in the Federal Rules of Civil Procedure" for "A copy of any foreign document of record or on file in a public office of a foreign country or political subdivision thereof, certified by the lawful custodian thereof, shall be admissible in evidence when authenticated by a certificate of a consular officer of the United States resident in such foreign country, under the seal of his office, that the copy has been certified by the lawful custodian", in the text, and "official documents" for "documents, generally; copies" in the catchline.

1949—Act May 24, 1949, corrected spelling of "admissible".

### Federal Rules of Civil Procedure

Authentication of copy of official record, see rule 44 Appendix to this title.

Effect of rule 44 on former section 695e of this title, see note by Advisory Committee under rule 44.

### Federal Rules of Criminal Procedure

Criminal cases, proof of official record, see rule 27, Title 18, Appendix, Crimes and Criminal Procedure.

### Section Referred to in Other Sections

This section is referred to in title 22 section 1204.

## [§ 1742. Repealed. Pub. L. 88-619, § 6(a), Oct. 3, 1964, 78 Stat. 996]

Section, act June 25, 1948, ch. 646, 62 Stat. 948 related to authentication and certification of copies of documents relating to land titles, by persons having custody of such of any foreign government or its agents, certification by an American minister or consul that they be true copies of the originals, the recording of such copies in the office of the General Counsel for the Department of the Treasury, and to the evidentiary value of such copies.

## § 1743. Demand on postmaster

The certificate of the Postmaster General or the General Accounting Office of the mailing to a postmaster of a statement of his account and that payment of the balance stated has not been received shall be sufficient evidence of a demand notwithstanding any allowances or credits subsequently made. A copy of such statement shall be attached to the certificate.

(June 25, 1948, ch. 646, 62 Stat. 948.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 670 (R.S. § 890; June 10, 1921, ch. 18, § 301, 42 Stat. 23).

Provisions in section 670 of title 28, U.S.C., 1940 ed., that the statement should recite that a letter has been mailed to a described post office and sufficient time has elapsed for it to have reached its destination, was omitted as superfluous.

The last clause of section 670 of title 28, U.S.C., 1940 ed., was omitted as covered by the phrase "notwithstanding any allowances or credits subsequently made" in the revised section.

Changes were made in phraseology.

### Federal Rules of Civil Procedure

Proof of official records, see rule 44, Appendix to this title.

Effect of rule 44 on former section 670 of this title, see note by Advisory Committee under rule 44.

### Federal Rules of Criminal Procedure

Proof of official records, see rule 27, and note of the Advisory Committee under rule 27, Title 18, Appendix, Crimes and Criminal Procedure.

## § 1744. Copies of Patent Office documents, generally

Copies of letters patent or of any records, books, papers, or drawings belonging to the Patent Office and relating to patents, authenticated under the seal of the Patent Office and certified by the Commissioner of Patents, or by another officer of the Patent Office authorized to do so by the Commissioner, shall be admissible in evidence with the same effect as the originals.

Any person making application and paying the required fee may obtain such certified copies.

(June 25, 1948, ch. 646, 62 Stat. 948; May 24, 1949, ch. 139, § 92(c), 63 Stat. 103.)

### Historical and Revision Notes

Based on section 127 of title 15, U.S.C., 1940 ed., Commerce and Trade, and title 28, U.S.C., 1940 ed., § 673 (R.S. § 892; Mar. 19, 1920, ch. 104, § 7, 41 Stat. 535; Mar. 4, 1925, ch. 535, § 2, 43 Stat. 1269).

For purposes of uniformity, words "written or printed," at the beginning of the section, were omitted. Similar sections in this chapter do not contain such words.

Words "or in his name attested by a chief of division duly designated by the commissioner," after "Commissioner of Patents," were omitted as unnecessary.

Changes in phraseology were made.

### AMENDMENTS

1949—Act May 24, 1949, substituted "patents" following "relating to" for "registered trade-marks, labels, or prints", and inserted "or by another officer of the Patent Office authorized to do so by the Commissioner" following "Commissioner of Patents".

### CHANGE OF NAME

"Patent Office" and "Commissioner of Patents" redesignated "Patent and Trademark Office" and "Commissioner of Patents and Trademarks", respectively, by section 3 of Pub. L. 93-596, Jan. 2, 1975, 88 Stat. 1949, set out as a note under section 1 of Title 35, Patents.

### TRANSFER OF FUNCTIONS

The functions of all officers of the Department of Commerce and all functions of all agencies and employees of the Department, were, with a few exceptions, transferred to the Secretary of Commerce, with power vested in him to authorize their performance or the performance of any of his functions by any of those officers, agencies, and employees, by Reorg. Plan No. 5 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3174, 64 Stat. 1263, set out in the Appendix to Title 5, Government Organization and Employees. The Patent Office, referred to in this section, is an agency of the Department of Commerce, and the Commissioner of Patents, referred to in this section, is an officer of that Department.

### FEDERAL RULES OF CIVIL PROCEDURE

Proof of official record, see rule 44, Appendix to this title.

Effect of rule 44 on former section 673 of this title, see note by Advisory Committee under rule 44.

### FEDERAL RULES OF CRIMINAL PROCEDURE

Proof of official records, see rule 27, and note of the Advisory Committee under rule 44, Title 18, Appendix, Crimes and Criminal Procedure.

### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1745 of this title.

## § 1745. Copies of foreign patent documents

Copies of the specifications and drawings of foreign letters patent, or applications for foreign letters patent, and copies of excerpts of the official journals and other official publications of foreign patent offices belonging to the United States Patent Office, certified in the manner provided by section 1744 of this title are prima facie evidence of their contents and of the dates indicated on their face.

(June 25, 1948, ch. 646, 62 Stat. 948; May 24, 1949, ch. 139, § 92(d), (e), 63 Stat. 103; Oct. 3, 1964, Pub. L. 88-619, § 7(a), 78 Stat. 996.)

### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 674 (R.S. § 893). Changes were made in phraseology.

### AMENDMENTS

1964—Pub. L. 88-619, among other changes, inserted "or applications for foreign letters patent, and copies of excerpts of the official journals and other official publications of foreign patent offices belonging to the United States Patent Office" in the text, and substituted "documents" for "specifications and drawings" in the catchline.

1949—Act May 24, 1949, § 92(d), repealed former section 1745, relating to printed copies of patent specifications and drawings, and by section 92(e) of act May 24, 1949, renumbered former section 1746 to be section 1745.

### CHANGE OF NAME

"Patent Office" redesignated "Patent and Trademark Office", by section 3 of Pub. L. 93-596, Jan. 2, 1975, 88 Stat. 1949, set out as a note under section 1 of Title 35, Patents.

### FEDERAL RULES OF CIVIL PROCEDURE

Proof of official records, see rule 44, Appendix to this title.

Effect of rule 44 on former section 675 of this title, see note by Advisory Committee under rule 44.

### FEDERAL RULES OF CRIMINAL PROCEDURE

Proof of official records, see rule 27, and note of the Advisory Committee under rule 27, Title 18, Appendix, Crimes and Criminal Procedure.

## § 1746. Unsworn declarations under penalty of perjury

Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:

(1) If executed without the United States: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date).

(Signature)".

(2) If executed within the United States, its territories, possessions, or commonwealths: " I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).

(Signature)".

(Added Pub. L. 94-550, § 1(a), Oct. 18, 1976, 90 Stat. 2534.)

### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 8 section 1357; title 10 section 931; title 18 sections 152, 1546, 1621, 1623; title 25 section 399; title 46 sections 229e, 231.

# CHAPTER 117—EVIDENCE; DEPOSITIONS

Sec.
1781. Transmittal of letter rogatory or request.
1782. Assistance to foreign and international tribunals and to litigants before such tribunals.
1783. Subpoena of person in foreign country.
1784. Contempt.
[1785. Repealed.]

### AMENDMENTS

1964—Pub. L. 88-619, §§ 8(b), 9(b), 10(b), 12(b), Oct. 3, 1964, 78 Stat. 997, 9, substituted "Transmittal of letter rogatory or request" for "Foreign witnesses" in item 1781, "Assistance to foreign and international tribunals and to litigants before such tribunals" for "Testimony for use in foreign countries" in item 1782, "person" for "witness" in item 1783, and eliminated item 1785 which read: "Privilege against incrimination."

### Depositions in Admiralty Cases

Prior to the general unification of civil and admiralty procedure and the recission of the Admiralty Rules on July 1, 1966, Revised Statutes §§ 863 to 865, as amended, which related to depositions de bene esse, when and how taken, notice, mode of taking, and transmission to court, provided as follows:

"Sec. 863. The testimony of any witness may be taken in any civil cause depending in a district court by deposition de bene esse, when the witness lives at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of the district in which the case is to be tried, and to a greater distance than one hundred miles from the place of trial, before the time of trial, or when he is ancient and infirm. The deposition may be taken before any judge of any court of the United States, or any clerk of a district court, or any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the cause. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition, to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition; and in all cases in rem, the person having the agency or possession of the property at the time of seizure shall be deemed the adverse party, until a claim shall have been put in; and whenever, by reason of the absence from the district and want of an attorney of record or other reason, the giving of the notice herein required shall be impracticable, it shall be lawful to take such depositions as there shall be urgent necessity for taking, upon such notice as any judge authorized to hold courts in such district shall think reasonable and direct. Any person may be compelled to appear and depose as provided by this section, in the same manner as witnesses may be compelled to appear and testify in court.

"Sec. 864. Every person deposing as provided in the preceding section [R.S. § 863] shall be cautioned and sworn to testify the whole truth, and carefully examined.

"His testimony shall be reduced to writing or typewriting by the officer taking the deposition, or by some person under his personal supervision, or by the deponent himself in the officer's presence, and by no other person, and shall, after it has been reduced to writing or typewriting, be subscribed by the deponent. [As amended May 23, 1900, ch. 541, 31 Stat. 182.]

"Sec. 865. Every deposition taken under the two preceding sections [R.S. §§ 863, 864] shall be retained by the magistrate taking it, until he delivers it with his own hand into the court for which it is taken; or it shall, together with a certificate of the reasons as aforesaid of taking it and of the notice, if any, given to the adverse party, be by him sealed up and directed to such court, and remain under his seal until opened in court. But unless it appears to the satisfaction of the court that the witness is then dead, or gone out of the United States, or to a greater distance than one hundred miles from the place where the court is sitting, or that, by reason of age, sickness, bodily infirmity, or imprisonment, he is unable to travel and appear at court, such deposition shall not be used in the cause."

R.S. §§ 863 to 865, as amended, quoted above, were applicable to admiralty proceedings only. Proceedings in bankruptcy and copyright are governed by rule 26 et seq. of Federal Rules of Civil Procedure. See also Rules of Bankruptcy Procedure set out in the Appendix to Title 11, Bankruptcy, and Copyright Rules of Practice, following section 101 of Title 17, Copyrights.

### Federal Rules of Civil Procedure

Depositions and discovery, see rules 26 to 37, Appendix to this title.

Persons before whom depositions may be taken in foreign countries, see rule 28.

Subpoena for taking depositions, see rule 45.

### Federal Rules of Criminal Procedure

Subpoena for taking depositions in criminal cases, see rule 17, Title 18, Appendix, Crimes and Criminal Procedure.

### Rules of the United States Court of Claims

Subpoena to witness in foreign country, see rule, 123, Appendix to this title.

## § 1781. Transmittal of letter rogatory or request

(a) The Department of State has power, directly, or through suitable channels—

(1) to receive a letter rogatory issued, or request made, by a foreign or international tribunal, to transmit it to the tribunal, officer, or agency in the United States to whom it is addressed, and to receive and return it after execution; and

(2) to receive a letter rogatory issued, or request made, by a tribunal in the United States, to transmit it to the foreign or international tribunal, officer, or agency to whom it is addressed, and to receive and return it after execution.

(b) This section does not preclude—

(1) the transmittal of a letter rogatory or request directly from a foreign or international tribunal to the tribunal, officer, or agency in the United States to whom it is addressed and its return in the same manner; or

(2) the transmittal of a letter rogatory or request directly from a tribunal in the United States to the foreign or international tribunal, officer, or agency to whom it is addressed and its return in the same manner.

(June 25, 1948, ch. 646, 62 Stat. 948; Oct. 3, 1964, Pub. L. 88-619, § 8(a), 78 Stat. 996.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 653 (R.S. § 875; Feb. 27, 1877, ch. 69, § 1, 19 Stat. 241; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167).

Word "officer" was substituted for "commissioner" to obviate uncertainty as to the person to whom the letters or commissioned may be issued.

The third sentence of section 653 of title 28, U.S.C., 1940 ed., providing for admission of testimony "so taken and returned" without objection as to the method of return, was omitted as unnecessary. Obviously, if the method designated by Congress is followed, it cannot be objected to.

The last sentence of section 653 of title 26, U.S.C., 1940 ed., relating to letters rogatory from courts of foreign countries, is incorporated in section 1782 of this title.

The revised section extends the provisions of section 653 of title 28, U.S.C., 1940 ed., which applied only to cases wherein the United States was a party or was interested, so as to insure a uniform method of taking foreign depositions in all cases.

Words "courts of the United States" were inserted to make certain that the section is addressed to the Federal rather than the State courts as obviously intended by Congress.

Changes were made in phraseology.

### AMENDMENTS

1964—Pub. L. 88-619 substituted provisions authorizing the Department of State to transmit a letter rogatory or request by a foreign or international tribunal, or by a tribunal in the United States, to the tribunal, officer or agency in the United States or its foreign or international counterpart, to whom addressed, and to return it after execution, and providing that this section does not preclude direct transmission of letters rogatory or requests between interested tribunals, officers or agencies of foreign, international and of United States origin, for provisions authorizing United States ministers or consuls, whenever a United States court issues letters rogatory or a commission to take a deposition, to receive the executed letters or commissions from foreign courts or officers, endorse them with the place and date of receipt and any change in the deposition, and transmit it to the clerk of the issuing court in the same manner as his official dispatches, in the text and "Transmittal of letter rogatory or request" for "Foreign witnesses" in the catchline.

### FEDERAL RULES OF CIVIL PROCEDURE

Persons before whom depositions may be taken in foreign countries, see rule 28, Appendix to this title.

## § 1782. Assistance to foreign and international tribunals and to litigants before such tribunals

(a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

(b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.

(June 25, 1948, ch. 646, 62 Stat. 949; May 24, 1949, ch. 139, § 93, 63 Stat. 103; Oct. 3, 1964, Pub. L. 88-619, § 9(a), 78 Stat. 997.)

### HISTORICAL AND REVISION NOTES

### 1948 ACT

Based on title 28, U.S.C., 1940 ed., §§ 649-653, 701, 703, 704 (R.S. §§ 871-875, 4071, 4073, 4074; Feb. 27, 1877, ch. 69, § 1, 19 Stat. 241; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167; June 25, 1936, ch. 804, 49 Stat. 1921).

Sections 649-652 of title 28, U.S.C., 1940 ed., applied only to the District of Columbia and contained detailed provisions for issuing subpoenas, payment of witness fees and procedure for ordering and taking depositions. These matters are all covered by Federal Rules of Civil Procedure, Rules 26-32.

Provisions in sections 649-652 of title 28, U.S.C., 1940 ed., relating to the taking of testimony in the District of Columbia for use in State and Territorial courts were omitted as covered by section 14-204 of the District of Columbia Code, 1940 ed., and Rules 26 et seq., and 46 of the Federal Rules of Civil Procedure.

Only the last sentence of section 653 of title 28, U.S.C., 1940 ed., is included in this revised section. The remaining provisions relating to depositions of witnesses in foreign countries form the basis of section 1781 of this title.

Sections 701, 703, and 704 of title 28, U.S.C., 1940 ed., were limited to "suits for the recovery of money or property depending in any court in any foreign country with which the United States are at peace, and in which the government of such foreign country shall be a party or shall have an interest."

The revised section omits this limitation in view of the general application of the last sentence of section 653 of title 28, U.S.C., 1940 ed., consolidated herein. The improvement of communications and the expected growth of foreign commerce will inevitably increase litigation involving witnesses separated by wide distances.

Therefore the revised section is made simple and clear to provide a flexible procedure for the taking of depositions. The ample safeguards of the Federal Rules of Civil Procedure, Rules 26-32, will prevent misuse of this section.

The provisions of section 703 of title 28, U.S.C., 1940 ed., for punishment of disobedience to subpoena or refusal to answer is covered by Rule 37(b)(1) of Federal Rules or Civil Procedure.

The provisions of section 704 of title 28, U.S.C., 1940 ed., with respect to fees and mileage of witnesses are covered by Rule 45(c) of Federal Rules of Civil Procedure.

Changes were made in phraseology.

### 1949 ACT

This amendment corrects restrictive language in section 1782 of title 28, U.S.C., in conformity with original law and permits depositions in any judicial proceeding without regard to whether the deponent is "residing" in the district or only sojourning there.

### AMENDMENTS

1964—Pub. L. 88-619 substituted provisions which empowered district courts to order residents to give testimony or to produce documents for use in a foreign or international tribunal, pursuant to a letter rogatory, or request, of a foreign or international tribunal or upon application of any interested person, and to direct that the evidence be presented before a person appointed by the court, provided that such person may administer oaths and take testimony, that the evidence be taken in accordance with the Federal Rules of Civil Procedure unless the order prescribes using the procedure of the foreign or international tribunal, that a person may not be compelled to give legally privileged evidence, and that this chapter doesn't preclude a person from voluntarily giving evidence for use in a foreign or international tribunal, for provisions permitting depositions of witnesses within the United States for use in any court in a foreign country with which the United States was at peace to be taken before a person authorized to administer oaths designated by the district court of the district where the witness resides or is found, and directing that the procedure used be that generally used in courts of the United States, in the text, and "Assistance to foreign and international tribunals and to litigants before such tribunals" for "Testimony for use in foreign countries", in the catchline.

1949—Act May 24, 1949, struck out the word "residing" following "witness", and substituted "judicial proceeding" for "civil action" following "to be used in any".

CROSS REFERENCES

Fees of witnesses in the United States courts, see section 1821 of this title.

Letters rogatory from United States courts, see section 1781 of this title.

### § 1783. Subpoena of person in foreign country

(a) A court of the United States may order the issuance of a subpoena requiring the appearance as a witness before it, or before a person or body designated by it, of a national or resident of the United States who is in a foreign country, or requiring the production of a specified document or other thing by him, if the court finds, that particular testimony or the production of the document or other thing by him is necessary in the interest of justice, and, in other than a criminal action or proceeding, if the court finds, in addition, that it is not possible to obtain his testimony in admissible form without his personal appearance or to obtain the production of the document or other thing in any other manner.

(b) The subpoena shall designate the time and place for the appearance or for the production of the document or other thing. Service of the subpoena and any order to show cause, rule, judgment, or decree authorized by this section or by section 1784 of this title shall be effected in accordance with the provisions of the Federal Rules of Civil Procedure relating to service of process on a person in a foreign country. The person serving the subpoena shall tender to the person to whom the subpoena is addressed his estimated necessary travel and attendance expenses, the amount of which shall be determined by the court and stated in the order directing the issuance of the subpoena.

(June 25, 1948, ch. 646, 62 Stat. 949; Oct. 3, 1964, Pub. L. 88-619, § 10(a), 78 Stat. 997.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§ 711, 712, and 713 (July 3, 1926, ch. 762, §§ 1-3, 44 Stat. 835).

Word "resident" was substituted for "or domiciled therein." (See reviser's note under section 1391 of this title.)

Words "or any assistant or district attorney acting under him," after "Attorney General" in section 712 of title 28, U.S.C., 1940 ed., were omitted, since, in any event, the approval of the Attorney General would be required. (See section 507 of this title.)

Changes were made in phraseology.

AMENDMENTS

1964—Pub. L. 88-619 amended section generally, and among other changes, authorized a United States court to issue a subpoena to require the appearance of a witness before it or a person or body designated by it, and the production of documents or other tangible evidence, when necessary in the interest of justice, and in other than criminal actions or proceedings, if the court finds, in addition, that its not possible to obtain admissible evidence in any other manner, and provided that the procedure relating to the subpoena shall be in accordance with the Federal Rules of Civil Procedure, and deleted provisions which authorized the issuance of a subpoena when a personally notified individual failed to appear to testify pursuant to letter rogatory, or failed to answer any question he would have to answer in any examination before the court or if such person was beyond United States jurisdiction and the testimony was desired by the Attorney General in a criminal proceeding, provided that the subpoena issue to any United States consul, that the consul make personal service of the subpoena and of any order, rule, judgment or decree, that he make return of the subpoena and tender expenses to the witness, and substituted "person" for "witness" in the catchline.

FEDERAL RULES OF CIVIL PROCEDURE

Civil case, subpoena of witness in foreign country, see Rule 45, Appendix to this title.

FEDERAL RULES OF CRIMINAL PROCEDURE

Criminal case, subpoena of witness in foreign country, see Rule 17 Title 18, Appendix, Crimes and Criminal Procedure.

RULES OF THE UNITED STATES COURT OF CLAIMS

Letters rogatory, failure to respond to, see rule 92, Appendix to this title.

Subpoena to witness in foreign country, see rule 123.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1784 of this title.

### § 1784. Contempt

(a) The court of the United States which has issued a subpoena served in a foreign country may order the person who has failed to appear or who has failed to produce a document or other thing as directed therein to show cause before it at a designated time why he should not be punished for contempt.

(b) The court, in the order to show cause, may direct that any of the person's property within the United States be levied upon or seized, in the manner provided by law or court rules governing levy or seizure under execution, and held to satisfy any judgment that may be rendered against him pursuant to subsection (d) of this section if adequate security, in such amount as the court may direct in the order, be given for any damage that he might suffer should he not be found in contempt. Security under this subsection may not be required of the United States.

(c) A copy of the order to show cause shall be served on the person in accordance with section 1783(b) of this title.

(d) On the return day of the order to show cause or any later day to which the hearing may be continued, proof shall be taken. If the person is found in contempt, the court, notwithstanding any limitation upon its power generally to punish for contempt, may fine him not more than $100,000 and direct that the fine and costs of the proceedings be satisfied by a sale of the property levied upon or seized, conducted upon the notice required and in the manner provided for sales upon execution.

(June 25, 1948, ch. 646, 62 Stat. 949; Oct. 3, 1964, Pub. L. 88-619, § 11, 78 Stat. 998.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§ 714, 715, 716, 717, and 718 (July 3, 1926, ch. 762, §§ 4-8, 44 Stat. 836).

Sections 714-718 of title 28, U.S.C., 1940 ed., were consolidated, since all relate to contempt by a witness served personally in a foreign country.

The last sentence omits specific reference to section 118 of title 28, U.S.C., 1940 ed., now incorporated in section 1655 of this title, which provides for the method of opening judgments rendered on publication of process. (See also Rule 60(b) of the Federal Rules of Civil Procedure.)

Changes were made in phraseology.

### AMENDMENTS

1964—Pub. L. 88-619 amended section generally, and among other changes, authorized the court to order a person to show cause for failing to produce a document or other thing in subsec. (a), provided that a copy of the order to show cause shall be served in accordance with section 1783(b) of this title, and deleted provisions requiring the marshal making levy or seizure to forward to any United States consul in the country where the witness may be, a copy of the order and a request for its personal service, and to cause publication of the order in the district where the issuing court sits, in subsec. (c), and deleted provisons in subsec. (d) permitting any judgment rendered upon service by publication only to be opened for answer within one year.

### FEDERAL RULES OF CIVIL PROCEDURE

Civil cases, contempt for failure to obey subpoena, see Rule 45, Appendix to this title.

### FEDERAL RULES OF CRIMINAL PROCEDURE

Criminal cases, contempt for failure to obey subpoena, see Rule 17, Title 18, Appendix, Crimes and Criminal Procedure.

### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1783 of this title.

## [§ 1785. Repealed. Pub. L. 88-619, § 12(a), Oct. 3, 1964, 78 Stat. 998]

Section, act June 25, 1948, ch. 646, 62 Stat. 950, provided a privilege against self-incrimination on examination under letters rogatory, and is now covered by section 1782(a) of this title.

# CHAPTER 119—EVIDENCE; WITNESSES

| Sec. | |
|---|---|
| 1821. | Per diem and mileage generally; subsistence. |
| 1822. | Competency of interested persons; share of penalties payable. |
| [1823. | Repealed.] |
| 1824. | Mileage fees under summons as both witness and juror. |
| 1825. | Payment of fees. |
| 1826. | Recalcitrant witnesses. |

### AMENDMENTS

1970—Pub. L. 91-563, § 5(b), Dec. 19, 1970, 84 Stat. 1478, struck out item 1823.

Pub. L. 91-452, title III, § 301(b), Oct. 15, 1970, 84 Stat. 934, added item 1826.

### CROSS REFERENCES

Criminal cases, witnesses and evidence, see sections 3481 et seq. of Title 18, Crimes and Criminal Procedure.

### FEDERAL RULES OF CIVIL PROCEDURE

Civil cases—
- Evidence, see Rules of Evidence for United States Courts and Magistrates, Appendix to this title.
- Subpoena for attendance of witnesses, see Rule 45.

### FEDERAL RULES OF CRIMINAL PROCEDURE

Subpoena for attendance of witnesses, see Rule 17, Title 18, Appendix, Crimes and Criminal Procedure.

### RULES OF EVIDENCE

Evidence, see Rule 26, Title 18, Appendix, Crimes and Criminal Procedure, and Rules of Evidence for Unite States Courts and Magistrates, Appendix to this title.

Expert witnesses, see Art. VII, Rules of Evidence for United States Courts and Magistrates.

## § 1821. Per diem and mileage generally; subsistence

A witness attending in any court of the United States, or before a United States commissioner, or before any person authorized to take his deposition pursuant to any rule or order of a court of the United States, shall receive $20 for each day's attendance and for the time necessarily occupied in going to and returning from the same, and 10 cents per mile for going from and returning to his place of residence. Regardless of the mode of travel employed by the witness, computation of mileage under this section shall be made on the basis of a uniform table of distances adopted by the Attorney General. Witnesses who are not salaried employees of the Government and who are not in custody and who attend at points so far removed from their respective residences as to prohibit return thereto from day to day shall be entitled to an additional allowance of $16 per day for expenses of subsistence including the time necessarily occupied in going to and returning from the place of attendance: *Provided*, That in lieu of the mileage allowance provided for herein, witnesses who are required to travel between the Territories and possessions, or to and from the continental United States, shall be entitled to the actual expenses of travel at the lowest first-class rate available at the time of reservation for passage, by means of transportation employed: *Provided further*, That this section shall not apply to Alaska.

When a witness is detained in prison for want of security for his appearance, he shall be entitled, in addition to his subsistence, to a compensation of $1 per day.

Witnesses in the district courts for the districts of Canal Zone, Guam, and the Virgin Islands shall receive the same fees and allowances provided in this section for witnesses in other district courts of the United States.

(June 25, 1948, ch. 646, 62 Stat. 950; May 10, 1949, ch. 96, 63 Stat. 65; May 24, 1949, ch. 139, § 94, 63 Stat. 103; Oct. 31, 1951, ch. 655, § 51(a), 65 Stat. 727; Sept. 3, 1954, ch. 1263, § 45, 68 Stat. 1242; Aug. 1, 1956, ch. 826, 70 Stat. 798; Mar. 27, 1968, Pub. L. 90-274, § 102(b), 82 Stat. 62.)

### HISTORICAL AND REVISION NOTES

#### 1948 ACT

Based on title 28, U.S.C., 1940 ed., § 600c, section 1115(a) of title 26, U.S.C., 1940, Internal Revenue Code, and section 11-1514 of the D.C. Code, 1940 ed. (R.S. §§ 823, 848; Apr. 26, 1926, ch. 183, § 3, 44 Stat. 324; May 17, 1932, ch. 190, 47 Stat. 158; June 25, 1936, ch. 804, 49 Stat. 1921; Feb. 10, 1939, ch. 2, § 1115(a), 53 Stat. 160; Dec. 24, 1942, ch. 825, § 1, 56 Stat. 1088.

Section consolidates part of section 600c of title 28, U.S.C., 1940 ed., with section 1115(a) of title 26, U.S.C., 1940 ed., and section 11-1514 of the D.C. Code, 1940 ed.

Words "or person taking his deposition pursuant to any order of a court of the United States" were added to cover that circumstance.

Reference in section 600c of title 28, U.S.C., 1940 ed., and section 11-1514 of the D.C. Code, 1940 ed., to the district courts of Hawaii, Puerto Rico and the District of Columbia, were omitted as covered by the words "any court of the United States".

Provision of section 600c of title 28, U.S.C., 1940 ed., for payment of witnesses is incorporated in section 1825 of this title.

Changes were made in phraseology.

#### Senate Revision Amendment

By Senate amendments, all provisions relating to the Tax Court were eliminated. Therefore, as finally enacted, section 1115(a) of Title 26, U.S.C., Internal Revenue Code, was not one of the sources of this section. However, no change in the text of this section was necessary. See 80th Congress Senate Report No. 1559.

#### 1949 Act

This section restores certain provisions of the original statute, R.S. § 848, which were inadvertently omitted from revised title 28, U.S.C., § 1821.

#### Amendments

1968—Pub. L. 90-274 increased the per diem allowance from $4 to $20, increased the mileage allowance from 8 cents per mile to 10 cents per mile, increased the daily subsistence allowance from $8 to $16, and directed that witnesses in the district courts for the districts of the Canal Zone, Guam, and the Virgin Islands receive the same fees and allowances provided in this section for witnesses in other district courts of the United States.

1956—Act Aug. 1, 1956, substituted ", or before any person authorized to take his deposition pursuant to any rule or order" for "or person taking his disposition pursuant to any order", increased the payments for mileage from 7 to 8 cents per mile and subsistence allowance from $5 to $8 per day, and authorized the computation of mileage on the basis of a uniform table of distances adopted by the Attorney General.

1954—Act Sept. 3, 1954, removed language which had restricted section's applicability to those depositions taken pursuant to order of the court.

1951—Act Oct. 31, 1951, substituted "residences" for "residence" in that part of second sentence which precedes the first proviso in such sentence.

1949—Act May 24, 1949, added last par.

Act May 10, 1949, increased witnesses' fees from $2 to $4 per day, mileage allowance from 5 cents to 7 cents a mile, subsistence allowance from $3 to $5 per day, and added provisos.

#### Change of Name

Reference to United States commissioner deemed to be reference to United States magistrate pursuant to Pub. L. 90-578, title IV, § 402(b)(2), Oct. 17, 1968, 82 Stat. 1118. See chapter 43 (§ 631 et seq.) of this title.

#### Effective Date of 1968 Amendment

Amendment by Pub. L. 90-274 effective 270 days after Mar. 27, 1968, except as to cases in which an indictment has been returned or a petit jury empaneled prior to such effective date, see section 104 of Pub. L. 90-274, set out as an Effective Date of 1968 Amendment note under section 1861 of this title.

#### Federal Rules of Civil Procedure

Subpoena, see rule 45, Appendix to this title.

### § 1822. Competency of interested persons; share of penalties payable

Any person interested in a share of any fine, penalty or forfeiture incurred under any Act of Congress, may be examined as a witness in any proceeding for the recovery of such fine, penalty or forfeiture by any party thereto. Such examination shall not deprive the witness of his share.

(June 25, 1948, ch. 646, 62 Stat. 950.)

#### Historical and Revision Notes

Based on section 644 of title 18, U.S.C., 1940 ed., Criminal Code and Criminal Procedure, R.S. § 5295.

Changes were made in phraseology.

### [§ 1823. Repealed. Pub. L. 91-563, § 5(a), Dec. 19, 1970, 84 Stat. 1478]

Section, acts June 25, 1948, ch. 646, 62 Stat. 950; May 24, 1949, ch. 139, § 95, 63 Stat. 103; Oct. 5, 1949, ch. 601, 63 Stat. 704; July 7, 1952, ch. 581, 66 Stat. 439; July 28, 1955, ch. 424, § 3, 69 Stat. 394, related to payment of witnesses fees to officers and employees of the United States, and is now covered by sections 5515, 5537, 5751, and 6322 of Title 5, Government Organization and Employees.

### § 1824. Mileage fees under summons as both witness and juror

No constructive or double mileage fees shall be allowed by reason of any person being summoned both as a witness and a juror.

(June 25, 1948, ch. 646, 62 Stat. 951.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 602 (May 27, 1908, ch. 200, § 1, 35 Stat. 377).

Words "or as a witness in two or more cases pending in the same court and triable at the same term thereof" were omitted as covered by section 1821 of this title.

Changes were made in phraseology.

#### Federal Rules of Civil Procedure

Subpoena, see rule 45, Appendix to this title.

### § 1825. Payment of fees

In any case wherein the United States or an officer or agency thereof, is a party, the United States marshal for the district shall pay all fees of witnesses on the certificate of the United States Attorney or Assistant United States Attorney, and in the proceedings before a United States Commissioner, on the certificate of such commissioner.

In all proceedings, in forma pauperis, for a writ of habeas corpus or in proceedings under section 2255 of this title, the United States marshal for the district shall pay all fees of witnesses for the party authorized to proceed in forma pauperis, on the certificate of the district judge.

Fees and mileage need not be tendered to the witness upon service of a subpena issued in behalf of the United States or an officer or agency thereof, or upon service of a subpena issued on behalf of a party, authorized to proceed in forma pauperis, where the payment thereof is to be made by the United States marshal as authorized in this section.

(June 25, 1948, ch. 646, 62 Stat. 951; Sept. 2, 1965, Pub. L. 89-162, 79 Stat. 618.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., §§ 600c, 608 (R.S. §§ 236, 823, 848, 855; June 10, 1921, ch. 18, § 305, 42 Stat. 24; Apr. 26, 1926, ch. 183, § 3, 44 Stat. 324; May 17, 1932, ch. 190, 47 Stat. 158; June 25, 1936, ch. 804, 49

Stat. 1921; Oct. 13, 1941, ch. 431, § 2, 55 Stat. 736; Dec. 24, 1942, ch. 825, § 1, 56 Stat. 1088).

Section consolidates parts of sections 600c and 608 of title 28, U.S.C., 1940 ed., relating to payment of witnesses. Other provisions of such sections are incorporated in sections 1821 and 1871 of this title.

Provisions in sections 600c and 608 of title 28, U.S.C., 1940 ed., for payment or certification on order of court were omitted as unnecessary and inappropriate on recommendation of the Judicial Conference Committee on Revision of the Judicial Code.

Words in section 608 of title 28, U.S.C., 1940 ed., "to which they appear to be entitled on the certificate of attendance" following the words "all fees" and the concluding phrase "which sum shall be allowed the marshal in the General Accounting Office in his accounts were omitted as unnecessary."

The second paragraph is new. It conforms to Rule 45(e) of the Federal Rules of Civil Procedure but is inconsistent with Rule 17(d) of the Federal Rules of Criminal Procedure and supersedes that rule as to Federal criminal cases. The Department of Justice suggests that Rule 17(d) is unworkable. To attempt compliance each deputy marshal serving process must carry, on the average, $500 in cash on trips to serve process.

The marshal must advance the money from his personal funds. The Comptroller General has not been able to set up any procedure to make it feasible to advance fees to Government witnesses.

If a witness is served but fails or refuses to appear, the marshal is out of pocket the money advanced and has no recourse. In the exceptional cases of real necessity, the marshal supplies transportation to an indigent witness under established regulations which protect the disbursement.

Changes were made in phraseology.

#### AMENDMENTS

1965—Pub. L. 89-162 inserted provisions that, in all proceedings in forma pauperis, for a writ of habeas corpus, or in proceedings under section 2255 of this title, the United States marshal for the district shall pay all fees of witnesses for the party authorized to proceed in forma pauperis on the certificate of the district judge and that fees and mileage need not be tendered to the witness upon service of a subpena issued on behalf of a party authorized to proceed in forma pauperis where the payment thereof is to be made by the United States marshal as authorized in this section.

#### CHANGE OF NAME

Reference to United States Commissioner deemed to be reference to United States Magistrate pursuant to Pub. L. 90-578, title IV, § 402(b)(2), Oct. 17, 1968, 82 Stat. 1118. See chapter 43 (§ 631 et seq.) of this title.

#### CROSS REFERENCES

Accounts of marshal, see section 572 of this title.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 572 of this title.

### § 1826. Recalcitrant witnesses

(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of—

(1) the court proceeding, or

(2) the term of the grand jury, including extensions,

before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

(b) No person confined pursuant to subsection (a) of this section shall be admitted to bail pending the determination of an appeal taken by him from the order for his confinement if it appears that the appeal is frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal.

(Added Pub. L. 91-452, title III, § 301(a), Oct. 15, 1970, 84 Stat. 932.)

## CHAPTER 121—JURIES; TRIAL BY JURY

Sec.

1861. Declaration of policy.
1862. Discrimination prohibited.
1863. Plan for random jury selection.
1864. Drawing of names from the master jury wheel; completion of juror qualification form.
1865. Qualifications for jury service.
1866. Selection and summoning of jury panels.
1867. Challenging compliance with selection procedures.
1868. Maintenance and inspection of records.
1869. Definitions.
1870. Challenges.
1871. Fees.
1872. Issues of fact in Supreme Court.
1873. Admiralty and maritime cases.
1874. Actions on bonds and specialties.

#### AMENDMENTS

1968—Pub. L. 90-274, § 101, Mar. 27, 1968, 82 Stat. 53, substituted "Declaration of policy" for "Qualifications" as item 1861, "Discrimination prohibited" for "Exemptions" as item 1862, "Plan for random jury selection" for "Exclusion or excuse from service" as item 1863, "Drawing of names from the master jury wheel; completion of juror qualification form" for "Manner of drawing; jury commissioners and their compensation" as item 1864, "Qualifications for jury service" for "Apportionment within district; additional jury commissioners" as item 1865, "Selection and summoning of jury panels" for "Special petit juries; talesmen from bystanders" as item 1866, "Challenging compliance with selection procedures" for "Summoning jurors" as item 1867, "Maintenance and inspection of records" for "Disqualification of marshal or deputy" as item 1868, "Definitions" for "Frequency of service" as item 1869, and reenacted items 1870–1874 without change.

#### CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in title 5 section 8101.

### § 1861. Declaration of policy

It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose.

(June 25, 1948, ch. 646, 62 Stat. 951; Sept. 9, 1957, Pub. L. 85-315, part V, § 152, 71 Stat. 638; Mar. 27, 1968, Pub. L. 90-274, § 101, 82 Stat. 54.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., §§ 411 and 415 (Mar. 3, 1911, ch. 231, §§ 275, 278, 38 Stat. 1164, 1165).

The revised section prescribes uniform standards of qualification for jurors in Federal Courts instead of making qualifications depend upon State laws. This is in accord with proposed legislation recommended by the Judicial Conference of the United States.

The last paragraph is added to exclude jurors incompetent to serve as jurors in State courts.

### Amendments

1968—Pub. L. 90-274 substituted provisions declaring the policy of the United States with respect to trial by jury and the opportunity to serve on such juries for provisions setting out the required qualifications of Federal jurors, including age, citizenship, residence, freedom from conviction of certain crimes, ability to read, write, speak, and understand the English language, and capability of rendering efficient jury service.

1957—Pub. L. 85-315 substituted "Qualifications of Federal jurors" for "Qualifications" in catchline.

Pub. L. 85-315 substituted "and who has resided for a period of one year within the judicial district" for "and resides within the judicial district", and eliminated provisions which prohibited service as a grand or petit juror if a person was incompetent to serve as a grand or petit juror by the law of the State in which the district court is held.

### Effective Date of 1968 Amendment

Section 104 of Pub. L. 90-274 provided that: "This Act [amending this section and sections 1821, 1862 to 1869, and 1871 of this title, repealing section 867 of Title 48, Territories and Insular Possessions, and enacting provisions set out as notes under this section] shall become effective two hundred and seventy days after the date of enactment [Mar. 27, 1968]: *Provided*, That this Act shall not apply in any case in which an indictment has been returned or petit jury empaneled prior to such effective date."

### Short Title

Section 1 of Pub. L. 90-274 provided: "That this Act [amending this section and sections 1821, 1862 to 1869, and 1871 of this title, repealing section 867 of Title 48, Territories and Insular Possessions, and enacting provisions set out as notes under this section] may be cited as the 'Jury Selection and Service Act of 1968'."

### Cross References

Constitutional provisions relating to trial by jury, see U.S. Const. Amends. 6 and 7.

Virgin Islands, jury trials in criminal cases, see section 1406c of Title 48, Territories and Insular Possessions.

### Federal Rules of Civil Procedure

Jurors and juries, see Rules 38, 39, and 48, Appendix to this title.

### Federal Rules of Criminal Procedure

Jurors and juries, see Rules 23 and 24, Title 18, Appendix, Crimes and Criminal Procedure.

### Section Referred to in Other Sections

This section is referred to in sections 1863, 1866, 1869 of this title.

## § 1862. Discrimination prohibited

No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States on account of race, color, religion, sex, national origin, or economic status.

(June 25, 1948, ch. 646, 62 Stat. 952; Mar. 27, 1968, Pub. L. 90-274, § 101, 82 Stat. 54.)

### Historical and Revision Notes

This section makes provision for specific exemption of classes of citizens usually excused from jury service in the interest of the public health, safety, or welfare. The inclusion in the jury list of persons so exempted usually serves only to waste the time of the court.

### Amendments

1968—Pub. L. 90-274 substituted provisions prohibiting discrimination against citizens in their service as jurors because of race, color, religion, sex, national origin, or economic status for provisions identifying three groups as exempt from jury service, including members of the armed forces on active duty, members of fire or police departments, and public officers actively engaged in the performance of official duties.

### Effective Date of 1968 Amendment

Amendment by Pub. L. 90-274 effective 270 days after Mar. 27, 1968, except as to cases in which an indictment has been returned or a petit jury empaneled prior to such effective date, see section 104 of Pub. L. 90-274, set out as an Effective Date of 1968 Amendment note under section 1861 of this title.

### Section Referred to in Other Sections

This section is referred to in sections 1863, 1866, 1869 of this title.

## § 1863. Plan for random jury selection

(a) Each United States district court shall devise and place into operation a written plan for random selection of grand and petit jurors that shall be designed to achieve the objectives of sections 1861 and 1862 of this title, and that shall otherwise comply with the provisions of this title. The plan shall be placed into operation after approval by a reviewing panel consisting of the members of the judicial council of the circuit and either the chief judge of the district whose plan is being reviewed or such other active district judge of that district as the chief judge of the district may designate. The panel shall examine the plan to ascertain that it complies with the provisions of this title. If the reviewing panel finds that the plan does not comply, the panel shall state the particulars in which the plan fails to comply and direct the district court to present within a reasonable time an alternative plan remedying the defect or defects. Separate plans may be adopted for each division or combination of divisions within a judicial district. The district court may modify a plan at any time and it shall modify the plan when so directed by the reviewing panel. The district court shall promptly notify the panel, the Administrative Office of the United States Courts, and the Attorney General of the United States, of the initial adoption and future modifications of the plan by filing copies therewith. Modifications of the plan made at the instance of the district court shall become effective after approval by the panel. Each district court shall submit a report on the jury selection process within its jurisdiction to the Administrative Office of the United States Courts in such form and at such times as the Judicial Conference of the United States may specify. The Judicial Conference of the United

States may, from time to time, adopt rules and regulations governing the provisions and the operation of the plans formulated under this title.

(b) Among other things, such plan shall—

(1) either establish a jury commission, or authorize the clerk of the court, to manage the jury selection process. If the plan establishes a jury commission, the district court shall appoint one citizen to serve with the clerk of the court as the jury commission: *Provided, however,* That the plan for the District of Columbia may establish a jury commission consisting of three citizens. The citizen jury commissioner shall not belong to the same political party as the clerk serving with him. The clerk or the jury commission, as the case may be, shall act under the supervision and control of the chief judge of the district court or such other judge of the district court as the plan may provide. Each jury commissioner shall, during his tenure in office, reside in the judicial district or division for which he is appointed. Each citizen jury commissioner shall receive compensation to be fixed by the district court plan at a rate not to exceed $50 per day for each day necessarily employed in the performance of his duties, plus reimbursement for travel, subsistence, and other necessary expenses incurred by him in the performance of such duties. The Judicial Conference of the United States may establish standards for allowance of travel, subsistence, and other necessary expenses incurred by jury commissioners.

(2) specify whether the names of prospective jurors shall be selected from the voter registration lists or the lists of actual voters of the political subdivisions within the district or division. The plan shall prescribe some other source or sources of names in addition to voter lists where necessary to foster the policy and protect the rights secured by sections 1861 and 1862 of this title. The plan for the District of Columbia may require the names of prospective jurors to be selected from the city directory rather than from voter lists. The plans for the districts of Puerto Rico and the Canal Zone may prescribe some other source or sources of names of prospective jurors in lieu of voter lists, the use of which shall be consistent with the policies declared and rights secured by sections 1861 and 1862 of this title.

(3) specify detailed procedures to be followed by the jury commission or clerk in selecting names from the sources specified in paragraph (2) of this subsection. These procedures shall be designed to ensure the random selection of a fair cross section of the persons residing in the community in the district or division wherein the court convenes. They shall ensure that names of persons residing in each of the counties, parishes, or similar political subdivisions within the judicial district or division are placed in a master jury wheel; and shall ensure that each county, parish, or similar political subdivision within the district or division is substantially proportionally represented in the master jury wheel for that judicial district, division, or combination of divisions. For the purposes of determining proportional representation in the master jury wheel, either the number of actual voters at the last general election in each county, parish, or similar political subdivision, or the number of registered voters if registration of voters is uniformly required throughout the district or division, may be used.

(4) provide for a master jury wheel (or a device similar in purpose and function) into which the names of those randomly selected shall be placed. The plan shall fix a minimum number of names to be placed initially on the master jury wheel, which shall be at least one-half of 1 per centum of the total number of persons on the list used as a source of names for the district or division; but if this number of names is believed to be cumbersome and unnecessary, the plan may fix a smaller number of names to be placed in the master wheel, but in no event less than one thousand. The chief judge of the district court, or such other district court judge as the plan may provide, may order additional names to be placed in the master jury wheel from time to time as necessary. The plan shall provide for periodic emptying and refilling of the master jury wheel at specified times, the interval for which shall not exceed four years.

(5) specify those groups of persons or occupational classes whose members shall on individual request therefor, be excused from jury service. Such groups or classes shall be excused only if the district court finds, and the plan states, that jury service by such class or group would entail undue hardship or extreme inconvenience to the members thereof, and excuse of members thereof would not be inconsistent with sections 1861 and 1862 of this title.

(6) specify those groups of persons or occupational classes whose members shall be barred from jury service on the ground that they are exempt. Such groups or classes shall be exempt only if the district court finds, and the plan states, that their exemption is in the public interest and would not be inconsistent with sections 1861 and 1862 of this title. The plan shall provide for exemption of the following persons: (i) members in active service in the Armed Forces of the United States; (ii) members of the fire or police departments of any State, district, territory, possession, or subdivision thereof; (iii) public officers in the executive, legislative, or judicial branches of the Government of the United States, or any State, district, territory, or possession or subdivision thereof, who are actively engaged in the performance of official duties.

(7) fix the distance, either in miles or in travel time, from each place of holding court beyond which prospective jurors residing shall, on individual request therefor, be excused from jury service on the ground of undue hardship in traveling to the place where court is held.

(8) fix the time when the names drawn from the qualified jury wheel shall be disclosed to parties and to the public. If the plan permits these names to be made public, it may nevertheless permit the chief judge of the district court, or such other district court

judge as the plan may provide, to keep these names confidential in any case where the interests of justice so require.

(9) specify the procedures to be followed by the clerk or jury commission in assigning persons whose names have been drawn from the qualified jury wheel to grand and petit jury panels.

(c) The initial plan shall be devised by each district court and transmitted to the reviewing panel specified in subsection (a) of this section within one hundred and twenty days of the date of enactment of the Jury Selection and Service Act of 1968. The panel shall approve or direct the modification of each plan so submitted within sixty days thereafter. Each plan or modification made at the direction of the panel shall become effective after approval at such time thereafter as the panel directs, in no event to exceed ninety days from the date of approval. Modifications made at the instance of the district court under subsection (a) of this section shall be effective at such time thereafter as the panel directs, in no event to exceed ninety days from the date of modification.

(d) State, local, and Federal officials having custody, possession, or control of voter registration lists, lists of actual voters, or other appropriate records shall make such lists and records available to the jury commission or clerks for inspection, reproduction, and copying at all reasonable times as the commission or clerk may deem necessary and proper for the performance of duties under this title. The district courts shall have jurisdiction upon application by the Attorney General of the United States to compel compliance with this subsection by appropriate process.

(June 25, 1948, ch. 646, 62 Stat. 952; Mar. 27, 1968, Pub. L. 90-274, § 101, 82 Stat. 54; Apr. 6, 1972, Pub. L. 92-269, § 2, 86 Stat. 117.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940, ed., § 415 (Mar. 3, 1911, ch. 231, § 278, 36 Stat. 1165).

Subsections (a) and (b) are new and merely declaratory of existing practice.

The phrase "or previous condition of servitude" was omitted as obsolete.

Changes were made in phraseology.

### References in Text

The date of enactment of the Jury Selection and Service Act of 1968, referred to in subsec. (c), is the date of enactment of Pub. L. 90-274, which was approved on Mar. 27, 1968.

### Amendments

1972—Subsec. (b)(4). Pub. L. 92-269 added provisions requiring the master jury wheel to be emptied and refilled in not greater than four years intervals.

1968—Subsec. (a). Pub. L. 90-274 substituted provisions requiring a written plan covering the random selection of jurors by each United States District Court and the adoption, review, and modification of the plan for provisions authorizing district judges to exclude or excuse for good cause persons called as jurors.

Subsec. (b). Pub. L. 90-274 substituted provisions setting out the nine required features of a plan for random jury selection, including management by commission or clerk, selection from voter registration lists, detailed procedures for selecting names, a master jury wheel, excused or exempted groups, maximum distances of travel, disclosure of names, and procedures for assigning jurors drawn from the jury wheel to particular grand and petit jury panels, for provisions authorizing the district court to excuse, for the public interests, classes or groups upon a finding that such jury service would entail undue hardship, extreme inconvenience, or serious obstruction or delay in the fair and impartial administration of justice.

Subsec. (c). Pub. L. 90-274 substituted provisions covering the transmittal of the plan to a reviewing panel and the modification thereof for provisions prohibiting the exclusion of any citizen from juror service on account of race or color.

Subsec. (d). Pub. L. 90-274 added subsec. (d).

### Effective Date of 1968 Amendment

Amendment by Pub. L. 90-274 effective 270 days after Mar. 27, 1968, except as to cases in which an indictment has been returned or a petit jury empaneled prior to such effective date, see section 104 of Pub. L. 90-274, set out as an Effective Date of 1968 Amendment note under section 1861 of this title.

### Refilling of Master Jury Wheel Not Later Than September 1, 1973; Refilling of Qualified Jury Wheel Not Later Than October 1, 1973; Retroactive Effect

Sections 3 and 4 of Pub. L. 92-269 provided that:

"Sec. 3. (a) Each judicial district and each division or combination of divisions within a judicial district, for which a separate plan for random selection of jurors has been adopted pursuant to section 1863 of title 28, United States Code [this section], other than the District of Columbia and the districts of Puerto Rico and the Canal Zone, shall not later than September 1, 1973, refill its master jury wheel with names obtained from the voter registration lists for, or the lists of actual voters in, the 1972 general election.

"(b) The District of Columbia and the judicial districts of Puerto Rico and the Canal Zone shall not later than September 1, 1973, refill their master jury wheels from sources which include the names of persons eighteen years of age or older.

"(c) The qualified jury wheel in each judicial district, and in each division or combination of divisions in a judicial district for which a separate plan for random selection of jurors has been adopted, shall be refilled from the master jury wheel not later than October 1, 1973.

"Sec. 4. (a) Nothing in this Act amending this section and section 1865 of this title shall affect the composition of any master jury wheel or qualified jury wheel prior to the date on which it is first refilled in compliance with the terms of section 3.

"(b) Nothing in this Act shall affect the composition or preclude the service of any jury empaneled on or before the date on which the qualified jury wheel from which the jurors' names were drawn is refilled in compliance with the provisions of section 3."

### Section Referred to in Other Sections

This section is referred to in sections 1866 to 1868 of this title.

## § 1864. Drawing of names from the master jury wheel; completion of juror qualification form

(a) From time to time as directed by the district court, the clerk or a district judge shall publicly draw at random from the master jury wheel the names of as many persons as may be required for jury service. The clerk or jury commission shall prepare an alphabetical list of the names drawn, which list shall not be disclosed to any person except pursuant to the district court plan and to sections 1867 and 1868 of this title. The clerk or jury commission shall mail to every person whose name is drawn from the master wheel a juror qualification form accompanied by instructions to fill out and return the form, duly signed and sworn, to the clerk or jury commission by mail within ten days. If the person is unable to fill out the form, another shall do it for him, and shall indicate that he has done so and the reason therefor. In any case in which it appears that there is an omission, ambiguity, or error in a form, the clerk or jury commission shall return the form with instructions to the person to make such additions or corrections as may be necessary and to return the form to the clerk or jury commission within ten days. Any person who fails to return a completed juror qualification form as instructed may be summoned by the clerk or jury commission forthwith to appear before the clerk or jury commission to fill out a juror qualification form. A person summoned to appear because of failure to return a juror qualification form as instructed who personally appears and executes a juror qualification form before the clerk or jury commission may, at the discretion of the district court, except where his prior failure to execute and mail such form was willful, be entitled to receive for such appearance the same fees and travel allowances paid to jurors under section 1871 of this title. At the time of his appearance for jury service, any person may be required to fill out another juror qualification form in the presence of the jury commission or the clerk of the court, at which time, in such cases as it appears warranted, the person may be questioned, but only with regard to his responses to questions contained on the form. Any information thus acquired by the clerk or jury commission may be noted on the juror qualification form and transmitted to the chief judge or such district court judge as the plan may provide.

(b) Any person summoned pursuant to subsection (a) of this section who fails to appear as directed shall be ordered by the district court forthwith to appear and show cause for his failure to comply with the summons. Any person who fails to appear pursuant to such order or who fails to show good cause for noncompliance with the summons may be fined not more than $100 or imprisoned not more than three days, or both. Any person who willfully misrepresents a material fact on a juror qualification form for the purpose of avoiding or securing service as a juror may be fined not more than $100 or imprisoned not more than three days, or both.

(June 25, 1948, ch. 646, 62 Stat. 952; Mar. 27, 1968, Pub. L. 90–274, § 101, 82 Stat. 57.)

### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§ 412, 412a (Mar. 3, 1911, ch. 231, § 276, 36 Stat. 1164; Feb. 3, 1917, ch. 27, 39 Stat. 873; May 21, 1945, ch. 129, title IV, 59 Stat. 198; July 5, 1946, ch. 541, title IV, 60 Stat. 478).

The words "The district court" were substituted for the phrase "the judge thereof, or by the judge senior in commission in districts having more than one judge" to conform to other sections authorizing appointment of court officers. See section 751 of this title relating to appointment of district court clerk.

The limitation in section 412a of title 28, U.S.C., 1940 ed., that jury commissioners shall serve no more than three days in any one term of court was omitted as unnecessary. This is a matter that may safely be left to the discretion of the court.

The last paragraph was added in conformity with section 11-1401 of the District of Columbia Code, 1940 ed., providing for three jury commissioners.

Changes were made in phraseology.

### SENATE REVISION AMENDMENT

As finally enacted, act July 9, 1947, ch. 211, title IV, 61 Stat. 304, which was classified to Title 28, U.S.C., 1946 ed., § 412a, was also a source of this section. Accordingly such act was included by Senate amendment in the schedule of repeals. See 80th Congress Senate Report No. 1559.

### AMENDMENTS

1968—Pub. L. 90-274 substituted provisions for the public drawing of names from the master jury wheel, the completion of the jury qualification form, and the penalties for failure to appear and for misrepresentation of material facts for provisions requiring the drawing of names from a jury box, the refilling of the box by the clerk and a jury commissioner, the requirements and compensation of the commissioner, and the alternate placement of names by the clerk and the commissioner.

### EFFECTIVE DATE OF 1968 AMENDMENT

Amendment by Pub. L. 90-274 effective 270 days after Mar. 27, 1968, except as to cases in which an indictment has been returned or a petit jury empaneled prior to such effective date, see section 104 of Pub. L. 90-274, set out as an Effective Date of 1968 Amendment note under section 1861 of this title.

### FEDERAL RULES OF CIVIL PROCEDURE

Jurors and juries, see rules 38, 39, 46, 47, and 48, Appendix to this title.

### FEDERAL RULES OF CRIMINAL PROCEDURE

Jurors and juries, see rules 6, 23, 24, and 51, Title 18, Appendix, Crimes and Criminal Procedure.

## § 1865. Qualifications for jury service

(a) The chief judge of the district court, or such other district court judge as the plan may provide, on his initiative or upon recommendation of the clerk or jury commission, shall determine solely on the basis of information provided on the juror qualification form and other competent evidence whether a person is unqualified for, or exempt, or to be excused from jury service. The clerk shall enter such determination in the space provided on the juror qualification form and the alphabetical list of names drawn from the master jury wheel. If a person did not appear in response to a summons, such fact shall be noted on said list.

(b) In making such determination the chief judge of the district court, or such other district court judge as the plan may provide, shall deem any person qualified to serve on grant and petit juries in the district court unless he—

(1) is not a citizen of the United States eighteen years old who has resided for a period of one year within the judicial district;

(2) is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form;

(3) is unable to speak the English language;

(4) is incapable, by reason of mental or physical infirmity, to render satisfactory jury service; or

(5) has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime

punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty.

(June 25, 1948, ch. 646, 62 Stat. 952; Mar. 27, 1968, Pub. L. 90-274, § 101, 82 Stat. 58; Apr. 6, 1972, Pub. L. 92-269, § 1, 86 Stat. 117.)

### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§ 181, 413 (Mar. 3, 1911, ch. 231, §§ 100, 277, 36 Stat. 1121, 1164).

Section consolidates a part of section 181 with section 413 of title 28, U.S.C., 1940 ed. Other provisions of said section 181 are incorporated in section 115 of this title.

Word "jurors" was changed to "grand and petit jurors" upon authority of *Agnew* v. *United States*, 1897, 17 S.Ct. 235, 165 U.S. 36, 41 L.Ed. 624, construing such term to include both types of jurors.

The last sentence of subsection (a) was added to conform with existing practice in many districts. Subsection (b) extends to all districts a provision of section 181 of title 28, U.S.C., 1940 ed., which was designed for the convenience of the districts in Ohio and permitted jurors drawn for service at Cleveland, Toledo, and Columbus to serve at Youngstown, Lima, and Steubenville, respectively.

Changes were made in phraseology.

### AMENDMENTS

1972—Subsec. (b)(1). Pub. L. 92-269 substituted "eighteen years old" for "twenty-one years old".

1968—Subsec. (a). Pub. L. 90-274 substituted provisions for the excusing of persons from jury service by the chief judge of the district court or by other district court judge for provisions requiring the selection of jurors so as to be most favorable to an impartial trial and so as to minimize the expense and burden of jury service.

Subsec. (b). Pub. L. 90-274 substituted provisions setting out the conditions of ineligibility for jury service for provisions authorizing the service of jurors in a place within the district other than the place for which the jurors were summoned.

### EFFECTIVE DATE OF 1968 AMENDMENT

Amendment by Pub. L. 90-274 effective 270 days after Mar. 27, 1968, except as to cases in which an indictment has been returned or a petit jury empaneled prior to such effective date, see section 104 of Pub. L. 90-274, set out as an Effective Date of 1968 Amendment note under section 1861 of this title.

### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1866 of this title.

## § 1866. Selection and summoning of jury panels

(a) The jury commission, or in the absence thereof the clerk, shall maintain a qualified jury wheel and shall place in such wheel names of all persons drawn from the master jury wheel who are determined to be qualified as jurors and not exempt or excused pursuant to the district court plan. From time to time, the jury commission or the clerk shall publicly draw at random from the qualified jury wheel such number of names of persons as may be required for assignment to grand and petit jury panels. The jury commission or the clerk shall prepare a separate list of names of persons assigned to each grand and petit jury panel.

(b) When the court orders a grand or petit jury to be drawn, the clerk or jury commission or their duly designated deputies shall issue summonses for the required number of jurors.

Each person drawn for jury service may be served personally, or by registered or certified mail addressed to such person at his usual residence or business address.

If such service is made personally, the summons shall be delivered by the clerk or the jury commission or their duly designated deputies to the marshal who shall make such service.

If such service is made by registered or certified mail, the summons may be served by the clerk or jury commission or their duly designated deputies who shall make affidavit of service and shall file with such affidavit the addressee's receipt for the registered or certified summons. If such service is made by the marshal, he shall attach to his return the addressee's receipt for the registered or certified mail.

(c) Except as provided in section 1865 of this title or in any jury selection plan provision adopted pursuant to paragraph (5), (6), or (7) of section 1863(b) of this title, no person or class of persons shall be disqualified, excluded, excused, or exempt from service as jurors: *Provided*, That any person summoned for jury service may be (1) excused by the court, upon a showing of undue hardship or extreme inconvenience, for such period as the court deems necessary, at the conclusion of which such person shall be summoned again for jury service under subsections (b) and (c) of this section, or (2) excluded by the court on the ground that such person may be unable to render impartial jury service or that his service as a juror would be likely to disrupt the proceedings, or (3) excluded upon peremptory challenge as provided by law, or (4) excluded pursuant to the procedure specified by law upon a challenge by any party for good cause shown, or (5) excluded upon determination by the court that his service as a juror would be likely to threaten the secrecy of the proceedings, or otherwise adversely affect the integrity of jury deliberations. No person shall be excluded under clause (5) of this subsection unless the judge, in open court, determines that such is warranted and that exclusion of the person will not be inconsistent with sections 1861 and 1862 of this title. The number of persons excluded under clause (5) of this subsection shall not exceed one per centum of the number of persons who return executed jury qualification forms during the period, specified in the plan, between two consecutive fillings of the master jury wheel. The names of persons excluded under clause (5) of this subsection, together with detailed explanations for the exclusions, shall be forwarded immediately to the judicial council of the circuit, which shall have the power to make any appropriate order, prospective or retroactive, to redress any misapplication of clause (5) of this subsection, but otherwise exclusions effectuated under such clause shall not be subject to challenge under the provisions of this title. Any person excluded from a particular jury under clause (2), (3), or (4) of this subsection shall be eligible to sit on another jury if the basis for his initial exclusion would not be relevant to his ability to serve on such other jury.

(d) Whenever a person is disqualified, excused, exempt, or excluded from jury service, the jury commission or clerk shall note in the space provided on his juror qualification form or on the juror's card drawn from the qualified jury wheel the specific reason therefore.

(e) In any two-year period, no person shall be required to (1) serve or attend court for prospective service as a petit juror for a total of more than thirty days, except when necessary to complete service in a particular case, or (2) serve on more than one grand jury, or (3) serve as both a grand and petit juror.

(f) When there is an unanticipated shortage of available petit jurors drawn from the qualified jury wheel, the court may require the marshal to summon a sufficient number of petit jurors selected at random from the voter registration lists, lists of actual voters, or other lists specified in the plan, in a manner ordered by the court consistent with sections 1861 and 1862 of this title.

(g) Any person summoned for jury service who fails to appear as directed shall be ordered by the district court to appear forthwith and show cause for his failure to comply with the summons. Any person who fails to show good cause for noncompliance with a summons may be fined not more than $100 or imprisoned not more than three days, or both.

(June 25, 1948, ch. 646, 62 Stat. 952; May 24, 1947, ch. 179, § 96, 63 Stat. 103; Mar. 27, 1968, Pub. L. 90-274, § 101, 82 Stat. 58; Dec. 11, 1970, Pub. L. 91-543, 84 Stat. 1408.)

### HISTORICAL AND REVISION NOTES

### 1948 ACT

Based on title 28, U.S.C., 1940 ed., §§ 417, 418 (Mar. 3, 1911, ch. 231, §§ 280, 281, 36 Stat. 1165).

Section consolidates parts of sections 417, 418 of title 28, U.S.C., 1940 ed., with necessary changes in phraseology.

The requirement of section 418 of title 28, U.S.C., 1940 ed., for the summoning of a special jury in accordance with the law of the state was omitted as unnecessary and incongruous in view of other sections of this chapter making adequate provision for summoning jurors.

### 1949 ACT

This section amends section 1866 of title 28, U.S.C., by restoring provision of original law that special juries be impaneled in accordance with laws of the respective States.

### AMENDMENTS

1970—Subsec. (b). Pub. L. 91-543 added provisions authorizing duly designated deputies of the clerk or the jury commission to issue summonses, and deliver them to the marshal for service when personal service is to be made, and provisions authorizing, if service is made by registered or certified mail, the clerk or the jury commission or their duly designated deputies to make service of the summons.

1968—Subsec. (a). Pub. L. 90-274 substituted provisions authorizing the commission or clerk to maintain a jury wheel of qualified jurors and to draw particular panels therefrom for provisions authorizing the marshal to summon talesmen from the bystanders when there is an insufficient number of petit jurors.

Subsec. (b). Pub. L. 90-274 substituted provisions directing the clerk or jury commission to deliver summonses to the marshal for service when the court orders a grand or petit jury to be drawn and setting out the details of service for provisions requiring that, when a special jury was ordered by a district court, it had to be returned by the marshal in the same manner and form as was required in such case by the law of the State in which the district court sat.

Subsecs. (c)-(g). Pub. L. 90-274 added subsecs. (c)-(g).

1949—Act May 24, 1949, divided section into subsections and restored provisions that special juries be impaneled in accordance with State law.

### EFFECTIVE DATE OF 1968 AMENDMENT

Amendment by Pub. L. 90-274 effective 270 days after Mar. 27, 1968, except as to cases in which an indictment has been returned or a petit jury empaneled prior to such effective date, see section 104 of Pub. L. 90-274, set out as Historical and Revision Notes note under section 1861 of this title.

### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1869 of this title.

## § 1867. Challenging compliance with selection procedures

(a) In criminal cases, before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, the defendant may move to dismiss the indictment or stay the proceedings against him on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury.

(b) In criminal cases, before the voir dire examination begins, or within seven days after the Attorney General of the United States discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, the Attorney General may move to dismiss the indictment or stay the proceedings on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury.

(c) In civil cases, before the voir dire examination begins, or within seven days after the party discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, any party may move to stay the proceedings on the ground of substantial failure to comply with the provisions of this title in selecting the petit jury.

(d) Upon motion filed under subsection (a), (b), or (c) of this section, containing a sworn statement of facts which, if true, would constitute a substantial failure to comply with the provisions of this title, the moving party shall be entitled to present in support of such motion the testimony of the jury commission or clerk, if available, any relevant records and papers not public or otherwise available used by the jury commissioner or clerk, and any other relevant evidence. If the court determines that there has been a substantial failure to comply with the provisions of this title in selecting the grand jury, the court shall stay the proceedings pending the selection of a grand jury in conformity with this title or dismiss the indictment, whichever is appropriate. If the court determines that there has been a substantial failure to comply with the provisions of this title in selecting the petit jury, the court shall stay the proceedings pending the selection of a petit jury in conformity with this title.

(e) The procedures prescribed by this section shall be the exclusive means by which a person accused of a Federal crime, the Attorney General of the United States or a party in a civil case may challenge any jury on the ground that such jury was not selected in conformity with the provisions of this title. Nothing in this section shall preclude any person or the United States from pursuing any other remedy, civil or criminal, which may be available for the vindication or enforcement of any law prohibiting discrimination on account of race, color, religion, sex, national origin or economic status in the selection of persons for service on grand or petit juries.

(f) The contents of records or papers used by the jury commission or clerk in connection with the jury selection process shall not be disclosed, except pursuant to the district court plan or as may be necessary in the preparation or presentation of a motion under subsection (a), (b), or (c) of this section, until after the master jury wheel has been emptied and refilled pursuant to section 1863(b)(4) of this title and all persons selected to serve as jurors before the master wheel was emptied have completed such service. The parties in a case shall be allowed to inspect, reproduce, and copy such records or papers at all reasonable times during the preparation and pendency of such a motion. Any person who discloses the contents of any record or paper in violation of this subsection may be fined not more than $1,000 or imprisoned not more than one year, or both.

(June 25, 1948, ch. 646, 62 Stat. 953; Sept. 2, 1957, Pub. L. 85-259, 71 Stat. 583; Mar. 27, 1968, Pub. L. 90-274, § 101, 82 Stat. 59.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 416 (Mar. 3, 1911, ch. 231, § 279, 36 Stat. 1165; Jan. 31, 1929, ch. 126, 45 Stat. 1145).

Provisions for service by a disinterested person when marshal or his deputy is disqualified is incorporated in section 1868 of this title.

Provision for payment and reimbursement of postage and registry fee were omitted as covered by section 560 of this title.

Word "summons" was substituted for "writ of venire facias" in harmony with the Federal Rules of Civil Procedure which abolished unnecessary forms. See Rule 81(b) thereof, and Rule 12 of the Federal Rules of Criminal Procedure.

Provision of section 416 of title 28, U.S.C., 1940 ed., that the receipt of the person so addressed by registered mail should be regarded as personal service, was omitted. Such omission is consistent with Rule 5(b) of the Federal Rules of Civil Procedure providing that service by mail is complete upon mailing.

Provision for attachment to the return of the addressee's receipt for the summons, was inserted to cover its disposition.

Provision that no mileage shall be allowed for service by mail was omitted as unnecessary.

Changes were made in phraseology.

#### Amendments

1968—Pub. L. 90-274 substituted provisions by which a defendant may assert noncompliance with the selection procedures of the jury for provisions covering the issuance of summonses for jurors and service thereof upon jurors.

1957—Pub. L. 85-259 inserted the words "or certified" in the second and third sentences.

#### Effective Date of 1968 Amendment

Amendment by Pub. L. 90-274 effective 270 days after Mar. 27, 1968, except as to cases in which an indictment has been returned or a petit jury empaneled prior to such effective date, see section 104 of Pub. L. 90-274, set out as an Effective Date of 1968 Amendment note under section 1861 of this title.

#### Section Referred to in Other Sections

This section is referred to in sections 1864, 1869 of this title.

### § 1868. Maintenance and inspection of records

After the master jury wheel is emptied and refilled pursuant to section 1863(b)(4) of this title, and after all persons selected to serve as jurors before the master wheel was emptied have completed such service, all records and papers compiled and maintained by the jury commission or clerk before the master wheel was emptied shall be preserved in the custody of the clerk for four years or for such longer period as may be ordered by a court, and shall be available for public inspection for the purpose of determining the validity of the selection of any jury.

(June 25, 1948, ch. 646, 62 Stat. 953; Mar. 27, 1968, Pub. L. 90-274, § 101, 82 Stat. 60.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., §§ 416, 417 (Mar. 3, 1911, ch. 231, §§ 279, 280, 36 Stat. 1165, Jan. 31, 1929, ch. 126, 45 Stat. 1145).

Section consolidates parts of sections 416, 417 of title 28, U.S.C., 1940 ed., with necessary changes in phraseology.

The remaining portion of section 416 of title 28, U.S.C., 1940 ed., constitutes section 1867 of this title.

The remainder of section 417 of title 28, U.S.C., 1940 ed., is incorporated in section 1866 of this title.

Words, "in the opinion of the court, disqualified" were substituted for "not an indifferent person, or is interested in the event of the cause".

#### Amendments

1968—Pub. L. 90-274 substituted provisions for the maintenance and inspection of records in the hands of the commission or clerk before the master wheel was emptied for provisions covering the disqualification of the United States marshal or his deputy and the appointment of a disinterested person by the court.

#### Effective Date of 1968 Amendment

Amendment by Pub. L. 90-274 effective 270 days after Mar. 27, 1968, except as to cases in which an indictment has been returned or a petit jury empaneled prior to such effective date, see section 104 of Pub. L. 90-274, set out as an Effective Date of 1968 Amendment note under section 1861 of this title.

#### Section Referred to in Other Sections

This section is referred to in section 1864 of this title.

### § 1869. Definitions

For purposes of this chapter—

(a) "clerk" and "clerk of the court" shall mean the clerk of the district court of the United States or any authorized deputy clerk;

(b) "chief judge" shall mean the chief judge of any district court of the United States;

(c) "voter registration lists" shall mean the official records maintained by State or local election officials of persons registered to vote in either the most recent State or the most recent Federal general election, or, in the case of a State or political subdivision thereof that does not require registration as a prerequisite to voting, other official lists of persons qualified to vote in such election. The term shall also include the list of eligible voters maintained by any Federal examiners pursuant to the Voting Rights Act of 1965 where the names on such list have not been included on the official registration lists or other official lists maintained by the appropriate State or local officials. With respect to the districts of Guam and the Virgin Islands, "voter registration lists" shall mean the official records maintained by territorial election officials of persons registered to vote in the most recent territorial general election;

(d) "lists of actual voters" shall mean the official lists of persons actually voting in either the most recent State or the most recent Federal general election;

(e) "division" shall mean: (1) one or more statutory divisions of a judicial district; or (2) in statutory divisions that contain more than one place of holding court, or in judicial districts where there are no statutory divisions, such counties, parishes, or similar political subdivisions surrounding the places where court is held as the district court plan shall determine: *Provided*, That each county, parish, or similar political subdivision shall be included in some such division;

(f) "district court of the United States", "district court", and "court" shall mean courts constituted under chapter 5 of title 28, United States Code, section 22 of the Organic Act of Guam, as amended (64 Stat. 389; 48 U.S.C. 1424), section 21 of the Revised Organic Act of the Virgin Islands (68 Stat. 506; 48 U.S.C. 1611), and section 1 of title 3, Canal Zone Code; except that for purposes of sections 1861, 1862, 1866(c), 1866(d), and 1867 of this chapter such terms shall include the Superior Court of the District of Columbia;

(g) "jury wheel" shall include any device or system similar in purpose or function, such as a properly programed electronic data processing system or device;

(h) "juror qualification form" shall mean a form prescribed by the Administrative Office of the United States Courts and approved by the Judicial Conference of the United States, which shall elicit the name, address, age, race, occupation, education, length of residence within the judicial district, distance from residence to place of holding court, prior jury service, and citizenship of a potential juror, and whether he should be excused or exempted from jury service, has any physical or mental infirmity impairing his capacity to serve as juror, is able to read, write, speak, and understand the English language, has pending against him any charge for the commission of a State or Federal criminal offense punishable by imprisonment for more than one year, or has been convicted in any State or Federal court of record of a crime punishable by imprisonment for more than one year and has not had his civil rights restored by pardon or amnesty. The form shall request, but not require, any other information not inconsistent with the provisions of this title and required by the district court plan in the interests of the sound administration of justice. The form shall also elicit the sworn statement that his responses are true to the best of his knowledge. Notarization shall not be required. The form shall contain words clearly informing the person that the furnishing of any information with respect to his religion, national origin, or economic status is not a prerequisite to his qualification for jury service, that such information need not be furnished if the person finds it objectionable to do so, and that information concerning race is required solely to enforce nondiscrimination in jury selection and has no bearing on an individual's qualification for jury service.

(i) "public officer" shall mean a person who is either elected to public office or who is directly appointed by a person elected to public office.

(June 25, 1948, ch. 646, 62 Stat. 953; Oct. 16, 1963, Pub. L. 88-139, 32, 77 Stat. 248; Mar. 27, 1968, Pub. L. 90-274, § 101, 82 Stat. 61; July 29, 1970, Pub. L. 91-358, title I, § 172(b), 84 Stat. 590; Sept. 29, 1972, Pub. L. 92-437, § 1, 86 Stat. 740.)

### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 423 (Mar. 3, 1911, ch. 231, § 286, 36 Stat. 1166). Changes were made in phraseology.

### REFERENCE IN TEXT

The Voting Rights Act of 1965, referred to in subsec. (c), is Pub. L. 89-110, Aug. 6, 1965, 79 Stat. 437, as amended, which is classified generally to subchapters I-A (§ 1973 et seq.), I-B (§ 1973aa et seq.), and I-C (§ 1973bb et seq.) of chapter 20 of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 1973 of Title 42 and Tables volume.

### AMENDMENTS

1972—Subsec. (h). Pub. L. 92-437 added race and occupation to the particulars to be elicited on the juror qualification form, in provisions distinguishing between information to be requested and information to be required, omitted "race and occupation of a potential juror", and in information to be contained in the form, omitted "race, color" and "occupation" from the particulars, and required additional material to be contained in the form that information concerning race is required solely to enforce nondiscrimination in jury selection and that it has no bearing on an individual's qualification for jury service.

1970—Subsec. (f). Pub. L. 91-358 substituted reference to the Superior Court of the District of Columbia for references to the District of Columbia Court of General Sessions and the Juvenile Court of the District of Columbia.

1968—Pub. L. 90-274 substituted provisions defining "clerk", "clerk of the court", "chief judge", "voter registration lists", "list of actual voters", "division", "district court", "jury wheel", "juror qualification form", and "public officer" for provisions allowing the challenge of a petit juror who had been summoned and attended court as a petit juror at any session held within one year prior to the challenge.

1963—Pub. L. 88-139 substituted "session" for "term".

### EFFECTIVE DATE OF 1972 AMENDMENT

Section 2 of Pub. L. 92-437 provided that: "This Act [amending subsec. (h) of this section] shall take effect on the sixtieth day after the date of its enactment [Sept. 29, 1972]."

### EFFECTIVE DATE OF 1970 AMENDMENT

Amendment by Pub. L. 91-358 effective the first day of the seventh calendar month which begins after July 29, 1970, see section 199(a) of Pub. L. 91-358, set out as an Effective Date of 1970 Amendment note under section 1257 of this title.

### Effective Date of 1968 Amendment

Amendment by Pub. L. 90-274 effective 270 days after Mar. 27, 1968, except as to cases in which an indictment has been returned or a petit jury empaneled prior to such effective date, see section 104 of Pub. L. 90-274, set out as an Effective Date of 1968 Amendment note under section 1861 of this title.

## § 1870. Challenges

In civil cases, each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purposes of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly.

All challenges for cause or favor, whether to the array or panel or to individual jurors, shall be determined by the court.

(June 25, 1948, ch. 646, 62 Stat. 953; Sept. 16, 1959, Pub. L. 86-282, 73 Stat. 565.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 424 (Mar. 3, 1911, ch. 231, § 287, 36 Stat. 1166).

Provisions of section 424 of title 28, U.S.C., 1940 ed., relating to the number of peremptory challenges in criminal cases were deleted as superseded by Rule 24 of the Federal Rules of Criminal Procedure.

The last sentence of the first paragraph was added to permit the same flexibility in the matter of challenges in civil cases as is permitted in criminal cases by said Rule 24.

Words "without aid of triers" at end of section 424 of title 28, U.S.C., 1940 ed., were omitted as surplusage.

Changes were made in phraseology.

### Amendments

1959—Pub. L. 86-282 substituted "may" for "shall" following the words "several plaintiffs", and ", or the court may allow" for ". If there is more than one defendant the court may allow the defendants".

### Cross References

Challenges in summary trials, see section 394 of Title 33, Navigation and Navigable Waters.

### Federal Rules of Civil Procedure

Alternate jurors, challenges, see rule 47, Appendix to this title.

Jurors and juries, see rules 38, 39, 47 and 48.

### Federal Rules of Criminal Procedure

Criminal cases, jury challenges, see rule 24, Title 18, Appendix, Crimes and Criminal Procedure.

## § 1871. Fees

Grand and petit jurors in district courts or before United States commissioners shall receive the following fees, except as otherwise expressly provided by law:

For actual attendance at the place of trial or hearing and for the time necessarily occupied in going to and from such place at the beginning and end of such service or at any time during the same, $20 per day, except that any juror required to attend more than thirty days in hearing one case may be paid in the discretion and upon the certification of the trial judge a per diem fee not exceeding $25 for each day in excess of thirty days he is required to hear such case.

For the distance necessarily traveled to and from a juror's residence by the shortest practicable route in going to and returning from the place of service at the beginning and at the end of the term of service 10 cents per mile, plus the amount expended for tolls, for toll roads, for toll tunnels, and for toll bridges; and for additional necessary daily or other interim travel during the term of service the juror shall be allowed for such travel 10 cents per mile, plus the amount expended for tolls, for toll roads, for toll tunnels, and for toll bridges, but not to exceed the subsistence allowance which would have been paid him if he had remained at the place of holding court overnight or during temporary recess, and if daily travel appears impracticable, subsistence of $16 per day shall be allowed, including the time necessarily occupied in going to and returning from the place of attendance. Whenever in any case the jury is ordered to be kept together and not to separate, the cost of subsistence during such period shall be paid by the United States marshal upon the order of the court in lieu of the foregoing subsistence allowance.

Jury fees and travel and subsistence allowances provided by this section shall be paid by the United States marshal on the certificate of the clerk of the court, and in the case of jury fees in excess of $20 per diem, when allowed as hereinabove provided, on the certificate of the trial judge.

Grand and petit jurors in the district courts for the districts of Guam and the Canal Zone shall receive the same fees and allowances provided in this section for grand and petit jurors in other district courts of the United States.

(June 25, 1948, ch. 646, 62 Stat. 953; May 24, 1949, ch. 139, § 97, 63 Stat. 103; July 14, 1949, ch. 333, 63 Stat. 411; Sept. 7, 1957, Pub. L. 85-299, 71 Stat. 618; Sept. 2, 1965, Pub. L. 89-165, 79 Stat. 645; Mar. 27, 1968, Pub. L. 90-274, § 102(a), 82 Stat. 62.)

### Historical and Revision Notes

#### 1948 Act

Based on title 28, U.S.C., 1940 ed., §§ 600, 600a, 600b, 608, and sections 11-1512 and 11-1513 of the D.C. Code, 1940 ed., (R.S. §§ 236, 323; Apr. 26, 1926, ch. 183, §§ 1, 2, 44 Stat. 323; May 17, 1932, ch. 190, 47 Stat. 158; Oct. 13, 1941, ch. 431, § 2, 55 Stat. 736).

Section consolidates section 600 of title 28, U.S.C., 1940 ed., and sections 11-1512 and 11-1513 of the D. C. Code, 1940 ed., with part of section 608 of title 28, U.S.C., 1940 ed. The remainder of such section 608, relating to payment of witnesses' compensation, is the basis of section 1825 of this title.

Words "place of service" were substituted for references to attendance at court, in view of the earlier reference to service before commissioners.

The Advisory Committee to the House Committee on Revision of the Laws in revision of this title, recommends a careful study of the compensation of witnesses and jurors. Furthermore, provision should be made for the subsistence of jurors and witnesses serving at such distance from their homes as precludes daily travel to and from the court.

Changes were made in phraseology.

#### 1949 Act

This section incorporates in section 1871 of title 28, U.S.C., with changes in phraseology, the provisions of act of June 25, 1948 (ch. 652, 62 Stat. 1016), which became law subsequent to the enactment of the revision.

### Amendments

1968—Pub. L. 90-274 increased from $10 to $20 the per diem allowance for grand and petit jurors, increased from $14 to $25 the fee for extra days in cases requiring attendance in excess of 30 days, increased from $10 to $16 the daily subsistence rate when travel appears impracticable, increased from $10 to $20 per day the limit after which payment of fees by the marshal must be on the certificate of the trial judge, provided for the allowance of amounts expended for tolls, for toll roads, for toll tunnels, and for toll bridges, and directed that grand and petit jurors in the district courts for the districts of Guam and the Canal Zone receive the same fees and allowances provided for grand and petit jurors in other district courts of the United States.

1965—Pub. L. 89-165 increased from $7 to $10 the per diem allowance for grand and petit jurors, increased from $10 to $14 the fee for extra days in cases requiring attendance in excess of 30 days, prohibited payment for interim or daily travel at the 10-cent-per-mile rate in excess of the subsistence allowance which would have been paid if he had remained at the place of holding court overnight or during temporary recess, increased from $7 to $10 the daily subsistence rate when travel daily appears impracticable, and increased from $7 to $10 per day the limit after which payment of fees by the marshal must be on the certificate of the trial judge.

1957—Pub. L. 85-299 increased from 7 to 10 cents per mile and $5 to $7 per day the mileage and subsistence allowances of grand and petit jurors.

1949—Act July 14, 1949, increased the per diem fee paid jurors from $5 to $7, provided for per diem fee payments not to exceed $10 for each day in excess of thirty days, increased the mileage payment from 5 cents per mile to 7 cents, and provided for the certification of the judge in cases where the jury fee is in excess of $7 per diem.

Act May 24, 1949, increased jury fees and mileage and subsistence allowances.

### Effective Date of 1968 Amendment

Amendment by Pub. L. 90-274 effective 270 days after Mar. 27, 1968, except as to cases in which an indictment has been returned or a petit jury empaneled prior to such effective date, see section 104 of Pub. L. 90-274, set out as an Effective Date of 1968 Amendment note under section 1861 of this title.

### Change of Name

Reference to United States commissioners deemed to be reference to United States magistrates pursuant to Pub. L. 90-578, title IV, § 402(b)(2), Oct. 17, 1968, 82 Stat. 1118. See chapter 43 (§ 631 et seq.) of this title.

### Cross References

Accounts of marshal, see section 572 of this title.

### Section Referred to in Other Sections

This section is referred to in sections 572, 1864 of this title.

## § 1872. Issues of fact in Supreme Court

In all original actions at law in the Supreme Court against citizens of the United States, issues of fact shall be tried by a jury.

(June 25, 1948, ch. 646, 62 Stat. 953.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 343 (Mar. 3, 1911, ch. 231, § 235, 36 Stat. 1156).

Changes were made in phraseology.

## § 1873. Admiralty and maritime cases

In any case of admiralty and maritime jurisdiction relating to any matter of contract or tort arising upon or concerning any vessel of twenty tons or upward, enrolled and licensed for the coasting trade, and employed in the business of commerce and navigation between places in different states upon the lakes and navigable waters connecting said lakes, the trial of all issues of fact shall be by jury if either party demands it.

(June 25, 1948, ch. 646, 62 Stat. 953.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 770 (R.S. §§ 566, 648; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167).

Words "and Territories" following words "in different States" were omitted as obsolete. The act of February 26, 1845, ch. 20, 5 Stat. 726, from which this language was derived was intended primarily to cover the Great Lakes regions.

The first sentence of section 770 of title 28, U.S.C., 1940 ed., providing generally for the right of jury trials in district courts, was omitted as covered by Rule 38 of the Federal Rules of Civil Procedure.

Changes were made in phraseology.

### Federal Rules of Civil Procedure

Jury trial of right, see rule 38, Appendix to this title.

### Federal Rules of Criminal Procedure

Trial by jury, see rule 23, Title 18, Appendix, Crimes and Criminal Procedure.

## § 1874. Actions on bonds and specialties

In all actions to recover the forfeiture annexed to any articles of agreement, covenant, bond, or other specialty, wherein the forfeiture, breach, or nonperformance appears by default or confession of the defendant, the court shall render judgment for the plaintiff for such amount as is due. If the sum is uncertain, it shall, upon request of either party, be assessed by a jury.

(June 25, 1948, ch. 646, 62 Stat. 953.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 785 (R.S. § 961).

Word "actions" was substituted for "all suits brought," in view of Rule 2 of the Federal Rules of Civil Procedure. For the same reason, words "according to equity," after "to recover so much as is due," were omitted.

Words "or upon demurrer," after "default or confession of the defendant," were omitted in view of Federal Rules of Civil Procedure, Rule 7(c), abolishing demurrers.

Changes were made in phraseology.

### Section Referred to in D.C. Code

This section is referred to in section 15-106 of the District of Columbia Code.

## CHAPTER 123—FEES AND COSTS

Sec.
1911. Supreme Court.
1912. Damages and costs on affirmance.
1913. Courts of appeals.
1914. District courts; filing and miscellaneous fees; rules of court.[1]
1915. Proceedings in forma pauperis.
1916. Seamen's suits.

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[1] So in original. Does not conform to section catchline.

Sec.
1917. District courts; fee on filing notice of or petition for appeal.
1918. District courts; fines, forfeitures and criminal proceedings.
1919. District courts; dismissal for lack of jurisdiction.
1920. Taxation of costs.
1921. United States marshal's fees.
1922. Witness fees before United States commissioners
1923. Docket fees and costs of briefs.
1924. Verification of bill of costs.
1925. Admiralty and maritime cases.
1926. Court of Customs and Patent Appeals.
1927. Counsel's liability for excessive costs.
1928. Patent infringement action; disclaimer not filed.
1929. Extraordinary expenses not expressly authorized.

#### CROSS REFERENCES

Jury fees, see section 1871 of this title.

Witnesses, fees and subsistence, see section 1821 et seq. of this title.

### § 1911. Supreme Court

The Supreme Court may fix the fees to be charged by its clerk.

The fees of the clerk, cost of serving process, and other necessary disbursements incidental to any case before the court, may be taxed against the litigants as the court directs.

(June 25, 1948, ch. 646, 62 Stat. 954.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 330 (Mar. 3, 1911, ch. 231, § 223, 36 Stat. 1153).

The second paragraph was inserted to give statutory sanction to existing practice.

Changes were made in phraseology.

#### DEPOSIT FOR COSTS

A deposit on account of costs of $70 is required in certiorari costs and a deposit of $90 is required in appealed cases. [Letter of Nov. 1, 1949, from Administrative Office of the United States Courts.]

#### CROSS REFERENCES

Payment by clerk into Treasury of all fees, costs, and emoluments, see section 671 of this title.

#### RULES OF THE SUPREME COURT OF THE UNITED STATES

Supreme Court Rule 52 provides for fees and costs to be charged in pursuance of this section. See Appendix to this title, see rule 52, Appendix to this title.

### § 1912. Damages and costs on affirmance

Where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs.

(June 25, 1948, ch. 646, 62 Stat. 954.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 878, and section 1141(c)(4) of title 26 U.S.C., 1940 ed., Internal Revenue Code (R.S. § 1010; Mar. 3, 1911, ch. 231, §§ 117, 289, 36 Stat. 1131, 1167; Feb. 10, 1939, ch. 2, § 1141(c)(4), 53 Stat. 165).

Section consolidates section 878 of title 28 with section 1141(c)(4) of title 26, both U.S.C., 1940 ed., with changes in phraseology necessary to effect consolidation.

Words "prevailing party" were substituted for "the respondents in error," contained in said section 878 of title 28, since writs of error have been abolished.

#### SENATE REVISION AMENDMENT

By Senate amendment, all provisions relating to the Tax Court were eliminated. Therefore, section 1141(c)(4) of Title 26, U.S.C., Internal Revenue Code, was not one of the sources of this section as finally enacted. However, no change in the text of this section was necessary. See 80th Congress Senate Report No. 1559.

#### CROSS REFERENCES

Damages and costs in Courts of Appeals, see rules of the various Courts of Appeals.

#### RULES OF THE SUPREME COURT OF THE UNITED STATES

Interest and damages, see rule 56, Appendix to this title.

### § 1913. Courts of appeals

The fees and costs to be charged and collected in each court of appeals shall be prescribed from time to time by the Judicial Conference of the United States. Such fees and costs shall be reasonable and uniform in all the circuits.

(June 25, 1948, ch. 646, 62 Stat. 954.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 543 (Mar. 3, 1891, ch. 517, § 2, 26 Stat. 826; Feb. 19, 1897, ch. 263, 29 Stat. 536; Sept. 27, 1944, ch. 413, 58 Stat. 743).

Words "and in the United States Circuit Court of Appeals for the District of Columbia" were omitted as covered by "each court of appeals."

Judicial Conference of Senior Circuit Judges was changed to Judicial Conference "of the United States" in conformity with section 331 of this title.

Changes were made in phraseology.

#### JUDICIAL CONFERENCE SCHEDULE OF FEES

The Judicial Conference, at its session on Sept. 14, 1973, acting under the authority of provisions of this section, adopted the following schedule of fees, eff. Nov. 1, 1973, for services performed by the clerks of the United States Courts of Appeals, except that no fees were to be charged for services rendered on behalf of the United States:

"1. For docketing a case on appeal or review, or docketing any other proceeding, $50.00. A separate fee shall be paid by each party filing a notice of appeal in the district court, but parties filing a joint notice of appeal in the district court are required to pay only one fee. A docketing fee shall not be charged for the docketing of an application for the allowance of an interlocutory appeal under 28 U.S.C. 1292(b), unless the appeal is allowed.

"2. For every search of the records of the court and certifying the results of the same, $2.00.

"3. For certifying any document or paper, whether the certification is made directly on the document, or by separate instrument, $1.00.

"4. For making a typed copy of any record or paper, $1.00 per page of 250 words or fraction thereof. For reproducing any record or paper (by any means other than retyping), 50 cents per page. These fees do not include certification.

"5. For comparing with the original thereof any copy of any trascript of record, entry, record or paper, when such copy is furnished by any person requesting certification, $1.00 per page or fraction thereof. This fee is in addition to the fee for certification.

"No other fees for services than those above prescribed shall be charged or collected by any clerk, provided however that nothing herein shall be construed to prevent the clerk of any court of appeals, with the approval of the court, from charging and collecting a fee for each copy of an opinion as shall be fixed by the court."

### CROSS REFERENCES

Fees and costs, see rules of the various Courts of Appeals.

Power of Judicial Conference of the United States, see section 331 of this title.

## § 1914. District court; filing and miscellaneous fees; rules of court

(a) The clerk of each district court shall require the parties instituting any civil action, suit or proceeding in such court, whether by original process, removal or otherwise, to pay a filing fee of $15, except that on application for a writ of habeas corpus the filing fee shall be $5.

(b) The clerk shall collect from the parties such additional fees only as are prescribed by the Judicial Conference of the United States.

(c) Each district court by rule or standing order may require advance payment of fees.

(d) This section shall not apply to the District of Columbia.

(June 25, 1948, ch. 646, 62 Stat. 954.)

### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§ 549, 553 and 555 (R.S. § 828; June 28, 1902, ch. 1301, § 1, 32 Stat. 476; Feb. 11, 1925, ch. 204, §§ 2, 6, 8, 43 Stat. 857, 858; Jan. 22, 1927, ch. 50, § 2, 44 Stat. 1023; Jan. 31, 1928, ch. 14, § 1, 45 Stat. 54; Mar. 3, 1942, ch. 124, § 2, 56 Stat. 122; Sept. 27, 1944, ch. 414, §§ 1, 4, 5, 58 Stat. 743, 744).

Section consolidates sections 549, 553, and 555 of title 28, U.S.C., 1940 ed., as amended with necessary changes of phraseology.

The phrase "filing fee" was substituted for the inconsistent and misleading words of sections 549 and 553 of title 28, U.S.C., 1940 ed., "as full payment for all services to be rendered by the clerk" etc. thus removing the necessity for including exceptions and referring to other sections containing provisions for additional fees.

The provision in section 549 of title 28, U.S.C., 1940 ed., for payment of fees by the parties instituting criminal proceedings by indictment or information, was omitted. Such proceedings are instituted only by the United States from which costs cannot be exacted.

The provision in section 549 of title 28, U.S.C., 1940 ed., for taxation of fees as costs, was omitted as covered by section 1920 of this title.

Words "or appeal from a deportation order of a United States Commissioner" in section 553 of title 28, U.S.C., 1940 ed., were omitted as obsolete since repeal of the Chinese Exclusion Act by act Dec. 17, 1943, ch. 344, § 1, 57 Stat. 600. Appeal was formerly conferred by section 282 of title 8, U.S.C., 1940 ed., Aliens and Nationality.

Subsection (d) excepting the District of Columbia, was added to preserve the existing schedule of fees prescribed by section 11-1509 of the District of Columbia Code, 1940 ed.

### JUDICIAL CONFERENCE SCHEDULE OF ADDITIONAL FEES

The Judicial Conference, at its session on Sept. 14, 1973, acting under the authority of provisions of this section, adopted the following schedule of additional fees in the United States District Courts, eff. Nov. 1, 1973, for services performed by clerks of the United States District Courts, except that no fees were to be charged for services rendered on behalf of the United States:

"1. For filing or indexing any paper not in a case or proceeding for which a case filing fee has been paid, $1.00. This fee is applicable to the registration of a judgment, 28 U.S.C. 1963; the filing of a petition to perpetuate testimony, Rule 27(a), F.R.Civ.P.; the filing of papers by trustees under 28 U.S.C. 754; and the filing of letters rogatory or letters of request.

"2. For filing a requisition for and certifying the results of a search of the records of the court for judgments, decrees, other instruments, suits pending, and bankruptcy proceedings, $2.00 for each name searched.

"3. For certifying any document or paper, whether the certification is made directly on the document or by separate instrument, $1.00.

"4. For making a typed copy of any record or paper, except a copy of a writ for service on a party in a suit or action covered in 28 U.S.C. 1914(a), $1.00 per page of 250 words or fraction thereof. For reproducing any record or paper (by any means other than retyping), 50 cents per page. These fees do not include certification. With respect to copies of opinions of the district courts, the price is to be fixed by the court by local rule or order at 25 cents a page but not less than $1.00 per opinion.

"5. For comparing with the original thereof any copy of any transcript of record, entry, record or paper, when such copy is furnished by any person requesting certification, $1.00 per page or fraction thereof. This fee is in addition to the fee for certification.

"6. For the preparation and mailing of each set of notices in asset cases and in cases filed under the relief chapters of the Bankruptcy Act, in excess of 30 notices per set, 25 cents for each additional notice on the first 10,000 and 15 cents per notice on the balance, provided that in no event shall this charge exceed 25 percent of the net proceeds realized in asset cases.

"7. For admission of attorneys to practice, $10.00 each including a certificate of admission. For a duplicate certificate of admission, $2.00."

### CROSS REFERENCES

Accounting of bankruptcy fees collected by clerk, see section 79 of Title 11, Bankruptcy.

Advance payment of fees, see local rules of the various district courts.

Appeal of certiorari, fee of $5 on filing notice of or petition, or upon receipt of order allowing, or notice of allowance of, see section 1917 of this title.

Bankruptcy filing fee, see section 80 of Title 11, Bankruptcy.

Exemption of United States from payment of fees, see section 2412 of this title.

Payment by clerk into Treasury of all fees, costs and other moneys collected, see section 751 of this title.

Power of Judicial Conference of the United States, see section 331 of this title.

Reporter's fee for copy of transcript, see section 753 of this title.

Taxation of costs, see section 1920 of this title.

In admiralty and maritime cases, see section 1925 of this title.

## § 1915. Proceedings in forma pauperis

(a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

(b) In any civil or criminal case the court may, upon the filing of a like affidavit, direct that the expense of printing the record on appeal, if such printing is required by the appellate court, be paid by the United States, and the same shall be paid when authorized by the Director of the Administrative Office of the United States Courts.

(c) The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases.

(d) The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

(e) Judgment may be rendered for costs at the conclusion of the suit or action as in other cases, but the United States shall not be liable for any of the costs thus incurred. If the United States has paid the cost of a stenographic transcript or printed record for the prevailing party, the same shall be taxed in favor of the United States.

(June 25, 1948, ch. 646, 62 Stat. 954; May 24, 1949, ch. 139, § 98, 63 Stat. 104; Oct. 31, 1951, ch. 655, § 51(b), (c), 65 Stat. 727; Sept. 21, 1959, Pub. L. 86-320, 73 Stat. 590.)

### Historical and Revision Notes

#### 1948 Act

Based on title 28, U.S.C., 1940 ed., §§ 9a(c)(e), 832, 833, 834, 835, and 836 (July 20, 1892, ch. 209, §§ 1-5, 27 Stat. 252; June 25, 1910, ch. 435, 36 Stat. 866; Mar. 3, 1911, ch. 231, § 5a, as added Jan. 20, 1944, ch. 3, § 1, 58 Stat. 5; June 27, 1922, ch. 246, 42 Stat. 666; Jan. 31, 1928, ch. 14, § 1, 45 Stat. 54).

Section consolidates a part of section 9a(c)(e) with sections 832-836 of title 28, U.S.C., 1940 ed.

For distribution of other provisions of section 9a of title 28, U.S.C., 1940 ed., see Distribution Table.

Section 832 of title 28, U.S.C., 1940 ed., was completely rewritten, and constitutes subsections (a) and (b).

Words "and willful false swearing in any affidavit provided for in this section or section 832 of this title, shall be punishable as perjury as in other cases," in section 833 of title 28, U.S.C., 1940 ed., were omitted as covered by the general perjury statute, title 18, U.S.C., 1940 ed., § 231 (H.R. 1600, 80th Cong., sec. 1621).

A proviso in section 836 of title 28, U.S.C., 1940 ed., that the United States should not be liable for costs was deleted as covered by section 2412 of this title.

The provision in section 9a(e) of title 28, U.S.C., 1940 ed., respecting stenographic transcripts furnished on appeals in civil cases is extended by subsection (b) of the revised section to include criminal cases. Obviously it would be inconsistent to furnish the same to a poor person in a civil case involving money only and to deny it in a criminal proceeding where life and liberty are in jeopardy.

The provision of section 832 of title 28, U.S.C., 1940 ed., for payment when authorized by the Attorney General was revised to substitute the Director of the Administrative Office of the United States Courts who now disburses such items.

Changes in phraseology were made.

#### 1949 Act

This amendment clarifies the meaning of subsection (b) of section 1915 of title 28, U.S.C., and supplies, in subsection (e) of section 1915, an inadvertent omission to make possible the recovery of public funds expended in printing the record for persons successfully suing in forma pauperis.

### Amendments

1959—Subsec. (a). Pub. L. 86-320 substituted "person" for "citizen".

1951—Subsec. (b). Act Oct. 31, 1951, after "expense of", struck out "furnishing a stenographic transcript and".

Subsec. (e). Act Oct. 31, 1951, inserted the provision that the United States shall not be liable for any of the costs incurred.

1949—Subsec. (b). Act May 24, 1949, § 98(a), inserted "such printing is" between "if" and "required".

Subsec. (e). Act May 24, 1949, § 98(b), inserted "or printed record" following "stenographic transcript".

### Federal Rules of Civil Procedure

Default judgment, see rule 55, Appendix to this title.

Preservation of former section 785 of this title under rule 55, see note by Advisory Committee under rule 55.

### Cross References

Fair housing, enforcement by private persons in Federal or State courts without payment of fees, costs, or security, see section 3612 of Title 42, The Public Health and Welfare.

Reporters for United States District Court, see section 753 of this title.

### Section Referred to in Other Sections

This section is referred to in title 18 section 3006A.

### Section Referred to in D.C. Code

This section is referred to in section 11-2604 of the District of Columbia Code.

## § 1916. Seamen's suits

In all courts of the United States, seamen may institute and prosecute suits and appeals in their own names and for their own benefit for wages or salvage or the enforcement of laws enacted for their health or safety without prepaying fees or costs or furnishing security therefor.

(June 25, 1948, ch. 646, 62 Stat. 955.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 837 (June 12, 1917, ch. 27, § 1, 40 Stat. 157; July 1, 1918, ch. 113, § 1, 40 Stat. 683).

Changes in phraseology were made.

### Rules of the Supreme Court of the United States

Printing costs and proceedings on typewritten papers, see rule 54, Appendix to this title.

## § 1917. District courts; fee on filing notice of or petition for appeal

Upon the filing of any separate or joint notice of appeal or application for appeal or upon the receipt of any order allowing, or notice of the allowance of, an appeal or of a writ of certiorari $5 shall be paid to the clerk of the district court, by the appellant or petitioner.

(June 25, 1948, ch. 646, 62 Stat. 955.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 552 (Feb. 11, 1925, ch. 204, § 5, 43 Stat. 857; Jan. 31, 1928, ch. 14, § 1, 45 Stat. 54; Sept. 27, 1944, ch. 414, § 3, 58 Stat. 744).

Words "to the clerk of the district court" were added to clarify the intent of Congress, as shown by the title of the 1944 act containing this section, and by the text of such Act in its entirety.

Words "as an additional fee in said suit or action, or proceeding in bankruptcy" were omitted. The entire text of the basic 1944 act shows that Congress intended it to apply to all actions, suits and proceedings, including bankruptcy proceedings, and nowhere else in such act is any reference made to bankruptcy proceedings.

Changes were made in phraseology.

### § 1918. District courts; fines, forfeitures and criminal proceedings

(a) Costs shall be included in any judgment, order, or decree rendered against any person for the violation of an Act of Congress in which a civil fine or forfeiture of property is provided for.

(b) Whenever any conviction for any offense not capital is obtained in a district court, the court may order that the defendant pay the costs of prosecution.

(June 25, 1948, ch. 646, 62 Stat. 955.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 822 (R.S. § 974).

Changes were made in phraseology.

#### CROSS REFERENCES

Docket fees and costs of briefs, see notes under section 1923 of this title.

Particular items taxable as costs, see section 1920 of this title and notes thereto.

Witness fees, see notes under sections 1821 and 1825 of this title.

### § 1919. District courts; dismissal for lack of jurisdiction

Whenever any action or suit is dismissed in any district court for want of jurisdiction, such court may order the payment of just costs.

(June 25, 1948, ch. 646, 62 Stat. 955.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 80 (Mar. 3, 1911, ch. 231, § 37, 36 Stat. 1098).

Words "dismissed for want of jurisdiction" were substituted for "it shall appear to the satisfaction of the said district court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court". The substituted language is sufficient. (See reviser's note under section 1359 of this title.) The provisions of section 80 of title 28, U.S.C., 1940 ed., relating to dismissal for improper or collusive joinder in removal proceedings, are incorporated in section 1359 of this title. Other provisions of section 80 of title 28, U.S.C., 1940 ed., appear in section 1447 of this title.

Changes were made in phraseology.

### § 1920. Taxation of costs

A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

(June 25, 1948, ch. 646, 62 Stat. 955.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§ 9a(a) and 830 (R.S. § 983; Mar. 3, 1911, ch. 231, § 5a, as added Jan. 20, 1944, ch. 3, § 1, 58 Stat. 5).

For distribution of other provisions of section 9a of title 28, U.S.C., 1940 ed., see table at end of reviser's notes.

Word "may" was substituted for "shall" before "tax as costs," in view of Rule 54(d) of the Federal Rules of Civil Procedure, providing for allowance of costs to the prevailing party as of course "unless the court otherwise directs".

Changes were made in phraseology.

#### CROSS REFERENCES

Authority to administer oaths, see section 2903 of Title 5, Government Organization and Employees.

Costs, denial of to plaintiff where plaintiff recovers less than $10,000, see sections 1331 and 1332 of this title.

Definition of "court of the United States," see section 451 of this title.

Exemption of United States for costs except where statute permits taxation, see section 2412 of this title.

Fees and costs in admiralty and maritime cases, see section 1925 of this title.

Marshal's fees, see section 1921 of this title.

Per diem, mileage and subsistence of witnesses, see notes under section 1821 of this title.

Reporter's transcript, fees for, see section 753 of this title.

Taxation of costs in fine, forfeiture and criminal proceedings, see section 1918 of this title.

#### FEDERAL RULES OF CIVIL PROCEDURE

Costs allowed to prevailing party, see rule 54, Appendix to this title.

Costs of previously dismissed action, see rule 41.

Motion for retaxation of costs by clerk in civil actions, see rule 54.

Offer of judgment affecting costs, see rule 68.

Taxation of costs in civil actions by clerk, see rule 54.

United States agencies, and officers, liability for fees and costs, see rule 54.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 2412 of this title.

### § 1921. United States marshal's fees

Only the following fees of United States marshals shall be collected and taxed as costs, except as otherwise provided:

For serving a writ of possession, partition, execution, attachment in rem, or libel in admiralty, warrant, attachment, summons, capias, or any other writ, order, or process in any case or proceeding, except as otherwise provided, $3;

For serving a subpena or summons for a witness or appraiser, $2;

For forwarding any writ, order, or process to another judicial district for service, in addition to the prescribed fee, $1;

For the preparation of any notice of sale, proclamation in admiralty, or other public notice or bill of sale, $3;

For seizing or levying on property (including seizures in admiralty), disposing of the same by sale, setoff, or otherwise and receiving and paying over money, commissions of 3 per centum on the first $1,000 of the amounts collected and 1½ per centum on the excess of any sum over $1,000. If not disposed of by marshal's sale, the commission shall be in such amount as may be allowed by the court. In all cases in which the vessel or other property is sold by a public auctioneer, or by some party other than the marshal or his deputy, the commission herein authorized to be paid to the marshal

**shall be reduced by the amount paid to said auctioneer or other party;**

**For the keeping of property attached (including boats, vessels, or other property attached or libeled) actual expenses incurred, such as storage, moving boat hire, or other special transportation, watchmen's or keeper' fees, insurance, and $3 per hour for each deputy marshal required for special services, such as guarding, inventorying, moving, and so forth. The marshals shall collect, in advance, a deposit to cover the initial expenses for such services and periodically thereafter such amounts as may be necessary to pay such expenses until the litigation is concluded;**

**For copies of writs or other papers furnished at the request of any party, 30 cents per folio of one hundred words or fraction thereof;**

**For all services in a criminal case except for the summoning of witnesses, a sum to be fixed by the court not exceeding $25 where conviction is for a misdemeanor and not exceeding $100 where conviction is for a felony;**

**For necessary travel in serving or endeavoring to serve any process, writ, or order, 12 cents per mile, or fraction thereof, to be computed from the place where service is returnable to the place of service or endeavor; or, where two or more services or endeavors, or where an endeavor and a service, are made in behalf of the same party in the same case on the same trip, mileage shall be computed to the place of service or endeavor which is most remote from the place where service is returnable, adding thereto any additional mileage traveled in serving or endeavoring to serve in behalf of that party. When two or more writs of any kind, required to be served in behalf of the same party, on the same person, in the same case or proceeding, may be served at the same time, mileage on only one such writ shall be collected;**

**No mileage fees shall be collected for services or endeavors to serve in the District of Columbia;**

**The marshal may require a deposit to cover all fees and expenses herein prescribed.**

**(June 25, 1948, ch. 646, 62 Stat. 955; Sept. 9, 1950, ch. 937, 64 Stat. 824; Aug. 31, 1962, Pub. L. 87-621, § 1, 76 Stat. 417.)**

### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 574 (R.S. §§ 823, 829; May 28, 1896, ch. 252, § 6, 29 Stat. 179; May 29, 1930, ch. 356, 46 Stat. 486; Aug. 3, 1935, ch. 431, § 2, 49 Stat. 513).

Provisions for serving venires and summoning grand and petit jurors were omitted as useless since marshal's fees are now covered into the Treasury and there is no basis for apportioning the cost of summoning jurors for a term of court and taxing the same to individual cases.

The marshal's fee "for holding a court of inquiry or other proceedings before a jury, including summoning a jury, $5" is omitted as obsolete in the Federal practice. See, Black's Law Dictionary "Court of Inquiry." See, also, Webster's International Dictionary.

A fee of 50 cents "for each bail bond" is omitted as covered by the general provision for taxation of marshal's fees in criminal cases.

The provisions for a fee of $5 for drawing and executing a deed and $1 for executing a deed prepared by a party or his attorney are omitted as unnecessary. It is the marshal's duty to execute conveyances of property which he sells on execution and his salary compensates him therefor. There is no occasion for him to draw such a deed and no beneficial purpose in taxing the parties a fee for his signature.

The 2 per centum fee for disbursing moneys is omitted as an unnecessary burden upon funds belonging to litigants.

The provision that a folio consists of "100 words or major fraction thereof" is inserted to conform with section 607 of title 28, U.S.C., 1940 ed., which is transferred to title 44, U.S.C., 1940 ed., Public Printing and Documents, along with section 606 of said title 28, to which said section 607 also relates.

The provision for a lump sum to be determined by the court and taxed in criminal cases was added. It fixes a maximum of $25 in misdemeanor cases and $100 in felony cases. It may be questioned whether costs as such should ever be taxed against the convicted defendant in a criminal case. The acquitted defendant is not permitted to tax costs against the United States. Indeed the allowance of costs in criminal cases is not a matter of right but rests completely within the discretion of the court. *Morris* v. *United States*, 1911, 185 Fed. 73, 107 C.C.A. 293.

In *Alberty* v. *U.S.*, C.C.A.9, 1937, 91 F.2d 461, the defendant was fined $100 on each of 11 accounts of an indictment under the 1906 Food and Drug Act (title 21, §§ 2, 10, U.S.C., 1934 ed., as amended). Costs of prosecution were taxed in the sum of $1,499.80. Yet the court in its discretion might have reached substantially the same result by imposing a fine of $200 on each count without any taxation of costs.

Changes were made in phraseology.

### AMENDMENTS

1962—Pub. L. 87-621 increased fees for serving an attachment in rem, or libel in admiralty, warrant, attachment, summons, capias, or any other writ from $2 to $3, for serving a subpoena or summons for a witness or appraiser from 50 cents to $2, for preparation of a proclamation in admiralty from 30 cents to $3, and for copies of writs or other papers furnished at the request of any party from 10 to 30 cents per folio of 100 words or fraction thereof, and mileage for necessary travel from 10 cents a mile to 12 cents per mile, or fraction thereof, inserted provisions authorizing a fee of $1, in addition to the prescribed fee, for forwarding any writ, order, or process to another judicial district for service, and $3 for preparation of any notice of sale or other public notice or bill of sale, permitting payment of travel expenses where there is an endeavor to serve any process, writ, or order, prohibiting collection of mileage fees for services or endeavors to serve in the District of Columbia, and empowering marshals to require a deposit to cover all fees and expenses, and substituted provisions authorizing a fee of $3 for serving a writ of possession, partition, execution, order or process, and commissions of 3 per centum on the first $1,000 collected and 1½ per centum on amounts over $1,000 for seizing and levying on property (including seizures in admiralty), disposing of the same and receiving and paying over the money for provisions which permitted a marshal serving such a writ or process, and seizing and levying on property, advertising and disposing of the same and receiving and paying over the money, to receive the same fees and poundage as allowed for similar services to the sheriffs of the States in which the service is rendered, and 2½ per centum on any sum under $500, and 1½ per centum on amounts over $500 for sale of vessels or other property under process in admiralty, or under the order of a court of admiralty, and provisions permitting collection of actual expenses incurred, and $3 per hour for each deputy marshal required, for the keeping of property attached, and directing the marshal to collect, in advance, a deposit to cover initial expenses and periodically thereafter such amounts as necessary to pay expenses until litigation is concluded, for provisions which allowed only such compensation as the court, on petition, might allow.

1950—Act Sept. 9, 1950, increased the mileage fees from 6 to 10 cents a mile.

### Effective Date of 1962 Amendment

Section 3 of Pub. L. 87-621 provided that: "This Act [amending this section] shall become effective ninety days after enactment [Aug. 31, 1962]."

### Cross References

Collection of fees and accounting by marshal, see section 572 of this title.

Execution of all lawful writs and process, see section 547 of this title.

Expense of transporting prisoners, see section 567 of this title.

Marshal's compensation in bankruptcy proceedings, see section 80 of Title 11, Bankruptcy.

Power of state sheriff, see section 570 of this title.

Travel and subsistence of marshal, see section 567 of this title.

### Federal Rules of Civil Procedure

Proceeds of sales under admiralty process, see rule E, Appendix to this title.

## § 1922. Witness fees before United States commissioners

The fees of more than four witnesses shall not be taxed against the United States, in the examination of any criminal case before a United States commissioner, unless their materiality and importance are first approved and certified to by the United States attorney for the district in which the examination is had.

(June 25, 1948, ch. 646, 62 Stat. 956.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 828 (R.S. § 981; May 28, 1896, ch. 252, § 19, 29 Stat. 184).

Last clause of section 828 of title 28, U.S.C., 1940 ed., providing "and such taxation shall be subject to revision, as in other cases" was omitted as unnecessary in view of the inherent power of the court to revise costs taxed.

Changes were made in phraseology.

### Change of Name

References to United States commissioners to be deemed references to United States magistrates, see Pub. L. 90-578, title IV, § 402, Oct. 17, 1968, 82 Stat. 1118, which provided that, within each district, references in previously enacted statutes and previously promulgated rules and regulations to United States commissioners are to be deemed, within such district, references to United States magistrates duly appointed under section 661 of this title as soon as the first United States magistrate assumes office within that district or on Oct. 17, 1971, whichever is earlier. See Applicable Law note under section 631 of this title.

### Cross References

Compensation of United States magistrates, see section 634 of this title.

Liability of United States for costs, see section 2412 of this title.

## § 1923. Docket fees and costs of briefs

(a) Attorney's and proctor's docket fees in courts of the United States may be taxed as costs as follows:

$20 on trial or final hearing (including a default judgment whether entered by the court or by the clerk) in civil, criminal, or admiralty cases, except that in cases of admiralty and maritime jurisdiction where the libellant recovers less than $50 the proctor's docket fee shall be $10;

$20 in admiralty appeals involving not over $1,000;

$50 in admiralty appeals involving not over $5,000;

$100 in admiralty appeals involving more than $5,000;

$5 on discontinuance of a civil action;

$5 on motion for judgment and other proceedings on recognizances;

$2.50 for each deposition admitted in evidence.

(b) The docket fees of United States attorneys shall be paid to the clerk of court and by him paid into the Treasury.

(c) In admiralty appeals the court may allow as costs for printing the briefs of the successful party not more than:

$25 where the amount involved is not over $1,000;

$50 where the amount involved is not over $5,000;

$75 where the amount involved is over $5,000.

(June 25, 1948, ch. 646, 62 Stat. 956; June 18, 1954, ch. 304, 68 Stat. 253.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., §§ 571, 572, and 578 (R.S. §§ 823, 824; May 28, 1896, ch. 252, §§ 6, 24, 29 Stat. 179, 186; Feb. 26, 1919, ch. 49, § 1, 40 Stat. 1182; July 19, 1919, ch. 24, § 1, 41 Stat. 209; Feb. 11, 1921, ch. 46, 41 Stat. 1099; June 6, 1930, ch. 409, 46 Stat. 522; Aug. 3, 1935, ch. 431, § 1, 49 Stat. 513).

Section consolidates sections 571, 572, and 578 of title 28, U.S.C., 1940 ed.

The phrase "$20 on trial or final hearing in civil, criminal, or admiralty cases" was substituted for the following provisions of section 572 of title 28, U.S.C., 1940 ed., "On trial before a jury, in civil or criminal causes or before referees, or on a final hearing in equity or admiralty, a docket fee of $20", and the limitation of $10 in "cases at law when judgment is rendered without a jury" was omitted. This simplified restatement provides for a single docket fee in each case which reaches final hearing or trial. Since the docket fee is arbitrary, any limitation or distinction between law cases tried with or without a jury is unrealistic.

Word "solicitor" was omitted as obsolete and inapplicable in civil, criminal, or admiralty practice.

Words "motion for judgment" were substituted for "scire facias" to conform to Rules 2 and 81 of the Federal Rules of Civil Procedure.

Changes were made in phraseology.

### Amendments

1954—Subsec. (a). Act June 18, 1954, inserted in the first item the parenthetical words "including a default judgment whether entered by the court or by the clerk" following the words "final hearing".

### Cross References

Taxation of costs—
- Admiralty cases, see section 1925 of this title.
- Criminal cases, see section 1918 of this title.

### Federal Rules of Civil Procedure

Application of, see rule 81, Appendix to this title.

Depositions, see rules 26 to 32.

### Federal Rules of Criminal Procedure

Depositions, see rule 15, Title 18, Appendix, Crimes and Criminal Procedure.

### Section Referred to in Other Sections

This section is referred to in section 1920 of this title.

### Section Referred to in D.C. Code

This section is referred to in section 15-702 of the District of Columbia Code.

### § 1924. Verification of bill of costs

Before any bill of costs is taxed, the party claiming any item of cost or disbursement shall attach thereto an affidavit, made by himself or by his duly authorized attorney or agent having knowledge of the facts, that such item is correct and has been necessarily incurred in the case and that the services for which fees have been charged were actually and necessarily performed.

(June 25, 1948, ch. 646, 62 Stat. 957.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 831 (R.S. § 984; June 10, 1921, ch. 18, § 304, 42 Stat. 24).

Section as revised conforms to existing Federal Practice. See note to subdivision (d) of Rule 54 of the Federal Rules of Civil Procedure. For discussion as to verification of bill of costs under existing practice, see—8 Hughes, Federal Practice, Jurisdiction and Procedure—Civil and Criminal, § 6441.

Words "or allowed by the General Accounting Office" were omitted as unnecessary. That office will not allow items in a tax bill for costs against the United States unless such bill has been taxed by the court, and the court, under this section, cannot tax as costs items in an unverified bill.

Changes were made in phraseology.

### § 1925. Admiralty and maritime cases

Except as otherwise provided by Act of Congress, the allowance and taxation of costs in admiralty and maritime cases shall be prescribed by rules promulgated by the Supreme Court.

(June 25, 1948, ch. 646, 62 Stat. 957.)

#### Historical and Revision Notes

This section was drafted to make possible the promulgation of comprehensive and uniform rules governing costs in admiralty. Various enactments of Congress, all over 100 years old, relate to particular features of such matter, but do not set forth any comprehensive and uniform procedure. See, for example, sections 818, 826, and 827 of title 28, U.S.C., 1940 ed.

#### Federal Rules of Civil Procedure

Fees and costs in admiralty proceedings, see Rules 41, 43, 54 and Rules C and E, Appendix to this title.

### § 1926. Court of Customs and Patent Appeals

Fees and costs in the Court of Customs and Patent Appeals shall be fixed by a table of fees adopted by such court and approved by the Supreme Court. The fees and costs so fixed shall not, with respect to any item, exceed the fees and costs charged in the Supreme Court, and shall be accounted for and paid over to the Treasury.

(June 25, 1948, ch. 646, 62 Stat. 957.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 304 (Mar. 3, 1911, ch. 231, § 191, 36 Stat. 1144).

For distribution of other provisions of section 304 of title 28, U.S.C., 1940 ed., see Distribution Table.

Changes were made in phraseology.

### § 1927. Counsel's liability for excessive costs

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs.

(June 25, 1948, ch. 646, 62 Stat. 957.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 829 (R.S. § 982).

Word "personally" was inserted upon authority of *Motion Picture Patents Co.* v. *Steiner et al.*, 1912, 201 F. 63, 119 C.C.A. 401. Reference to "proctor" was omitted as covered by the revised section.

See definition of "court of the United States" in section 451 of this title.

Changes were made in phraseology.

#### Federal Rules of Civil Procedure

Costs, see rules 11 and 54, Appendix to this title.

### § 1928. Patent infringement action; disclaimer not filed

Whenever a judgment is rendered for the plaintiff in any patent infringement action involving a part of a patent and it appears that the patentee, in his specifications, claimed to be, but was not, the original and first inventor or discoverer of any material or substantial part of the thing patented, no costs shall be included in such judgment, unless the proper disclaimer has been filed in the Patent Office prior to the commencement of the action.

(June 25, 1948, ch. 646, 62 Stat. 957.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 821 (R.S. § 973).

Word "action" was substituted for "any suit at law or in equity" to conform with Rule 2 of the Federal Rules of Civil Procedure.

Words "or decree" were omitted after "judgment," because a judgment under Rule 54(a) of the Federal Rules of Civil Procedure by definition includes a decree.

Changes were made in phraseology.

#### Change of Name

"Patent Office" redesignated "Patent and Trademark Office", by section 3 of Pub. L. 93-596, Jan. 2, 1975, 88 Stat. 1949, set out as a note under section 1 of Title 35, Patents.

#### Cross References

Costs where disclaimer not filed in patent infringement action, see section 288 of Title 35, Patents.

#### Federal Rules of Civil Procedure

Costs, see rule 54, Appendix to this title.

### § 1929. Extraordinary expenses not expressly authorized

Where the ministerial officers of the United States incur extraordinary expense in executing Acts of Congress, the payment of which is not specifically provided for, the Attorney General may allow the payment thereof.

(June 25, 1948, ch. 646, 62 Stat. 957.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 577 (R.S. § 846; Feb. 18, 1875, ch. 80, § 1, Stat. 318; May 28, 1896, ch. 252, § 13, 29 Stat. 183; May 27, 1908, ch. 200, § 1, 35 Stat. 375; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167; Feb. 26, 1919, ch. 49, § 7, 40 Stat. 1182; Oct. 13, 1941, ch. 431, § 1, 55 Stat. 736).

Provision for payment of expenses under section 577 of title 28, U.S.C., 1940 ed., from appropriations for expenses of the judiciary was omitted as unnecessary.

Such expenses are carried in the Judiciary Appropriation Acts and will continue without this provision.

The first sentence of said section 577 is incorporated in section 551 of this title.

The qualifying phrase "under the special taxation of the district court in which the said services have been or shall be rendered, to be paid from the appropriation for defraying the expenses of the Judiciary," was omitted, and the functions of allowing extraordinary expenses was vested in the Attorney General instead of the President. Neither the President nor the district judge should be burdened with such duty since the Attorney General only has the information upon which to act.

Changes were made in phraseology.

## CHAPTER 125—PENDING ACTIONS AND JUDGMENTS

Sec.
1961. Interest.
1962. Lien.
1963. Registration in other districts.
1964. Constructive notice of pending actions.

### Amendments

1958—Pub. L. 85-689, § 1(b), (c), Aug. 20, 1958, 72 Stat. 683, amended analysis, substituting the heading "Chapter 125—Pending Actions and Judgments" for "Chapter 125—Judgments" and adding item 1964.

### Cross References

Declaratory judgments, see sections 2201 and 2202 of this title.

### Federal Rules of Civil Procedure

Judgments, see rules 54 to 58, Appendix to this title.

## § 1961. Interest

Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at the rate allowed by State law.

(June 25, 1948, ch. 646, 62 Stat. 957.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 811 (R.S. § 966; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167).

Changes were made in phraseology.

### Cross References

Interest on—
- Affirmed judgments of Court of Claims, see section 2516 of this title.
- Judgments against United States, see section 2411 of this title.

### Federal Rules of Civil Procedure

Execution, see rule 69, Appendix to this title.

## § 1962. Lien

Every judgment rendered by a district court within a State shall be a lien on the property located in such State in the same manner, to the same extent and under the same conditions as a judgment of a court of general jurisdiction in such State, and shall cease to be a lien in the same manner and time. Whenever the law of any State requires a judgment of a State court to be registered, recorded, docketed or indexed, or any other act to be done, in a particular manner, or in a certain office or county or parish before such lien attaches, such requirements shall apply only if the law of such State authorizes the judgment of a court of the United States to be registered, recorded, docketed, indexed or otherwise conformed to rules and requirements relating to judgments of the courts of the State.

(June 25, 1948, ch. 646, 62 Stat. 958.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., §§ 812 and 814 (R.S. § 967; Aug. 1, 1888, ch. 729, § 1, 25 Stat. 357; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167; Aug. 17, 1912, ch. 300, 37 Stat. 311).

Section consolidates sections 812 and 814 of title 28, U.S.C., 1940 ed., with changes in phraseology necessary to effect consolidation and to clarify the meaning of such sections.

Omitted words "or decree" after "judgments" as unnecessary inasmuch as Rule 54(a) of the Federal Rules of Civil Procedure by definition of judgment includes a decree.

Words "in the State of Louisiana" after "or parish" were omitted as unnecessary.

A reference to section 813 of title 28, U.S.C., 1940 ed., was omitted, since such section is omitted from this revision as covered by Rule 79(c) of the Federal Rules of Civil Procedure.

### Cross References

Declaratory judgments, see sections 2201 and 2202 of this title.

### Federal Rules of Civil Procedure

Judgments, see rules 54 to 58, Appendix to this title.

## § 1963. Registration in other districts

A judgment in an action for the recovery of money or property now or hereafter entered in any district court which has become final by appeal or expiration of time for appeal may be registered in any other district by filing therein a certified copy of such judgment. A judgment so registered shall have the same effect as a judgment of the district court of the district where registered and may be enforced in like manner.

A certified copy of the satisfaction of any judgment in whole or in part may be registered in like manner in any district in which the judgment is a lien.

(June 25, 1948, ch. 646, 62 Stat. 958; Aug. 23, 1954, ch. 837, 68 Stat. 772; July 7, 1958, Pub. L. 85-508, § 12(*o*), 72 Stat. 349.)

### Historical and Revision Notes

This section follows the recommendation of the Supreme Court's Advisory Committee on Federal Rules of Civil Procedure (1937) which included the following rule:

"**Rule 77. Registration of judgments in other district courts.** A judgment entered in any district court and which has become final through expiration of the time for appeal or by mandate on appeal may be registered in any other district court by filing therein an authenticated copy of the judgment. When so registered the judgment shall have the same effect and like proceedings for its enforcement may be taken thereon in the court in which it is registered as if the judgment had been originally entered by that court. If in the court in which the judgment was originally entered, the judgment has been satisfied in whole or in part or if an order has been made modifying or vacating it or affecting or suspending its operation, the party procuring the registration shall and any other party may file authenticated copies of the satisfaction or order with the court in which the judgment is registered. This rule shall not be construed to limit the effect of the Act of February 20, 1905, c. 592, § 20 (33 Stat. 729), as amended, U.S.C., title 15, § 100; or the Act of March 4, 1909, c. 320, §§ 36 and 37 (35 Stat. 1084), U.S.C., title 17, §§ 36 and 37; or § 56 of the Judicial Code, U.S.C., title 28, § 117; or to authorize the registration elsewhere of an order or a judgment rendered in a divorce action in the District of Columbia."

Section 2508 of this title provides for the registration of judgments of the Court of Claims in favor of the United States in any district. See, also, section 2413 of this title.

The phrase "for the recovery of money or property" was not in the committee's draft of Rule 77 of Federal Rules of Civil Procedure but was inserted in the revised section to exclude judgments in divorce actions, and any other actions, the registration of which would serve no useful purpose.

### AMENDMENTS

1958—Pub. L. 85-508 eliminated provisions which extended provisions of this section to the District Court for the Territory of Alaska. See section 81A of this title which establishes a United States District Court for the State of Alaska.

1954—Act Aug. 23, 1954, extended its provisions to the District Court for Alaska.

### EFFECTIVE DATE OF 1958 AMENDMENT

Amendment by Pub. L. 85-508 effective Jan. 3, 1959, upon admission of Alaska into the Union pursuant to Proc. No. 3269, Jan. 3, 1959, 24 F.R. 81, 73 Stat. c16, as required by sections 1 and 8(c) of Pub. L. 85-508, see notes set out under section 81A of this title and preceding section 21 of Title 48, Territories and Insular Possessions.

## § 1964. Constructive notice of pending actions

Where the law of a State requires a notice of an action concerning real property pending in a court of the State to be registered, recorded, docketed, or indexed in a particular manner, or in a certain office or county or parish in order to give constructive notice of the action as it relates to the real property, and such law authorizes a notice of an action concerning real property pending in a United States district court to be registered, recorded, docketed, or indexed in the same manner, or in the same place, those requirements of the State law must be complied with in order to give constructive notice of such an action pending in a United States district court as it relates to real property in such State.

(Added Pub. L. 85-689, § 1(a), Aug. 20, 1958, 72 Stat. 683.)

### EFFECTIVE DATE

Section 2 of Pub. L. 85-689 provided that "The amendments made by this Act [adding this section] shall only be effective with respect to actions commenced in United States district courts more than one hundred and eighty days after the date of enactment of this Act [Aug. 20, 1958]."

# CHAPTER 127—EXEMPTIONS AND JUDICIAL SALES

Sec.
2001. Sale of realty generally.
2002. Notice of sale of realty.
2003. Marshal's incapacity after levy on or sale of realty.
2004. Sale of personalty generally.
2005. Appraisal of goods taken on execution.
2006. Execution against revenue officer.
2007. Imprisonment for debt.

## § 2001. Sale of realty generally

(a) Any realty or interest therein sold under any order or decree of any court of the United States shall be sold as a whole or in separate parcels at public sale at the courthouse of the county, parish, or city in which the greater part of the property is located, or upon the premises or some parcel thereof located therein, as the court directs. Such sale shall be upon such terms and conditions as the court directs.

Property in the possession of a receiver or receivers appointed by one or more district courts shall be sold at public sale in the district wherein any such receiver was first appointed, at the courthouse of the county, parish, or city situated therein in which the greater part of the property in such district is located, or on the premises or some parcel thereof located in such county, parish, or city, as such court directs, unless the court orders the sale of the property or one or more parcels thereof in one or more ancillary districts.

(b) After a hearing, of which notice to all interested parties shall be given by publication or otherwise as the court directs, the court may order the sale of such realty or interest or any part thereof at private sale for cash or other consideration and upon such terms and conditions as the court approves, if it finds that the best interests of the estate will be conserved thereby. Before confirmation of any private sale, the court shall appoint three disinterested persons to appraise such property or different groups of three appraisers each to appraise properties of different classes or situated in different localities. No private sale shall be confirmed at a price less than two-thirds of the appraised value. Before confirmation of any private sale, the terms thereof shall be published in such newspaper or newspapers of general circulation as the court directs at least ten days before confirmation. The private sale shall not be confirmed if a bona fide offer is made, under conditions prescribed by the court, which guarantees at least a 10 per centum increase over the price offered in the private sale.

(c) This section shall not apply to sales and proceedings under Title 11 or by receivers or conservators of banks appointed by the Comptroller of the Currency.

(June 25, 1948, ch. 646, 62 Stat. 958; May 24, 1949, ch. 139, § 99, 63 Stat. 104.)

### HISTORICAL AND REVISION NOTES

### 1948 ACT

Based on title 28, U.S.C., 1940 ed., § 847 (Mar. 3, 1893, ch. 225, § 1, 27 Stat. 751; June 19, 1934, ch. 662, 48 Stat. 1119; Apr. 24, 1935, ch. 77, § 1, 49 Stat. 159; June 19, 1935, ch. 276, 49 Stat. 390).

A provision making the section applicable to pending proceedings was deleted as obsolete.

The term "court of the United States" is defined in section 451 of this title.

Changes were made in phraseology.

### 1949 ACT

This section corrects a typographical error in subsection (a) of section 2001 of title 28, U.S.C.

AMENDMENTS

1949—Subsec. (a). Act May 24, 1949, corrected spelling of "ancillary" in second par.

CROSS REFERENCES

Appraisal and sale of assets in bankruptcy proceedings, see section 110 of Title 11, Bankruptcy.

FEDERAL RULES OF CIVIL PROCEDURE

Execution, see rule 69, Appendix to this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 2004 of this title.

### § 2002. Notice of sale of realty

A public sale of realty or interest therein under any order, judgment or decree of any court of the United States shall not be made without notice published once a week for at least four weeks prior to the sale in at least one newspaper regularly issued and of general circulation in the county, state, or judicial district of the United States wherein the realty is situated.

If such realty is situated in more than one county, state, district or circuit such notice shall be published in one or more of the counties, states, or districts wherein it is situated, as the court directs. The notice shall be substantially in such form and contain such description of the property by reference or otherwise as the court approves. The court may direct that the publication be made in other newspapers.

This section shall not apply to sales and proceedings under Title 11 or by receivers or conservators of banks appointed by the Comptroller of the Currency.

(June 25, 1948, ch. 646, 62 Stat. 959; May 24, 1949, ch. 139, § 100, 63 Stat. 104.)

HISTORICAL AND REVISION NOTES

1948 ACT

Based on title 28, U.S.C., 1940 ed., § 849 (Mar. 3, 1893, ch. 225, § 3, 27 Stat. 751; Apr. 24, 1935, ch. 77, § 3, 49 Stat. 160; June 19, 1935, ch. 276, 49 Stat. 390).

A provision making the section applicable to pending proceedings was deleted as obsolete.

Word "under" was substituted for "ordered pursuant to section 847 of this title by" after "A public sale of realty or interest therein".

Sections 847 and 848, of title 28, U.S.C., 1940 ed., now sections 2001 and 2004 of this title, relate only to sales under orders or decrees, without any reference to sales under judgments. In 1921 the Supreme Court held, in *Yazoo & M. V. R. Co.* v. *City of Clarksdale*, 1921, 42 S.Ct. 27, 257 U.S. 10, 66 L.Ed. 104, that such section 847 did not apply to sales under common law executions. At that time such section 849 of title 28, U.S.C., 1940 ed., read as it has been revised above, without any reference to such section 847. However, in 1935, such sections 847, 848 and 849 were amended by one act, ch. 77, 49 Stat. 159, and, in such section 849, the words "pursuant to the provisions of this Act" were inserted, but the word "judgment," though retained in such section 849, was not inserted in such sections 847 and 848. It is probable that Congress did not intend, in 1935 to make such sections 847 and 848 applicable to sales under judgments in law actions. Hence, to make all three sections consistent, the above-mentioned substitution was made.

Reference to circuit was deleted from first and second paragraphs as unnecessary and inappropriate. Publication in a newspaper in a large circuit remote from the county in which the realty is situate, might be wholly insufficient to give notice to interested parties.

Changes were made in phraseology.

1949 ACT

This section corrects a typographical error in section 2002 of title 28, U.S.C.

AMENDMENTS

1949—Act May 24, 1949, substituted "11" for "II" following "Title" in the third par.

FEDERAL RULES OF CIVIL PROCEDURE

Execution, see rule 69, Appendix to this title.

SECTION REFERRED TO IN D.C. CODE

This section is referred to in section 15-314 of the District of Columbia Code.

### § 2003. Marshal's incapacity after levy on or sale of realty

Whenever a United States marshal dies, is removed from office, or the term of his commission expires, after levying on realty or any interest therein under a writ of execution issued by a court of the United States, and before sale or other final disposition thereof, like process shall issue to the succeeding marshal and the same proceedings shall be had as if such contingency had not occurred.

Whenever any such contingency arises after a marshal has sold any realty or interest therein and before a deed is executed, the court may, on application by the purchaser, or the plaintiff in whose action the sale was made, setting forth the facts of the case and the reason why the title was not perfected by such marshal, order the succeeding marshal to perfect the title and execute a deed to the purchaser, upon payment of the purchase money and unpaid costs.

(June 25, 1948, ch. 646, 62 Stat. 959; May 24, 1949, ch. 139, § 101, 63 Stat. 104.)

HISTORICAL AND REVISION NOTES

1948 ACT

Based on title 28, U.S.C., 1940 ed., § 850 (R.S. § 994).

Word "realty" was substituted for "lands, tenements, or hereditaments" in two places, the two terms being synonymous. (See Black's Law Dictionary, 3d Ed., p. 1969.)

Word "action" was substituted for "suit", in view of Rule 2 of the Federal Rules of Civil Procedure, prescribing but one form of action.

Changes were made in phraseology.

1949 ACT

This section corrects a typographical error in section 2003 of title 28, U.S.C.

AMENDMENTS

1949—Act May 24, 1949, corrected the spelling of "realty" in the first par.

FEDERAL RULES OF CIVIL PROCEDURE

Execution, see rule 69, Appendix to this title.

### § 2004. Sale of personalty generally

Any personalty sold under any order or decree of any court of the United States shall be sold in accordance with section 2001 of this title, unless the court orders otherwise.

This section shall not apply to sales and proceedings under Title 11 or by receivers or conservators of banks appointed by the Comptroller of the Currency.

(June 25, 1948, ch. 646, 62 Stat. 959.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 848 (Mar. 3, 1893, ch. 225, § 2, 27 Stat. 751; Apr. 24, 1935, ch. 77, § 2, 49 Stat. 160; June 19, 1935, ch. 276, 49 Stat. 390).

A provision making the section applicable to pending proceedings was deleted as obsolete.

Changes were made in phraseology.

#### Federal Rules of Civil Procedure

Execution, see rule 69, Appendix to this title.

### § 2005. Appraisal of goods taken on execution

Whenever State law requires that goods taken on execution be appraised before sale, goods taken under execution issued from a court of the United States shall be appraised in like manner.

The United States marshal shall summon the appraisers in the same manner as the sheriff is required to summon appraisers under State law.

If the appraisers fail to attend and perform their required duties, the marshal may sell the goods without an appraisal. Appraisers attending and performing their duties, shall receive the fees allowed for appraisals under State law.

(June 25, 1948, ch. 646, 62 Stat. 959.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 846 (R.S. § 993).

Words "shall be appraised in like manner" were substituted for "the appraisers appointed under the authority of the State may appraise goods taken in execution on a fieri facias issued out of any court of the United States". The change precludes construction that the State appraisers only are available to appraise such goods in civil actions in the federal courts.

Changes were made in phraseology.

#### Federal Rules of Civil Procedure

Execution, see rule 69, Appendix to this title.

### § 2006. Execution against revenue officer

Execution shall not issue against a collector or other revenue officer on a final judgment in any proceeding against him for any of his acts, or for the recovery of any money exacted by or paid to him and subsequently paid into the Treasury, in performing his official duties, if the court certifies that:

(1) probable cause existed; or

(2) the officer acted under the directions of the Secretary of the Treasury or other proper Government officer.

When such certificate has been issued, the amount of the judgment shall be paid out of the proper appropriation by the Treasury.

(June 25, 1948, ch. 646, 62 Stat. 960).

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 842 (R.S. § 989).

Changes were made in phraseology.

#### Cross References

Executions in favor of United States, see section 2413 of this title.

#### Federal Rules of Civil Procedure

Execution, against certain public officers, see rule 69, Appendix to this title.

Judgment, see rule 54.

#### Section Referred to in Other Sections

This section is referred to in title 26 section 7422.

### § 2007. Imprisonment for debt

(a) A person shall not be imprisoned for debt on a writ of execution or other process issued from a court of the United States in any State wherein imprisonment for debt has been abolished. All modifications, conditions, and restrictions upon such imprisonment provided by State law shall apply to any writ of execution or process issued from a court of the United States in accordance with the procedure applicable in such State.

(b) Any person arrested or imprisoned in any State on a writ of execution or other process issued from any court of the United States in a civil action shall have the same jail privileges and be governed by the same regulations as persons confined in like cases on process issued from the courts of such State. The same requirements governing discharge as are applicable in such State shall apply. Any proceedings for discharge shall be conducted before a United States commissioner for the judicial district wherein the defendant is held.

(June 25, 1948, ch. 646, 62 Stat. 960.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., §§ 843, 844, and 845 (R.S. §§ 990, 991, 992; May 28, 1896, ch. 252, § 19, 29 Stat. 184; Mar. 2, 1901, ch. 814, 31 Stat. 956; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167).

Changes were made in phraseology.

#### Change of Name

Reference to United States commissioner deemed to be reference to United States magistrate, pursuant to Pub. L. 90-578, title IV, § 402(b)(2), Oct. 17, 1968, 82 Stat. 1118. See chapter 43 (§ 631 et seq.) of this title.

#### Cross References

Discharge of indigent prisoner, see section 3569 of Title 18, Crimes and Criminal Procedure.

#### Federal Rules of Civil Procedure

Execution and seizure of person or property, see rules 64 and 69, Appendix to this title.

## CHAPTER 129—MONEYS PAID INTO COURT

Sec.
2041. Deposit.
2042. Withdrawal.

### § 2041. Deposit

All moneys paid into any court of the United States, or received by the officers thereof, in any case pending or adjudicated in such court, shall be forthwith deposited with the Treasurer of the United States or a designated depositary, in the name and to the credit of such court.

This section shall not prevent the delivery of any such money to the rightful owners upon security, according to agreement of parties, under the direction of the court.

(June 25, 1948, ch. 646, 62 Stat. 960.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 851 (R.S. § 995; May 29, 1920, ch. 214, § 1, 41 Stat. 654).

Changes were made in phraseology.

#### Cross References

Bribe moneys, deposit in registry of court, see section 3612 of Title 18, Crimes and Criminal Procedure.

Condemnation proceedings, deposit in registry of court, see section 258a of Title 40, Public Buildings, Property, and Works.

Court officers depositing registry moneys, see section 646 of Title 18, Crimes and Criminal Procedure.

Depositaries of public moneys and financial agents of Government, see section 90 of Title 12, Banks and Banking.

Limitation of liability, deposit of value of interest in court, see section 185 of Title 46, Shipping.

Powers upon designation and assignment, exception as to permanent designation of depository of funds, see section 296 of this title.

#### Federal Rules of Civil Procedure

Bringing funds into court, see rule C, Appendix to this title.

Claims against proceeds in registry, see rule E.

Deposit in court, see rule 67.

Funds in court registry, see rule E.

### § 2042. Withdrawal

No money deposited shall be withdrawn except by order of court.

In every case in which the right to withdraw money deposited in court has been adjudicated or is not in dispute and such money has remained so deposited for at least five years unclaimed by the person entitled thereto, such court shall cause such money to be deposited in the Treasury in the name and to the credit of the United States. Any claimant entitled to any such money may, on petition to the court and upon notice to the United States attorney and full proof of the right thereto, obtain an order directing payment to him.

(June 25, 1948, ch. 646, 62 Stat. 960.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 852 (R.S. § 996; Feb. 19, 1897, ch. 265, § 3, 29 Stat. 578; Mar. 3, 1911, ch. 224, 36 Stat. 1083).

Words "and the money deposited as aforesaid shall constitute and be a permanent appropriation for payments in obedience to such orders" were omitted, in view of section 725p(b)(14), of title 31, U.S.C., 1940 ed., which repealed permanent appropriations of unclaimed money accounts and substituted authorization for annual appropriations effective July 1, 1935.

Changes were made in phraseology.

In U. S. Law Week, Nov. 7, 1939, Rep. Walter Chandler (Author of Chandler Act, Bankruptcy) observed as to the Judicial Code:

"Among the major subjects needing study and revision are—Numerous procedural changes which have been brought about through adoption of the Federal Rules of Civil Procedure should be codified." * * *

#### Cross References

Unclaimed moneys, see section 106 of Title 11, Bankruptcy.

#### Federal Rules of Civil Procedure

Deposit in court, see rule 67, Appendix to this title.

#### Section Referred to in Other Sections

This section is referred to in title 11 section 106; title 18 section 3612.

## CHAPTER 131—RULES OF COURTS

Sec.
2071. Rule-making power generally.
2072. Rules of civil procedure.
[2073, 2074. Repealed.]
2075. Bankruptcy rules.
2076. Rules of evidence.

#### Amendments

1975—Pub. L. 93-595, § 2(a)(2), Jan. 2, 1975, 88 Stat. 1949, added item 2076.

1966—Pub. L. 89-773, § 3, Nov. 6, 1966, 80 Stat. 1323, eliminated words "for district courts" from item 2072, and eliminated items 2073 and 2074.

1964—Pub. L. 88-623, § 2, Oct. 3, 1964, 78 Stat. 1001, added item 2075.

1954—Act July 27, 1954, ch. 583, § 2, 68 Stat. 567, amended analysis by adding item 2074.

#### Federal Rules of Criminal Procedure

Criminal procedure rules are set out in Title 18, Appendix, Crimes and Criminal Procedure.

### § 2071. Rule-making power generally

The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court.

(June 25, 1948, ch. 646, 62 Stat. 961; May 24, 1949, ch. 139, § 102, 63 Stat. 104.)

#### Historical and Revision Notes

#### 1948 Act

Based on title 28, U.S.C., 1940 ed., §§ 219, 263, 296, 307, 723, 731, and 761, and section 1111 of title 26, U.S.C., 1940 ed., Internal Revenue Code (R.S. §§ 913, 918; Mar. 3, 1887, ch. 359, § 4, 24 Stat. 506; Mar. 3, 1911, ch. 231, §§ 122, 157, 194, 291, 297, 36 Stat. 1132, 1139, 1145, 1167, 1168; Mar. 3, 1911, ch. 231, § 187(a), as added Oct. 10, 1940, ch. 843, § 1, 54 Stat. 1101; Feb. 13, 1925, ch. 229, § 13, 43 Stat. 941; Mar. 2, 1929, ch. 488, § 1, 45 Stat. 1475; Feb. 10, 1939, ch. 2, § 1111, 53 Stat. 160; Oct. 21, 1942, ch. 619, title V, § 504(a), (c), 56 Stat. 957).

Sections 219, 263, 296, 307, 723, and 731 of title 28, U.S.C., 1940 ed., gave specified courts, other than the Supreme Court, power to make rules. Section 761 of such title related to rules established in the district courts and Court of Claims. Section 1111 of title 26, U.S.C., 1940 ed., related to Tax Court. This section consolidates all such provisions. For other provisions of such sections, see Distribution Table.

Recognition by Congress of the broad rule-making power of the courts will make it possible for the courts to prescribe complete and uniform modes of procedure, and alleviate, at least in part, the necessity of searching in two places, namely in the Acts of Congress and in the rules of the courts, for procedural requisites.

Former Attorney General Cummings recently said: "Legislative bodies have neither the time to inquire objectively into the details of judicial procedure nor the opportunity to determine the necessity for amendment or change. Frequently such legislation has been enacted for the purpose of meeting particular problems or supposed difficulties, but the results have usually been confusing or otherwise unsatisfactory. Comprehensive action has been lacking for the obvious reason that the professional nature of the task would leave the legislature little time for matters of substance and statesmanship. It often happened that an admitted need for change, even in limited areas, could not be secured."—The New Criminal Rules—Another Triumph of the Democratic Process. American Bar Association Journal, May 1945.

Provisions of sections 263 and 296 of title 28, U.S.C., 1940 ed., authorizing the Court of Claims and Customs Court to punish for contempt, were omitted as covered by H. R. 1600, § 401, 80th Congress, for revision of the Criminal Code.

Provisions of section 1111 of title 26, U.S.C., 1940 ed., making applicable to Tax Court Proceedings "the rules of evidence applicable in the courts of the District of Columbia in the type of proceeding which, prior to Sept. 16, 1938, were within the jurisdiction of the courts of equity of said District," were omitted as unnecessary and inconsistent with other provisions of law relating to the Federal courts. The rules of evidence in Tax Court proceedings are the same as those which apply to civil procedure in other courts. See *Dempster Mill. Mfg. Co.* v. *Burnet*, 1931, 46 F.2d 604, 60 App.D.C. 23.

For rule-making power of the Supreme Court in copyright infringement actions, see section 25(e) of title 17, U.S.C., 1940 ed., Copyrights. See, also, section 205(a) of title 11, U.S.C., 1940 ed., Bankruptcy, authorizing the Supreme Court to promulgate rules relating to service of process in railroad reorganization proceedings.

### Senate Revision Amendment

By Senate amendment, all provisions relating to the Tax Court were eliminated. Therefore, section 1111 of Title 26, U.S.C., Internal Revenue Code, was not one of the sources of this section as finally enacted. However, no change in the text of this section was necessary. See 80th Congress Senate Report No. 1559.

### 1949 Act

This amendment clarifies section 2071 of title 28, U.S.C., by giving express recognition to the power of the Supreme Court to prescribe its own rules and by giving a better description of its procedural rules.

### Amendments

1949—Act May 24, 1949, expressed recognition to the Supreme Court's power to prescribe its own rules and give a better description of its procedural rules.

### Approval and Effective Date of Rules Governing Section 2254 Cases and Section 2255 Proceedings For United States District Courts

Pub. L. 94-426, § 1, Sept. 28, 1976, 90 Stat. 1334, provided: "That the rules governing section 2254 cases in the United States district courts and the rules governing section 2255 proceedings for the United States district courts, as proposed by the United States Supreme Court, which were delayed by the Act entitled 'An Act to delay the effective date of certain proposed amendments to the Federal Rules of Criminal Procedure and certain other rules promulgated by the United States Supreme Court' (Public Law 94-349), are approved with the amendments set forth in section 2 of this Act and shall take effect as so amended, with respect to petitions under section 2254 and motions under section 2255 of title 28 of the United States Code filed on or after February 1, 1977."

### Postponement of Effective Date of Proposed Rules and Forms Governing Proceedings Under Sections 2254 and 2255 of this Title

Pub. L. 94-349, § 2, July 8, 1976, 90 Stat. 822, provided: "That, notwithstanding the provisions of section 2072 of title 28 of the United States Code, the rules and forms governing section 2254 [section 2254 of this title] cases in the United States district courts and the rules and forms governing section 2255 [section 2255 of this title] proceedings in the United States district courts which are embraced by the order entered by the United States Supreme Court on April 26, 1976, and which were transmitted to the Congress on or about April 26, 1976, shall not take effect until thirty days after the adjournment sine die of the 94th Congress, or until and to the extent approved by Act of Congress, whichever is earlier."

### Approval and Effective Date of Amendments Proposed November 20, 1972 and December 18, 1972

Pub. L. 93-595, § 3, Jan. 2, 1975, 88 Stat. 1959, provided that: "The Congress expressly approves the amendments to the Federal Rules of Civil Procedure [Rules 30(c), 32(c), 43, and 44.1] and the amendments to the Federal Rules of Criminal Procedure [Rules 26, 26.1, and 28], which are embraced by the orders entered by the Supreme Court of the United States on November 20, 1972, and December 18, 1972, and such amendments shall take effect on the one hundred and eightieth day beginning after the date of the enactment of this Act [Jan. 2, 1975]."

### Congressional Approval Requirement for Proposed Rules of Evidence for United States Courts and Amendments to Federal Rules of Civic Procedure and Criminal Procedure; Suspension of Effectiveness of Such Rules

Pub. L. 93-12, Mar. 30, 1973, 87 Stat. 9, provided: "That notwithstanding any other provisions of law, the Rules of Evidence for United States Courts and Magistrates, the Amendments to the Federal Rules of Civil Procedure, and the Amendments to the Federal Rules of Criminal Procedure, which are embraced by the orders entered by the Supreme Court of the United States on Monday, November 20, 1972, and Monday, December 18, 1972, shall have no force or effect except to the extent, and with such amendments, as they may be expressly approved by the Act of Congress."

### Admiralty Rules

The Rules of Practice in Admiralty and Maritime Cases, promulgated by the Supreme Court on Dec. 20, 1920, effective Mar. 7, 1921, as revised, amended, and supplemented, were rescinded, effective July 1, 1966, in accordance with the general unification of civil and admiralty procedure which became effective July 1, 1966. Provision for certain distinctly maritime remedies were preserved however in the Supplemental Rules for Certain Admiralty and Maritime Claims, rules A to F, Federal Rules of Civil Procedure, Appendix to this title.

### Cross References

Court of Appeals—
  Designation and assignment of District Court judge to sit on, see section 292 of this title.
  Designation of places for terms or sessions of, see section 48 of this title.
  Participation by members of bar at judicial conference of circuit, see section 333 of this title.
Court of Claims—
  Compelling compliance with subpoenas for appearance before commissioners, see section 2503 of this title.
  Findings and report of facts by commissioners, see section 2503 of this title.
  Terms of court, see section 174 of this title.
Court of Customs and Patent Appeals, sessions, see section 214 of this title.
Customs Court—
  Assignment or reassignment of cases, see section 253 of this title.
  Notice of time and place of hearing before judge or division, see section 2632 of this title.
District Court—
  Advance payment of fees, see section 1914 of this title.
  Division of business, see section 137 of this title.
  Exercise of judicial powers, see section 132 of this title.
  Regular terms, see section 138 of this title.
  Special terms, see section 141 of this title.
Tax Court rules, see section 7453 of Title 26, Internal Revenue Code.
Virgin Islands district court, rules of practice, see section 1405z of Title 48, Territories and Insular Possessions.

### Federal Rules of Civil Procedure

Rules by district courts, authority to make, see rule 83, Appendix to this title.

### Federal Rules of Criminal Procedure

Court of Appeals, rules, see rule 57, Title 18, Appendix, Crimes and Criminal Procedure.

District court rules, see rule 57.

## § 2072. Rules of civil procedure

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

(June 25, 1948, ch. 646, 62 Stat. 961; May 24, 1949, ch. 139, § 103, 63 Stat. 104; July 18, 1949, ch. 343, § 2, 63 Stat. 446; May 10, 1950, ch. 174, § 2, 64 Stat. 158; July 7, 1958, Pub. L. 85-508, § 12(m), 72 Stat. 348; Nov. 6, 1966, Pub. L. 89-773, § 1, 80 Stat. 1323.)

### Historical and Revision Notes

#### 1948 Act

Based on title 28, U.S.C., 1940 ed., §§ 637, 723b, 723c, 730, and 761 (R.S. §§ 862, 917; Mar. 3, 1887, ch. 359, § 4, 24 Stat. 506; Mar. 3, 1911, ch. 231, §§ 291, 297, 36 Stat. 1167, 1168; Feb. 13, 1925, ch. 229, § 13, 43 Stat. 941; June 19, 1934, ch. 651, §§ 1, 2, 48 Stat. 1064).

Section consolidates sections 723b and 723c of title 28, U.S.C., 1940 ed., with parts of sections 637, 730, and 761 of such title.

Provisions of sections 637 and 730 of title 28, U.S.C., 1940 ed., relating to admiralty rules are incorporated in section 2073 of this title.

The provision of section 723c of title 28, U.S.C., 1940 ed., for the uniting of rules for suits in equity and actions at law so as to secure one form of civil action, was omitted as executed.

Provisions of section 761 of title 28, U.S.C., 1940 ed., relating to rules governing suits in the Court of Claims appear in section 2071 of this title.

Words "and for the courts of the District of Columbia" were omitted. The phrase "district courts" includes the District Court for the District of Columbia. The Municipal Court for the District of Columbia has been directed to make its rules by Act April 1, 1942, ch. 207, § 5(b), 56 Stat. 192 (D.C. Code Supp. 1943, § 11-756(b)).

Changes were made in phraseology.

The term "district courts of the United States", includes the district courts for Hawaii and Puerto Rico. See section 451 of this title.

Sections 646 and 873a of title 48, U.S.C., 1940 ed., make the Federal Rules of Civil Procedure applicable to Hawaii and Puerto Rico, respectively. Such sections are recommended for repeal as covered by the revised section.

### Senate Revision Amendment

For Senate amendment to this section, see 80th Congress Senate Report No. 1559, amendment No. 40.

#### 1949 Act

This amendment to section 2072 of title 28, U.S.C., and the similar amendment of section 2073 of such title by another section of this bill, will require the Chief Justice to report to Congress proposed rules and amendments of rules instead of channeling reports through the Attorney General who now reports them to Congress. The present provision that the Attorney General should act as a transmitting agent between the Supreme Court and the Congress is inconsistent with the plan of title 28, U.S.C., under which the Attorney General no longer acts as the administrative officer of the Federal courts. The provision was continued in section 2072 of title 28 inadvertently. Similar amendments are proposed for section 2073 of title 28, and section 3771 of title 18, U.S.C., by other sections of this bill.

### Amendments

1966—Pub. L. 89-773 eliminated words "for district courts" from the catchline, inserted provisions in the text empowering the Supreme Court to prescribe by general rules the practice and procedure of courts of appeals in civil actions, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers, and expanded the term "civil actions" to include admiralty and maritime cases, and appeals therein.

1958—Pub. L. 85-508 eliminated provisions which related to the District Court for the Territory of Alaska. See section 81A of this title which establishes a United States District Court for the State of Alaska.

1950—Act May 10, 1950, allowed proposed rule changes to be submitted to Congress not later than May 1 of each year and to become effective 90 days from the date of their being reported from the Supreme Court.

1949—Act July 18, 1949, made it applicable to District Court for Alaska.

Act May 24, 1949, substituted "Chief Justice" for "Attorney General" in third par.

### Effective Date of 1958 Amendment

Amendment by Pub. L. 85-508 effective Jan. 3, 1959, upon admission of Alaska into the Union pursuant to Proc. No. 3269, Jan. 3, 1959, 24 F.R. 81, 73 Stat. c16, as required by sections 1 and 8(c) of Pub. L. 85-508, see notes set out under section 81A of this title and preceding section 21 of Title 48, Territories and Insular Possessions.

### Approval and Effective Date of Rules Governing Section 2254 Cases and Section 2255 Proceedings for United States District Courts

Rules and forms governing proceedings under sections 2254 and 2255 of this title proposed by Supreme Court order and which were delayed by section 2 of Pub. L. 94-349, were approved and took effect with respect to petitions under section 2254 and motions under section 2255 of this title filed on or after Feb. 1, 1977, see section 1 of Pub. L. 94-426, set out as a note under section 2071 of this title.

### POSTPONEMENT OF EFFECTIVE DATE OF PROPOSED RULES AND FORMS GOVERNING PROCEEDINGS UNDER SECTIONS 2254 AND 2255 OF THIS TITLE

Rules and forms governing proceedings under sections 2254 and 2255 of this title proposed by Supreme Court order of Apr. 26, 1976 effective 30 days after adjournment sine die of 94th Congress, or until and to the extent approved by Act of Congress, whichever is earlier, see section 2 of Pub. L. 94-349, set out as a note under section 2071 of this title.

### APPLICABILITY TO VIRGIN ISLANDS

Rules of civil procedure promulgated under this section as applicable to the District Court of the Virgin Islands, see section 1615 of Title 48, Territories and Insular Possessions.

### ADMIRALTY RULES

The Rules of Practice in Admiralty and Maritime Cases, promulgated by the Supreme Court on Dec. 20, 1920, effective Mar. 7, 1921, as revised, amended, and supplemented, were rescinded, effective July 1, 1966, in accordance with the general unification of civil and admiralty procedure which became effective July 1, 1966. Provision for certain distinctly maritime remedies were preserved however, in the Supplemental Rules for Certain Admiralty and Maritime Claims, Rules A to F, Federal Rules of Civil Procedure, Appendix to this title.

### FEDERAL RULES OF CIVIL PROCEDURE

Application of rules of procedure, see rules 1, 2, 35, 38, 81, Appendix to this title.

Evidence, see rule 43.

One form of action, see rules 1 and 2.

### FEDERAL RULES OF CRIMINAL PROCEDURE

Criminal procedure rules, power of Supreme Court to prescribe, see sections 3771 and 3772, Title 18, Appendix, Crimes and Criminal Procedure.

### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 2112 of this title; title 26 section 7482; title 29 section 160; title 48 sections 1424, 1615.

**[§§ 2073, 2074. Repealed. Pub. L. 89-773, § 2, Nov. 6, 1966, 80 Stat. 1323]**

Section 2073, acts June 25, 1948, ch. 646, 62 Stat. 961; May 24, 1949, ch. 139, § 104, 63 Stat. 104; May 10, 1950, ch. 174, § 3, 64 Stat. 158, empowered the Supreme Court to prescribe, by general rules, the practice and procedure in admiralty and maritime cases in the district courts. See now section 2072 of this title.

Section 2074, act July 27, 1954, ch. 583, § 1, 68 Stat. 567, empowered the Supreme Court to prescribe rules for review of decisions of the Tax Court of the United States. See now section 2072 of this title.

### SAVINGS PROVISIONS

Section 2 of Pub. L. 89-773 provided in part that the repeal of sections 2073 and 2074 of this title shall not operate to invalidate or repeal rules adopted under the authority of one of those sections prior to the enactment of Pub. L. 89-773, which rules shall remain in effect until superseded by rules prescribed under the authority of section 2072 of this title as amended by Pub. L. 89-773.

## § 2075. Bankruptcy rules

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure under the Bankruptcy Act.

Such rules shall not abridge, enlarge, or modify any substantive right.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(Added Pub. L. 88-623, § 1, Oct. 3, 1964, 78 Stat. 1001.)

### REFERENCES IN TEXT

The Bankruptcy Act, referred to in text, is act July 1, 1898, ch. 541, 30 Stat. 544, as amended, which is classified generally to Title 11, Bankruptcy. For complete classification of this Act to the Code, see Tables volume.

## § 2076. Rules of evidence

The Supreme Court of the United States shall have the power to prescribe amendments to the Federal Rules of Evidence. Such amendments shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session of Congress but not later than the first day of May, and until the expiration of one hundred and eighty days after they have been so reported; but if either House of Congress within that time shall by resolution disapprove any amendment so reported it shall not take effect. The effective date of any amendment so reported may be deferred by either House of Congress to a later date or until approved by Act of Congress. Any rule whether proposed or in force may be amended by Act of Congress. Any provision of law in force at the expiration of such time and in conflict with any such amendment not disapproved shall be of no further force or effect after such amendment has taken effect. Any such amendment creating, abolishing, or modifying a privilege shall have no force or effect unless it shall be approved by act of Congress.

(Added Pub. L. 93-595, § 2(a)(1), Jan. 2, 1975, 88 Stat. 1948, and amended Pub. L. 94-149, § 2, Dec. 12, 1975, 89 Stat. 806.)

### AMENDMENTS

1975—Pub. L. 94-149 inserted a period at end of the section.

# CHAPTER 133—REVIEW—MISCELLANEOUS PROVISIONS

Sec.

2101. Supreme Court; time for appeal or certiorari; docketing; stay.
2102. Priority of criminal case on appeal from State court.
2103. Appeal from State court or from a United States court of appeals improvidently taken regarded as petition for writ of certiorari.
2104. Appeals from State courts.
2105. Scope of review; abatement.
2106. Determination.
2107. Time for appeal to court of appeals.
2108. Proof of amount in controversy.
2109. Quorum of Supreme Court justices absent.
2110. Time for appeal to Court of Claims in tort claims cases.
2111. Harmless error.
2112. Record on review and enforcement of agency orders.
2113. Definition.

### HISTORICAL AND REVISION NOTES

### 1949 ACT

This section inserts in the chapter analysis of chapter 133 of title 28, U.S.C., a new item "2111," in view of the insertion in such title, by another section of this bill, of a new section 2111.

### AMENDMENTS

1970—Pub. L. 91-358, title I, § 172(a)(2)(B), July 29, 1970, 84 Stat. 590, added item 2113.

1962—Pub. L. 87-669, § 2, Sept. 19, 1962, 76 Stat. 556, substituted "or from a United States court of appeals improvidently taken regarded as petition for" for "improvidently taken regarded as" in item 2103.

1958—Pub. L. 85-791, § 1, Aug. 28, 1958, 72 Stat. 941, added item 2112.

1949—Act May 24, 1949, ch. 139, § 105, 63 Stat. 104, added item 2111.

### FEDERAL RULES OF APPELLATE PROCEDURE

See Appendix to this title.

### FEDERAL RULES OF CRIMINAL PROCEDURE

Appeals, how taken, see rules 37 to 39, Title 18, Appendix, Crimes and Criminal Procedure.

## § 2101. Supreme Court; time for appeal or certiorari; docketing; stay

(a) A direct appeal to the Supreme Court from any decision under sections 1252, 1253 and 2282 of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

(d) The time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court.

(e) An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.

(f) In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay.

(June 25, 1948, ch. 646, 62 Stat. 961; May 24, 1949, ch. 139, § 106, 63 Stat. 104.)

### HISTORICAL AND REVISION NOTES

### 1948 ACT

Based on title 28, U.S.C., 1940 ed., §§ 47, 47a, 349a, 350, 380, 380a, section 29 of title 15, U.S.C., 1940 ed., Commerce and Trade, and section 45 of title 49, U.S.C., 1940 ed., Transportation (Feb. 11, 1903, ch. 544, § 2, 32 Stat. 1167; Mar. 3, 1911, ch. 231, §§ 210, 266, 291, 36 Stat. 1150, 1162, 1167; Mar. 4, 1913, ch. 160, 37 Stat. 1013; Oct. 22, 1913, ch. 32, 38 Stat. 220; Sept. 6, 1916, ch. 448, § 6, 39 Stat. 727; Feb. 13, 1925, ch. 229, §§ 1, 8 (a, b, d), 43 Stat. 938, 940; Jan. 31, 1928, ch. 14, § 1, 45 Stat. 54; June 7, 1934, ch. 426, 48 Stat. 936; Aug. 24, 1937, ch. 754, §§ 2, 3, 50 Stat. 752; June 9, 1944, ch. 239, 58 Stat. 272).

Section consolidates section 350 of title 28, U.S.C., 1940 ed., with those portions of sections 47, 47a, 349a, 380, and 380a, of said title 28, section 29, of title 15, U.S.C., 1940 ed., and section 45 of title 49, U.S.C., 1940 ed., respective time for taking direct appeal. (For disposition of other provisions of said sections, see Distribution Table.)

Subsection (a) of the revised section is derived from sections 349a and 380a of title 28, U.S.C., 1940 ed. The phrase "under rules prescribed by the Supreme Court" was substituted for the phrase "under such rules as may be prescribed by the proper courts" which appeared in both such sections. The Supreme Court by its revised rules 10-13 has made adequate provision for filing record and docketing case. (See Revised Rules of the Supreme Court following section 354 of title 28, U.S.C., 1940 ed.)

Subsection (b) is in accord with sections 47 and 47a of title 28, U.S.C., 1940 ed., and section 29 of title 15, U.S.C., 1940 ed., Commerce and Trade, and section 45 of title 49, U.S.C., 1940 ed., Transportation.

Subsection (c), with respect to the time for taking other appeals or petitioning for a writ of certiorari, substitutes, as more specific, the words "ninety days" for the words "three months" contained in section 350 of title 28, U.S.C., 1940 ed. The provision in said section 350 for allowance of additional time was retained, notwithstanding the language of the Supreme Court in *Comm'r* v. *Bedford's Estate*, 1945, 65 S.Ct. 1157, 1159, 325 U.S. 283, 89 L.Ed. 1611, to the effect that the 3 months' period is "more than ample * * * to determine whether to seek further review".

In subsection (c), words "in a civil action, suit, or proceeding" were added because section 350 of title 28, U.S.C., 1940 ed., was superseded as to criminal cases by Federal Rules of Criminal Procedure, Rule 39(a)(2), (b)(2).

Words "or the United States Court of Appeals for the District of Columbia" in section 350 of title 28, U.S.C., 1940 ed., were omitted as covered by "court of appeals" in subsection (d) of this revised section.

Words in section 350 of title 28, U.S.C., 1940 ed., "excepting that writs of certiorari to the Supreme Court of the Philippine Islands may be granted where application therefor is made within six months", were omitted as obsolete, in view of the independence of the Philippines recognized by section 1240 of title 48, U.S.C., 1940 ed., Territories and Insular Possessions.

Subsection (e) relates only to supersedeas or stay of execution of judgments sought to be reviewed in the Supreme Court on writ of certiorari. Supersedeas or stay of proceedings taken to the Supreme Court by appeal from courts of appeals, or direct appeals from a district court or three-judge courts, is governed by Rule 62 of the Federal Rules of Civil Procedure.

Changes were made in phraseology.

#### 1949 Act

This section clarifies the meaning of subsection (c) of section 2101 of title 28, U.S.C. At present, such subsection, after the words, "ninety days after entry of such judgment or decree", reads, "unless, upon application for writ of certiorari, for good cause, the Supreme Court or a justice thereof allows an additional time not exceeding sixty days."

The new subsection (d) of section 2101 supplies an omission in revised title 28, U.S.C., and confirms the authority of the Supreme Court to regulate the time for seeking review of State criminal cases.

The other amendment merely renumbers subsections (d) and (e) of such section 2101 as subsections (e) and (f), respectively.

#### References in Text

Section 2282 of this title, referred to in subsec. (a), was repealed by Pub. L. 94-381, § 2, Aug. 12, 1976, 90 Stat. 1119.

#### Amendments

1949—Subsec. (c). Act May 24, 1949, § 106(a), clarified the allowance of an additional 60 days in which to apply for a writ of certiorari.

Subsec. (d). Act May 24, 1949, § 106(b) added subsec. (d).

Subsecs. (e) and (f). Act May 24, 1949, § 106, redesignated former subsecs. (d) and (e) as subsecs. (e) and (f).

#### Federal Rules of Appellate Procedure

Criminal cases, time for appeal, see rule 4, Appendix to this title.

#### Section Referred to in Other Sections

This section is referred to in section 2350 of this title.

### § 2102. Priority of criminal case on appeal from State court

Criminal cases on review from State courts shall have priority, on the docket of the Supreme Court, over all cases except cases to which the United States is a party and such other cases as the court may decide to be of public importance.

(June 25, 1948, ch. 646, 62 Stat. 962.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 351 (Mar. 3, 1911, ch. 231, § 253, 36 Stat. 1160; Jan. 31, 1928, ch. 14, § 1, 45 Stat. 54).

Changes were made in phraseology.

### § 2103. Appeal from State court or from a United States court of appeals improvidently taken regarded as petition for writ of certiorari

If an appeal to the Supreme Court is improvidently taken from the decision of the highest court of a State, or of a United States court of appeals, in a case where the proper mode of a review is by petition for certiorari, this alone shall not be ground for dismissal; but the papers whereon the appeal was taken shall be regarded and acted on as a petition for writ of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken. Where in such a case there appears to be no reasonable ground for granting a petition for writ of certiorari it shall be competent for the Supreme Court to adjudge to the respondent reasonable damages for his delay, and single or double costs.

(June 25, 1948, ch. 646, 62 Stat. 962; Sept. 13, 1962, Pub. L. 87-669, § 1, 76 Stat. 556.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 344 (Mar. 3, 1911, ch. 231, §§ 236, 237, 36 Stat. 1156; Dec. 23, 1914, ch. 2, 38 Stat. 790; Sept. 6, 1916, ch. 448, § 2, 39 Stat. 726; Feb. 17, 1922, ch. 54, 42 Stat. 366; Feb. 13, 1925, ch. 229, § 1, 43 Stat. 937; Jan. 31, 1928, ch. 14, § 1, 45 Stat. 54).

Provisions of section 344 of title 28, U.S.C., 1940 ed., relating to jurisdiction of the Supreme Court to review decisions of the highest courts of the States are the basis of section 1257 of this title. Other provisions of said section 344 are incorporated in section 2106 of this title.

Changes were made in phraseology.

#### Amendments

1962—Pub. L. 87-669 inserted ", or of a United States court of appeals," in the text, and substituted "or from a United States court of appeals improvidently taken regarded as petition for" for "improvidently taken regarded as" in the section catchline.

### § 2104. Appeals from State courts

An appeal to the Supreme Court from a State court shall be taken in the same manner and under the same regulations, and shall have the same effect, as if the judgment or decree appealed from had been rendered in a court of the United States.

(June 25, 1948, ch. 646, 62 Stat. 962.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 871 (R.S., § 1003).

Words "An appeal to" were substituted for "writs of error from", in view of the abolition of the writ of error.

Changes were made in phraseology.

### § 2105. Scope of review; abatement

There shall be no reversal in the Supreme Court or a court of appeals for error in ruling upon matters in abatement which do not involve jurisdiction.

(June 25, 1948, ch. 646, 62 Stat. 963.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 879 (R.S. § 1011; Feb. 18, 1875, ch. 80, § 1, 18 Stat. 318).

The revised language is substituted for the provisions of section 879 of title 28, U.S.C., 1940 ed., to avoid any construction that matters of fact are not reviewable in nonjury cases. Such section 879 related to review upon a writ of error which applied only to actions at law. (See Rule 52(a) of the Federal Rules of Civil Procedure limiting the review of questions of fact which renders unnecessary any statutory limitation.)

Rule 7(c) of the Federal Rules of Civil Procedure abolished all pleas, and the rules adopted the motion as a substitute therefor.

Words "matters in abatement" were, therefore, substituted for the abolished "plea in abatement" and "plea to the jurisdiction."

Changes were made in phraseology.

### § 2106. Determination

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

(June 25, 1948, ch. 646, 62 Stat. 963.)

### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§ 344, 876, 877 (R.S. § 701; Mar. 3, 1891, ch. 517, §§ 10, 11, 26 Stat. 829; Mar. 3, 1911, ch. 231, §§ 231, 236, 237, 291, 36 Stat. 1156, 1167; Dec. 23, 1914, ch. 2, 38 Stat. 790; Sept. 16, 1916, ch. 448, § 2, 39 Stat. 726; Feb. 17, 1922, ch. 54, 42 Stat. 366; Feb. 13, 1925, ch. 229, § 1, 43 Stat. 937; Jan. 31, 1928, ch. 14, § 1, 45 Stat. 54).

Section consolidates part of section 344 of title 28, U.S.C., 1940 ed., with sections 876 and 877 of said title. Other provisions of said section 344 are incorporated in sections 1257 and 2103 of this title.

Words "or a court of appeals" were inserted after "Supreme Court" upon authority of *United States* v. *Illinois Surety Co.*, C.C.A. 1915, 226 F. 653, affirmed 37 S.Ct. 614, 244 U.S. 376, 61 L.Ed. 1206, wherein it was held that this section also applied to the courts of appeals in view of section 11 of the Circuit Court of Appeals Act of Mar. 3, 1891, ch. 517, 28 Stat. 829.

The revised section will cover instances where the Supreme Court remands a case to the highest court of a State and to the United States Tax Court. It will also cover a remand of a case to the Court of Claims or the Court of Customs and Patent Appeals. For authority to remand a case to The Tax Court, see *Equitable Life Assurance Society of U.S.* v. *Commissioner of Internal Revenue*, 1944, 64 S.Ct. 722, 321 U.S. 560, 88 L.Ed. 927.

Revised section will also permit a remand by the Supreme Court to a court of appeals inasmuch as such latter court then would be a lower court. The revised section is in conformity with numerous holdings of the Supreme Court to the effect that such a remand may be made. See especially, *Maryland Casualty Co.* v. *United States*, 1929, 49 S.Ct. 484, 279 U.S. 792, 73 L.Ed. 960; *Krauss Bros. Co.* v. *Mellon*, 1928, 48 S.Ct. 358, 276 U.S. 386, 72 L.Ed. 620 and *Buzyuski* v. *Luckenbach S. S. Co.*, 1928, 48 S.Ct. 440, 277 U.S. 226, 72 L.Ed. 860.

The last sentence of section 876 of title 28, U.S.C., 1940 ed., providing that the Supreme Court should not issue execution but should send a special mandate to the inferior court to award execution, was omitted. See rule 34 of the revised rules of the Supreme Court relating to Mandates, and section 1651 of this title authorizing the Supreme Court to issue all writs necessary in aid of its jurisdiction.

Changes were made in phraseology.

## § 2107. Time for appeal to court of appeals

Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry.

In any action, suit or proceeding in admiralty, the notice of appeal shall be filed within ninety days after the entry of the order, judgment or decree appealed from, if it is a final decision, and within fifteen days after its entry if it is an interlocutory decree.

The district court may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree.

This section shall not apply to bankruptcy matters or other proceedings under Title 11.

(June 25, 1948, ch. 646, 62 Stat. 963; May 24, 1949, ch. 139, §§ 107, 108, 63 Stat. 104.)

### HISTORICAL AND REVISION NOTES

#### 1948 ACT

Based on title 28, U.S.C., 1940 ed., §§ 227a, 230, and section 1142 of title 26, U.S.C., 1940 ed., Internal Revenue Code (Mar. 3, 1891, ch. 517, § 11, 26 Stat. 829; Mar. 3, 1911, ch. 231, § 129, 36 Stat. 1134; Feb. 13, 1925, ch. 229, § 8(c), 43 Stat. 940; Feb. 28, 1927, ch. 228, 44 Stat. 1261; Jan. 31, 1928, ch. 14, § 1, 45 Stat. 54; Feb. 10, 1939, ch. 2, § 1142, 53 Stat. 165; Oct. 21, 1942, ch. 619, title V, § 504(a), (c), 56 Stat. 957).

Section consolidates sections 227a and 230 of title 28, U.S.C., 1940 ed., with section 1142 of title 26, U.S.C., 1940 ed., Internal Revenue Code. Other provisions of such section 227a are incorporated in section 1292 of this title.

Section 227a of title 28, U.S.C., 1940 ed., provided a time limit of 30 days for appeals from patent-infringement decisions, and section 230 of title 28, U.S.C., 1940 ed., permitted 3 months for appeals generally. The revised section adopts the 30-day limit in conformity with recommendations of members of the Judicial Conference of the United States and proposed amendment to Rule 73 of the Federal Rules of Civil Procedure.

Section 1142 of title 26, U.S.C., 1940 ed., provided for 3 months within which to petition for appeal from a decision of The Tax Court. The second paragraph of the revised section reduces this to 60 days for reasons explained above. Other provisions of said section 1142 making a distinction between decisions before and after June 6, 1932, were omitted as executed.

Words "in an action, suit, or proceeding of a civil nature" were added in view of Rule 37 of the Federal Rules of Criminal Procedure prescribing a different limitation for criminal appeals.

Words "notice of appeal is filed" were substituted for provisions of sections 230 of title 28, U.S.C., 1940 ed., and 1142 of title 26, U.S.C., 1940 ed., for petition and allowance of appeal in order to eliminate the useless paper work involved in a pro forma application for appeal and perfunctory allowance of the same. The effect of the section is to require appeals to the courts of appeals in all cases to be taken by filing notice of appeal. See Rule 73(b) of Federal Rules of Civil Procedure.

The case of *Mosier* v. *Federal Reserve Bank of New York*, C.C.A. 1942, 132 F.2d 710, holds that the Federal Rules of Civil Procedure changing the method of "taking" an appeal, do not affect the time limitation prescribed by section 230 of title 28, U.S.C., 1940 ed.

Word "order" was added, in two places, after "judgment" so as to make the section cover all appeals of which the courts of appeals have jurisdiction, as set forth in section 1291 et seq. of this title.

The last paragraph was added in conformity with section 48 of title 11, U.S.C., 1940 ed., Bankruptcy, and other sections of that title regulating appellate procedure in bankruptcy matters.

The third paragraph was inserted to conform to the existing practice in Admiralty upon the recommendation of the Committee on the Federal Courts of the New York County Lawyers Association.

The time for appeal to the Court of Customs and Patent Appeals in patent and trade-mark cases is governed by section 89 of title 15, U.S.C., 1940 ed., Commerce and Trade, and section 60 of title 35, U.S.C., 1940 ed., Patents, and Rule 25 of the Rules of such court, and, in customs cases, by section 2601 of this title.

Changes were made in phraseology.

### Senate Revision Amendment

By Senate amendment, all provisions relating to the Tax Court were eliminated. Therefore, section 1142 of title 26, U.S.C., Internal Revenue Code, was not one of the sources of this section as finally enacted. However, no change in the text of this section was necessary. See 80th Congress Senate Report No. 1559.

### 1949 Act

This amendment to section 2107 of title 28, U.S.C., restores the former 15-day limitation of time within which to appeal from an interlocutory order in admiralty.

This amendment eliminates as surplusage the words "in any such action, suit or proceeding," from the fourth paragraph of section 2107 of title 28, U.S.C., and corrects a typographical error in the same paragraph.

### Amendments

1949—Act May 24, 1949, restored, in the third par., the 15-day limitation of time within which to appeal from an interlocutory order in admiralty, and in the fourth par., substituted "The district court may" for "The district court, in any such action, suit, or proceeding, may" and corrected the spelling of "excusable".

### Federal Rules of Appellate Procedure

Criminal cases, time for appeal, see rule 4, Appendix to this title.

### Cross References

Bankruptcy matters, time for appeal, see section 48 of Title 11, Bankruptcy.

### Section Referred to in Other Sections

This section is referred to in title 15 section 29; title 49 section 45.

## § 2108. Proof of amount in controversy

Where the power of any court of appeals to review a case depends upon the amount or value in controversy, such amount or value, if not otherwise satisfactorily disclosed upon the record, may be shown and ascertained by the oath of a party to the case or by other competent evidence.

(June 25, 1948, ch. 646, 62 Stat. 963.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 231 (Feb. 13, 1925, ch. 229, § 9, 43 Stat. 941).

Words "or in the Supreme Court" were omitted. Section 7 of the 1925 act containing such words related to review by the Supreme Court of the United States of decisions of the Supreme Court of the Philippine Islands and designated a certain jurisdictional amount. Such section 7 has now become obsolete, in view of the recognition of the independence of the Philippines, title 48 U.S.C., 1940 ed., § 1240, Territories and Insular Possessions, and there is no other case wherein the power of the Supreme Court to review depends on the amount or value in controversy.

## § 2109. Quorum of Supreme Court justices absent

If a case brought to the Supreme Court by direct appeal from a district court cannot be heard and determined because of the absence of a quorum of qualified justices, the Chief Justice of the United States may order it remitted to the court of appeals for the circuit including the district in which the case arose, to be heard and determined by that court either sitting in banc or specially constituted and composed of the three circuit judges senior in commission who are able to sit, as such order may direct. The decision of such court shall be final and conclusive. In the event of the disqualification or disability of one or more of such circuit judges, such court shall be filled as provided in chapter 15 of this title.

In any other case brought to the Supreme Court for review, which cannot be heard and determined because of the absence of a quorum of qualified justices, if a majority of the qualified justices shall be of opinion that the case cannot be heard and determined at the next ensuing term, the court shall enter its order affirming the judgment of the court from which the case was brought for review with the same effect as upon affirmance by an equally divided court.

(June 25, 1948, ch. 646, 62 Stat. 963.)

### Historical and Revision Notes

Based on portions of section 29 of title 15, U.S.C., 1940 ed., Commerce and Trade, and section 45 of title 49, U.S.C., 1940 ed., Transportation (Feb. 11, 1903, ch. 544, § 2, 32 Stat. 823; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167; June 9, 1944, ch. 239, 58 Stat. 272).

Section consolidates portions of section 29 of title 15, U.S.C., 1940 ed., and section 45 of title 49, U.S.C., 1940 ed., with changes of substance and phraseology.

The revised section includes the principal provisions of sections 29 and 45 of titles 15 and 49, U.S.C., 1940 ed., respectively, in case of the absence of a quorum of qualified Justices of the Supreme Court.

Sections 29 and 45 of titles 15 and 49, U.S.C., 1940 ed., respectively, were identical and were applicable only to decisions of three-judge courts in antitrust cases under section 107 of said title 15 and Interstate Commerce cases under sections 1, 8, and 12 of said title 49, "or any other acts having a like purpose that may hereinafter be enacted." The revised section broadens and extends the application of such provisions to include "any case involving a direct appeal to the Supreme Court from the decision of a district court or a district court of three judges which cannot be heard and determined because of the absence of a quorum of qualified justices." It includes direct appeals in criminal cases under section 3731 of title 18 (H.R. 1600, 80th Cong.).

Sections 29 and 45 of titles 15 and 49, U.S.C., 1940 ed., respectively provided that the Supreme Court certify the case to the Circuit Court of Appeals and that the Senior Circuit Judge, qualified to participate should designate himself and two other circuit judges next in order of seniority. Other provisions were made for designation of circuit judges from other circuits in case of insufficient circuit judges being available in the circuit.

The revised section permits the Chief Justice of the United States to designate the "court of appeals" to hear the case in banc or by means of a specially constituted court of appeals composed of the three circuit judges senior in commission who are able to sit. In case of disqualification or disability, the court shall be filled by designation and assignment as provided in chapter 15 of this title.

The provisions of section 29 of title 15, U.S.C., 1940 ed., and section 45 of title 49, U.S.C., 1940 ed., relating to time for appeal are incorporated in section 2101 of this title. The provisions of said sections for direct appeal to the Supreme Court are retained in said titles 15 and 49.

The second paragraph of the revised section is new. It recognizes the necessity of final disposition of litigation in which appellate review has been had and further review by the Supreme Court is impossible for lack of a quorum of qualified justices.

### § 2110. Time for appeal to Court of Claims in tort claims cases

Appeals to the Court of Claims in tort claims cases, as provided in section 1504 of this title, shall be taken within ninety days after the entry of the final judgment of the district court.

(June 25, 1948, ch. 646, 62 Stat. 964; May 24, 1949, ch. 139, § 109, 63 Stat. 105.)

#### HISTORICAL AND REVISION NOTES

#### 1948 ACT

Based on title 28, U.S.C., 1940 ed., § 933(a)(2) (Aug. 2, 1946, ch. 753, § 412(a)(2), 60 Stat. 844).

Section constitutes the provision as to time for appeals to Court of Claims in section 933(a)(2) of title 28, U.S.C., 1940 ed. For other provisions of said section 933(a)(2), see Distribution Table.

Changes were made in phraseology.

#### 1949 ACT

This amendment brings section 2110 of title 28, U.S.C., into conformity with other comparable provisions by stating appeal time in "days" rather than in the somewhat variable term of "months".

#### AMENDMENTS

1949—Act May 24, 1949, substituted "ninety days" for "three months".

### § 2111. Harmless error

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

(Added May 24, 1949, ch. 139, § 110, 63 Stat. 105.)

#### HISTORICAL AND REVISION NOTES

#### 1949 ACT

Incorporates in title 28, U.S.C., as section 2111 thereof, the harmless error provisions of section 269 of the Judicial Code (now repealed), which applied to all courts of the United States and to all cases therein and therefore was superseded only in part by the Federal Procedural Rules, which apply only to the United States district courts.

#### FEDERAL RULES OF CIVIL PROCEDURE

Harmless error, see rule 61, Appendix to this title.

### § 2112. Record on review and enforcement of agency orders

(a) The rules prescribed under the authority of section 2072 of this title may provide for the time and manner of filing and the contents of the record in all proceedings instituted in the courts of appeals to enjoin, set aside, suspend, modify, or otherwise review or enforce orders of administrative agencies, boards, commissions, and officers. Such rules may authorize the agency, board, commission, or officer to file in the court a certified list of the materials comprising the record and retain and hold for the court all such materials and transmit the same or any part thereof to the court, when and as required by it, at any time prior to the final determination of the proceeding, and such filing of such certified list of the materials comprising the record and such subsequent transmittal of any such materials when and as required shall be deemed full compliance with any provision of law requiring the filing of the record in the court. The record in such proceedings shall be certified and filed in or held for and transmitted to the court of appeals by the agency, board, commission, or officer concerned within the time and in the manner prescribed by such rules. If proceedings have been instituted in two or more courts of appeals with respect to the same order the agency, board, commission, or officer concerned shall file the record in that one of such courts in which a proceeding with respect to such order was first instituted. The other courts in which such proceedings are pending shall thereupon transfer them to the court of appeals in which the record has been filed. For the convenience of the parties in the interest of justice such court may thereafter transfer all the proceedings with respect to such order to any other court of appeals.

(b) The record to be filed in the court of appeals in such a proceeding shall consist of the order sought to be reviewed or enforced, the findings or report upon which it is based, and the pleadings, evidence, and proceedings before the agency, board, commission, or officer concerned, or such portions thereof (1) as the rules prescribed under the authority of section 2072 of this title may require to be included therein, or (2) as the agency, board, commission, or officer concerned, the petitioner for review or respondent in enforcement, as the case may be, and any intervenor in the court proceeding by written stipulation filed with the agency, board, commission, or officer concerned or in the court in any such proceeding may consistently with the rules prescribed under the authority of section 2072 of this title designate to be included therein, or (3) as the court upon motion of a party or, after a prehearing conference, upon its own motion may by order in any such proceeding designate to be included therein. Such a stipulation or order may provide in an appropriate case that no record need be filed in the court of appeals. If, however, the correctness of a finding of fact by the agency, board, commission, or officer is in question all of the evidence before the agency, board, commission, or officer shall be included in the record except such as the agency, board, commission, or officer concerned, the petitioner for review or respondent in enforcement, as the case may be, and any intervenor in the court proceeding by written stipulation filed with the agency, board, commission, or officer concerned or in the court agree to omit as wholly immaterial to the questioned finding. If there is omitted from the record any portion of the proceedings before the agency, board, commission, or officer which the court subsequently determines to be proper for it to consider to enable it to review or enforce the order in question the court may direct that such additional portion of the proceedings be filed as a supplement to the record. The agency, board, commission, or officer concerned may, at its option and without regard to the foregoing provisions of this subsection, and if so requested by the petitioner for review or respondent in enforcement shall, file in the court the entire record of the proceedings before it without abbreviation.

(c) The agency, board, commission, or officer concerned may transmit to the court of appeals the original papers comprising the whole or any part of the record or any supplemental record, otherwise true copies of such papers certified by an authorized officer or deputy of the agency, board, commission, or officer concerned shall be transmitted. Any original papers thus transmitted to the court of appeals shall be returned to the agency, board, commission, or officer concerned upon the final determination of the review or enforcement proceeding. Pending such final determination any such papers may be returned by the court temporarily to the custody of the agency, board, commission, or officer concerned if needed for the transaction of the public business. Certified copies of any papers included in the record or any supplemental record may also be returned to the agency, board, commission, or officer concerned upon the final determination of review or enforcement proceedings.

(d) The provisions of this section are not applicable to proceedings to review decisions of the Tax Court of the United States or to proceedings to review or enforce those orders of administrative agencies, boards, commissions, or officers which are by law reviewable or enforceable by the district courts.

(Added Pub. L. 85-791, § 2, Aug. 28, 1958, 72 Stat. 941, and amended Pub. L. 89-773, § 5(a), (b), Nov. 6, 1966, 80 Stat. 1323.)

### AMENDMENTS

1966—Subsec. (a). Pub. L. 89-773, § 5(a), substituted "The rules prescribed under the authority of section 2072 of this title may provide for the time and manner of filing" for "The several courts of appeal shall have power to adopt, with the approval of the Judicial Conference of the United States, rules, which so far as practicable shall be uniform in all such courts prescribing the time and manner of filing." See section 2072 of this title.

Subsec. (b). Pub. L. 89-773, § 5(b), substituted "the rules prescribed under the authority of section 2072 of this title" for "the said rules of the court of appeals" and for "the rules of such court".

### SAVINGS PROVISIONS

Section 5(c) of Pub. L. 89-773 provided that: "The amendments of section 2112 of title 28 of the United States Code [this section] made by this Act shall not operate to invalidate or repeal rules adopted under the authority of that section prior to the enactment of this Act [Nov. 6, 1966], which rules shall remain in effect until superseded by rules prescribed under the authority of section 2072 of title 28 of the United States Code as amended by this Act."

### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 2346 of this title; title 7 sections 8, 9, 136n, 194, 1115, 1600, 1601; title 12 sections 1464, 1730, 1730a, 1786, 1818, 1848; title 15 sections 21, 45, 57a, 78y, 79x, 80a-42, 80b-13, 687e, 717r, 1193, 1262, 1394, 1474, 1710, 1825, 1913, 2060, 2618; title 16 sections 825*l*, 1858; title 19 sections 81r, 1641; title 20 sections 241e-1, 241k, 351d, 827, 844a, 845, 869a, 1110c, 1207, 1232c, 1263, 1413, 1416, 1806, 2309; title 21 sections 346a, 348, 355, 360g, 371; title 22 section 1631f; title 26 sections 3310, 6363; title 27 section 204; title 29 sections 160, 210, 660, 667, 819; title 30 section 816; title 31 section 1263; title 33 section 921; title 39 section 3628; title 40 section 333; title 42 sections 263a, 263f, 291h, 300s, 504, 1316, 1857c-5, 1857f-5, 3025, 3045d, 3759, 5311, 5405, 6068, 6306, 6869; title 43 section 355; title 46 section 1181; title 47 section 402; title 49 section 1486.

## § 2113. Definition

For purposes of this chapter, the terms "State court", "State courts", and "highest court of a State" include the District of Columbia Court of Appeals.

(Added Pub. L. 91-358, title I, § 172(a)(2)(A), July 29, 1970, 84 Stat. 590.)

### EFFECTIVE DATE

Section effective the first day of the seventh calendar month which begins after July 29, 1970, see section 199(a) of Pub. L. 91-358, set out as an Effective Date of 1970 Amendment note under section 1257 of this title.

# PART VI—PARTICULAR PROCEEDINGS

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### SENATE REVISION AMENDMENT

Chapters 169, 171 and 173 were renumbered "167", "169" and "171", respectively, without change in their section numbers, by Senate amendment. See 80th Congress Senate Report No. 1559.

### AMENDMENTS

1966—Pub. L. 89-793, title VI, § 603, Nov. 8, 1966, 80 Stat. 1450, added chapter 175.

Pub. L. 89-554, § 4(d), Sept. 6, 1966, 80 Stat. 621, added chapter 158.

1960—Pub. L. 86-682, § 10, Sept. 2, 1960, 74 Stat. 708, added chapter 173.

### CROSS REFERENCES

Arbitration proceedings, see section 3 et seq. of Title 9, Arbitration.

Bankruptcy proceedings, see Bankruptcy Rules and Official Bankruptcy Forms, Appendix to Title 11, Bankruptcy.

Copyright proceedings, see section 101 of Title 17, Copyrights, and rules of copyright practice set out in Appendix to Title 17, Copyrights.

Labor disputes, procedure, see sections 159 and 160 of Title 29, Labor.

Railway labor disputes, court procedure after arbitration, see section 159 of Title 45, Railroads.

See, also, rule 81 of the Federal Rules of Civil Procedure, Appendix to this title.

## CHAPTER 151—DECLARATORY JUDGMENTS

Sec.
2201. Creation of remedy.
2202. Further relief.

### § 2201. Creation of remedy

**In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.**

(June 25, 1948, ch. 646, 62 Stat. 964; May 24, 1949, ch. 139, § 111, 63 Stat. 105; Aug. 28, 1954, ch. 1033, 68 Stat. 890; July 7, 1958, Pub. L. 85-508, § 12(p), 72 Stat. 349; Oct. 4, 1976, Pub. L. 94-455, title XIII, § 1306(b)(8), 90 Stat. 1719.)

#### Historical and Revision Notes

#### 1948 Act

Based on title 28, U.S.C., 1940 ed., § 400 (Mar. 3, 1911, ch. 231, § 274d, as added June 14, 1934, ch. 512, 48 Stat. 955; Aug. 30, 1935, ch. 829, § 405, 49 Stat. 1027).

This section is based on the first paragraph of section 400 of title 28, U.S.C., 1940 ed. Other provisions of such section are incorporated in section 2202 of this title.

While this section does not exclude declaratory judgments with respect to State taxes, such suits will not ordinarily be entertained in the courts of the United States where State law makes provision for payment under protest and recovery back or otherwise affords adequate remedy in the State courts. See *Great Lakes Dredge & Dock Co.* v. *Huffman*, La. 1943, 63 S.Ct. 1070, 319 U.S. 293, 87 L.Ed. 1407. See also *Spector Motor Service* v. *McLaughlin*, Conn. 1944, 65 S.Ct. 152, 323 U.S. 101, 89 L.Ed. 101. See also section 1341 of this title forbidding district courts to restrain enforcements of State taxes where State courts afford plain, speedy, and efficient remedy.

Changes were made in phraseology.

#### 1949 Act

Section corrects a typographical error in section 2201 of title 28, U.S.C.

#### Amendments

1976—Pub. L. 94-455 substituted "taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954" for "taxes".

1958—Subsec. (a). Pub. L. 85-508 eliminated provisions which related to the District Court for the Territory of Alaska. See section 81A of this title which establishes a United States District Court for the State of Alaska.

1954—Act Aug. 28, 1954, extended provisions to Alaska.

1949—Act May 24, 1949, corrected spelling of "or" in second sentence.

#### Effective Date of 1976 Amendment

Amendment by Pub. L. 94-455 applicable with respect to pleadings filed with the United States Tax Court, the District Court of the United States for the District of Columbia, or the United States Court of Claims more than 6 months after Oct. 4, 1976, but only with respect to determinations (or requests for determinations) made after Jan. 1, 1976, see section 1306(c) of Pub. L. 94-455, set out as an Effective Date note under section 7428 of Title 26, Internal Revenue Code.

#### Effective Date of 1958 Amendment

Amendment by Pub. L. 85-508 effective Jan. 3, 1959, upon admission of Alaska into the Union pursuant to Proc. No. 3269, Jan. 3, 1959, 24 F.R. 81, 73 Stat. c16, as required by sections 1 and 8(c) of Pub. L. 85-508, see notes set out under section 81A of this title and preceding section 21 of Title 48, Territories and Insular Possessions.

#### Amount in Controversy

Jurisdictional amount increased from $3,000 to $10,000 in diversity of citizenship cases and in cases arising under the Constitution, laws, or treaties of the United States, see sections 1331 and 1332 of this title.

#### Section Referred to in Other Sections

This section is referred to in title 7 section 623; title 8 sections 1105a, 1503.

### § 2202. Further relief

**Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.**

(June 25, 1948, ch. 646, 62 Stat. 964.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 400 (Mar. 3, 1911, ch. 231, § 274d, as added June 14, 1934, ch. 512, 48 Stat. 955; Aug. 30, 1935, ch. 829, § 405, 49 Stat. 1027).

This section is based on the second paragraph of section 400 of title 28, U.S.C., 1940 ed. Other provisions of such section are incorporated in section 2201 of this title.

Provision in said section 400 that the court shall require adverse parties whose rights are adjudicated to show cause why further relief should not be granted forthwith, were omitted as unnecessary and covered by the revised section.

Provisions relating to submission of interrogatories to a jury were omitted as covered by rule 49 of the Federal Rules of Civil Procedure.

Changes were made in phraseology.

#### Section Referred to in Other Sections

This section is referred to in title 7 section 623.

## CHAPTER 153—HABEAS CORPUS

Sec.
2241. Power to grant writ.
2242. Application.
2243. Issuance of writ; return; hearing; decision.
2244. Finality of determination.
2245. Certificate of trial judge admissible in evidence.
2246. Evidence; depositions; affidavits.
2247. Documentary evidence.
2248. Return or answer; conclusiveness.
2249. Certified copies of indictment, plea and judgment; duty of respondent.
2250. Indigent petitioner entitled to documents without cost.
2251. Stay of State court proceedings.
2252. Notice.
2253. Appeal.
2254. State custody; remedies in Federal courts.
2255. Federal custody; remedies on motion attacking sentence.

#### Senate Revision Amendment

Chapter catchline was changed by Senate amendment. See 80th Congress Senate Report No. 1559.

#### Amendments

1966—Pub. L. 89-711, § 3, Nov. 2, 1966, 80 Stat. 1106, substituted "Federal courts" for "State Courts" in item 2254.

### § 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

(June 25, 1948, ch. 646, 62 Stat. 964; May 24, 1949, ch. 139, § 112, 63 Stat. 105; Sept. 19, 1966, Pub. L. 89-590, 80 Stat. 811.)

#### HISTORICAL AND REVISION NOTES

#### 1948 ACT

Based on title 28, U.S.C., 1940 ed., §§ 451, 452, 453 (R.S. §§ 751, 752, 753; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167; Feb. 13, 1925, ch. 229, § 6, 43 Stat. 940).

Section consolidates sections 451, 452 and 453 of title 28, U.S.C., 1940 ed., with changes in phraseology necessary to effect the consolidation.

Words "for the purpose of an inquiry into the cause of restraint of liberty" in section 452 of title 28, U.S.C., 1940 ed., were omitted as merely descriptive of the writ.

Subsection (b) was added to give statutory sanction to orderly and appropriate procedure. A circuit judge who unnecessarily entertains applications which should be addressed to the district court, thereby disqualifies himself to hear such matters on appeal and to that extent limits his usefulness as a judge of the court of appeals. The Supreme Court and Supreme Court Justices should not be burdened with applications for writs cognizable in the district courts.

#### 1949 ACT

This section inserts commas in certain parts of the text of subsection (b) of section 2241 of title 28, U.S.C., for the purpose of proper punctuation.

#### AMENDMENTS

1966—Subsec. (d). Pub. L. 89-590 added subsec. (d).

1949—Subsec. (b). Act May 24, 1949, inserted commas following "Supreme Court" and "any justice thereof".

#### RULES OF THE SUPREME COURT OF THE UNITED STATES

Procedure on applications, see rule 31, Appendix to this title.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 18 section 3006A.

### § 2242. Application

Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf.

It shall allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority, if known.

It may be amended or supplemented as provided in the rules of procedure applicable to civil actions.

If addressed to the Supreme Court, a justice thereof or a circuit judge it shall state the reasons for not making application to the district court of the district in which the applicant is held.

(June 25, 1948, ch. 646, 62 Stat. 965.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 454 (R.S. § 754).

Words "or by someone acting in his behalf" were added. This follows the actual practice of the courts, as set forth in *United States ex rel. Funaro* v. *Watchorn*, C.C. 1908, 164 F. 152; *Collins* v. *Traeger*, C.C.A. 1928, 27 F.2d 842, and cases cited.

The third paragraph is new. It was added to conform to existing practice as approved by judicial decisions. See *Dorsey* v. *Gill* (App.D.C.) 148 F.2d 857, 865, 866. See also *Holiday* v. *Johnston*, 61 S.Ct. 1015, 313 U.S. 342, 85 L.Ed. 1392.

Changes were made in phraseology.

### § 2243. Issuance of writ; return; hearing; decision

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

(June 25, 1948, ch. 646, 62 Stat. 965.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§ 455, 456, 457, 458, 459, 460, and 461 (R.S. §§ 755–761).

Section consolidates sections 455–461 of title 28, U.S.C., 1940 ed.

The requirement for return within 3 days "unless for good cause additional time, not exceeding 20 days is allowed" in the second paragraph, was substituted for the provision of such section 455 which allowed 3 days for return if within 20 miles, 10 days if more than 20 but not more than 100 miles, and 20 days if more than 100 miles distant.

Words "unless for good cause additional time is allowed" in the fourth paragraph, were substituted for words "unless the party petitioning requests a longer time" in section 459 of title 28, U.S.C., 1940 ed.

The fifth paragraph providing for production of the body of the detained person at the hearing is in conformity with *Walker* v. *Johnston*, 1941, 61 S.Ct. 574, 312 U.S. 275, 85 L.Ed. 830.

Changes were made in phraseology.

### § 2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not heretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry.

(b) When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(June 25, 1948, ch. 646, 62 Stat. 965; Nov. 2, 1966, Pub. L. 89–711, § 1, 80 Stat. 1104.)

HISTORICAL AND REVISION NOTES

This section makes no material change in existing practice. Notwithstanding the opportunity open to litigants to abuse the writ, the courts have consistently refused to entertain successive "nuisance" applications for habeas corpus. It is derived from H.R. 4232 introduced in the first session of the Seventy-ninth Congress by Chairman Hatton Sumners of the Committee on the Judiciary and referred to that Committee.

The practice of suing out successive, repetitious, and unfounded writs of habeas corpus imposes an unnecessary burden on the courts. See *Dorsey* v. *Gill*, 1945, 148 F.2d 857, 862, in which Miller, J., notes that "petitions for the writ are used not only as they should be to protect unfortunate persons against miscarriages of justice, but also as a device for harassing court, custodial, and enforcement officers with a multiplicity of repetitious, meritless requests for relief. The most extreme example is that of a person who, between July 1, 1939, and April 1944 presented in the District Court 50 petitions for writs of habeas corpus; another person has presented 27 petitions; a third, 24; a fourth, 22; a fifth, 20. One hundred nineteen persons have presented 597 petitions—an average of 5."

SENATE REVISION AMENDMENTS

Section amended to modify original language which denied Federal judges power to entertain application for writ where legality of detention had been determined on prior application and later application presented no new grounds, and to omit reference to rehearing in section catch line and original provision authorizing hearing judge to grant rehearing. 80th Congress, Senate Report No. 1559, Amendment No. 45.

AMENDMENTS

1966—Subsec. (a). Pub. L. 89–711 designated existing provisions as subsec. (a) and, in subsec. (a) as so designated, struck out provision making the subsection's terms applicable to applications seeking inquiry into detention of persons detained pursuant to judgments of State courts.

Subsecs. (b) and (c). Pub. L. 89–711 added subsecs. (b) and (c).

### § 2245. Certificate of trial judge admissible in evidence

On the hearing of an application for a writ of habeas corpus to inquire into the legality of the detention of a person pursuant to a judgment the certificate of the judge who presided at the trial resulting in the judgment, setting forth the facts occurring at the trial, shall be admissible in evidence. Copies of the certificate shall be filed with the court in which the application is pending and in the court in which the trial took place.

(June 25, 1948, ch. 646, 62 Stat. 966.)

#### HISTORICAL AND REVISION NOTES

This section makes no substantive change in existing law. It is derived from H.R. 4232 introduced in the first session of the Seventy-ninth Congress by Chairman Sumners of the House Committee on the Judiciary. It clarifies existing law and promotes uniform procedure.

### § 2246. Evidence; depositions; affidavits

On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits.

(June 25, 1948, ch. 646, 62 Stat. 966.)

#### HISTORICAL AND REVISION NOTES

This section is derived from H.R. 4232 introduced in the first session of the Seventy-ninth Congress by Chairman Sumners of the House Committee on the Judiciary. It clarifies existing practice without substantial change.

### § 2247. Documentary evidence

On application for a writ of habeas corpus documentary evidence, transcripts of proceedings upon arraignment, plea and sentence and a transcript of the oral testimony introduced on any previous similar application by or in behalf of the same petitioner, shall be admissible in evidence.

(June 25, 1948, ch. 646, 62 Stat. 966.)

#### HISTORICAL AND REVISION NOTES

Derived from H.R. 4232, Seventy-ninth Congress, first session. It is declaratory of existing law and practice.

### § 2248. Return or answer; conclusiveness

The allegations of a return to the writ of habeas corpus or of an answer to an order to show cause in a habeas corpus proceeding, if not traversed, shall be accepted as true except to the extent that the judge finds from the evidence that they are not true.

(June 25, 1948, ch. 646, 62 Stat. 966.)

#### HISTORICAL AND REVISION NOTES

Derived from H.R. 4232, Seventy-ninth Congress, first session. At common law the return was conclusive and could not be controverted but it is now almost universally held that the return is not conclusive of the facts alleged therein. 39 C.J.S. pp. 664–666, §§ 98, 99.

### § 2249. Certified copies of indictment, plea and judgment; duty of respondent

On application for a writ of habeas corpus to inquire into the detention of any person pursuant to a judgment of a court of the United States, the respondent shall promptly file with the court certified copies of the indictment, plea of petitioner and the judgment, or such of them as may be material to the questions raised, if the petitioner fails to attach them to his petition, and same shall be attached to the return to the writ, or to the answer to the order to show cause.

(June 25, 1948, ch. 646, 62 Stat. 966.)

#### HISTORICAL AND REVISION NOTES

Derived from H.R. 4232, Seventy-ninth Congress, first session. It conforms to the prevailing practice in habeas corpus proceedings.

### § 2250. Indigent petitioner entitled to documents without cost

If on any application for a writ of habeas corpus an order has been made permitting the petitioner to prosecute the application in forma pauperis, the clerk of any court of the United States shall furnish to the petitioner without cost certified copies of such documents or parts of the record on file in his office as may be required by order of the judge before whom the application is pending.

(June 25, 1948, ch. 646, 62 Stat. 966.)

#### HISTORICAL AND REVISION NOTES

Derived from H.R. 4232, Seventy-ninth Congress, first session. It conforms to the prevailing practice.

### § 2251. Stay of State court proceedings

A justice or judge of the United States before whom a habeas corpus proceeding is pending, may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding.

After the granting of such a stay, any such proceeding in any State court or by or under the authority of any State shall be void. If no stay is granted, any such proceeding shall be as valid as if no habeas corpus proceedings or appeal were pending.

(June 25, 1948, ch. 646, 62 Stat. 966.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 465 (R.S. § 766; Mar. 3, 1893, ch. 226, 27 Stat. 751; Feb. 13, 1925, ch. 229, § 8(c), 43 Stat. 940; June 19, 1934, ch. 673, 48 Stat. 1177).

Provisions relating to proceedings pending in 1934 were deleted as obsolete.

A provision requiring an appeal to be taken within 3 months was omitted as covered by sections 2101 and 2107 of this title.

Changes were made in phraseology.

### § 2252. Notice

Prior to the hearing of a habeas corpus proceeding in behalf of a person in custody of State officers or by virtue of State laws notice shall be served on the attorney general or other appropriate officer of such State as the justice or judge at the time of issuing the writ shall direct.

(June 25, 1948, ch. 646, 62 Stat. 967.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 462 (R.S. § 762).

Section 462 of title 28, U.S.C., 1940 ed., was limited to alien prisoners described in section 453 of title 28, U.S.C., 1940 ed. The revised section extends to all cases of all prisoners under State custody or authority, leaving it to the justice or judge to prescribe the notice to State officers, to specify the officer served, and to satisfy himself that such notice has been given.

Provision for making due proof of such service was omitted as unnecessary. The sheriff's or marshal's return is sufficient.

Changes were made in phraseology.

### § 2253. Appeal

In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.

There shall be no right of appeal from such an order in a proceeding to test the validity of a warrant to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his detention pending removal proceedings.

An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause.

(June 25, 1948, ch. 646, 62 Stat. 967; May 24, 1949, ch. 139, § 113, 63 Stat. 105; Oct. 31, 1951, ch. 655, § 52, 65 Stat. 727.)

#### HISTORICAL AND REVISION NOTES

#### 1948 ACT

Based on title 28, U.S.C., 1940 ed., §§ 463(a) and 466 (Mar. 10, 1908, ch. 76, 36 Stat. 40; Feb. 13, 1925, ch. 229, §§ 6, 13, 43 Stat. 940, 942; June 29, 1938, ch. 806, 52 Stat. 1232).

This section consolidates paragraph (a) of section 463, and section 466 of title 28, U.S.C., 1940 ed.

The last two sentences of section 463(a) of title 28, U.S.C., 1940 ed., were omitted. They were repeated in section 452 of title 28, U.S.C., 1940 ed. (See reviser's note under section 2241 of this title.)

Changes were made in phraseology.

#### 1949 ACT

This section corrects a typographical error in the second paragraph of section 2253 of title 28.

#### AMENDMENTS

1951—Act Oct. 31, 1951, substituted "to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his" for "of removal issued pursuant to section 3042 of Title 18 or the" in the second paragraph.

1949—Act May 24, 1949, substituted "3042" for "3041" in the second par.

#### FEDERAL RULES OF CRIMINAL PROCEDURE

Commitment to another district; removal, see Rule 40, Title 18, Appendix, Crimes and Criminal Procedure.

### § 2254. State custody; remedies in State courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

**(e)** If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

**(f)** A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(June 25, 1948, ch. 646, 62 Stat. 967; Nov. 2, 1966, Pub. L. 89-711, § 2, 80 Stat. 1105.)

### Historical and Revision Notes

This new section is declaratory of existing law as affirmed by the Supreme Court. (See Ex parte Hawk, 1944, 64 S. Ct. 448, 321, U.S. 114, 88L. Ed. 572.)

### Senate Revision Amendments

Senate amendment to this section, Senate Report No. 1559, amendment No. 47, has three declared purposes, set forth as follows:

"The first is to eliminate from the prohibition of the section applications in behalf of prisoners in custody under authority of a State officer but whose custody has not been directed by the judgment of a State court. If the section were applied to applications by persons detained solely under authority of a State officer it would unduly hamper Federal courts in the protection of Federal officers prosecuted for acts committed in the course of official duty.

"The second purpose is to eliminate, as a ground of Federal jurisdiction to review by habeas corpus judgments of State courts, the proposition that the State court has denied a prisoner a 'fair adjudication of the legality of his detention under the Constitution and laws of the United States.' The Judicial Conference believes that this would be an undesirable ground for Federal jurisdiction in addition to exhaustion of State remedies or lack of adequate remedy in the State courts because it would permit proceedings in the Federal court on this ground before the petitioner had exhausted his State remedies. This ground would, of course, always be open to a petitioner to assert in the Federal court after he had exhausted his State remedies or if he had no adequate State remedy.

"The third purpose is to substitute detailed and specific language for the phrase 'no adequate remedy available.' That phrase is not sufficiently specific and precise, and its meaning should, therefore, be spelled out in more detail in the section as is done by the amendment."

### Amendments

1966—Subsec. (a). Pub. L. 89-711, § 2(a), (b), substituted "Federal courts" for "State Courts" in the subsection catchline and added subsec. (a).

Subsecs. (b), (c). Pub. L. 89-711, § 2(c), designated the first of the two existing paragraphs of the section as subsec. (b) and the second as subsec. (c).

Subsecs. (d) to (f). Pub. L. 89-711, § 2(d), added subsecs. (d) to (f).

### Section Referred to in Other Sections

This section is referred to in title 18 section 3006A.

### Approval and Effective Date of Rules Governing Section 2254 Cases and Section 2255 Proceedings for United States District Courts

Pub. L. 94-426, § 1, Sept. 28, 1976, 90 Stat. 1334, provided: "That the rules governing section 2254 cases in the United States district courts and the rules governing section 2255 proceedings for the United States district courts, as proposed by the United States Supreme Court, which were delayed by the Act entitled 'An Act to delay the effective date of certain proposed amendments to the Federal Rules of Criminal Procedure and certain other rules promulgated by the United States Supreme Court' (Public Law 94-349), are approved with the amendments set forth in section 2 of this Act and shall take effect as so amended, with respect to petitions under section 2254 and motions under section 2255 of title 28 of the United States Code filed on or after February 1, 1977."

### Postponement of Effective Date of Proposed Rules Governing Proceedings Under this Section and Section 2255 of this Title

Rules and forms governing proceedings under this section and section 2255 of this title proposed by Supreme Court order of Apr. 26, 1976, effective 30 days after adjournment sine die of 94th Congress, or until and to the extent approved by Act of Congress, whichever is earlier, see section 2 of Pub. L. 94-349, set out as a note under section 2071 of this title.

## RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS

**Effective February 1, 1977**

Rule
1. Scope of rules.
2. Petition.
3. Filing petition.
4. Preliminary consideration by judge.
5. Answer; contents.
6. Discovery.
7. Expansion of record.
8. Evidentiary hearing.
9. Delayed or successive petitions.
10. Powers of magistrates.
11. Federal Rules of Civil Procedure; extent of applicability.

APPENDIX OF FORMS

Model form for use in applications for habeas corpus under 28 U.S.C. § 2254.
Model form for use in 28 U.S.C. § 2254 cases involving a Rule 9 issue.

### Effective Date of Rules; Effective Date of 1975 Amendment

Rules governing Section 2254 cases, and the amendments thereto by Pub. L. 94-426, Sept. 28, 1976, 90 Stat. 1334, effective with respect to petitions under section 2254 of this title and motions under section 2255 of this title filed on or after Feb. 1, 1977, see section 1 of Pub. L. 94-426, set out as a note above.

### Rule 1. Scope of Rules

**(a) Applicable to cases involving custody pursuant to a judgment of a state court**

These rules govern the procedure in the United States district courts on applications under 28 U.S.C. § 2254:

(1) by a person in custody pursuant to a judgment of a state court, for a determination that such custody is in violation of the Constitution, laws, or treaties of the United States; and

(2) by a person in custody pursuant to a judgment of either a state or a federal court, who makes application for a determination that custody to which he may be subject in the future under a judgment of a state court will be in violation of the Constitution, laws, or treaties of the United States.

**(b) Other situations**

In applications for habeas corpus in cases not covered by subdivision (a), these rules may be applied at the discretion of the United States district court.

### ADVISORY COMMITTEE NOTE

Rule 1 provides that the habeas corpus rules are applicable to petitions by persons in custody pursuant to a judgment of a state court. See *Preiser* v. *Rodriguez*, 411 U.S. 475, 484 (1973). Whether the rules ought to apply to other situations (*e.g.*, person in active military service, *Glazier* v. *Hackel*, 440 F.2d 592 (9th Cir. 1971); or a reservist called to active duty but not reported, *Hammond* v. *Lenfest*, 398 F.2d 705 (2d Cir. 1968)) is left to the discretion of the court.

The basic scope of habeas corpus is prescribed by statute. 28 U.S.C. § 2241(c) provides that the "writ of habeas corpus shall not extend to a prisoner unless * * * (h)e is *in custody* in violation of the Constitution." 28 U.S.C. § 2254 deals specifically with state custody, providing that habeas corpus shall apply only "in behalf of a person in custody pursuant to a judgment of a state court * * *."

In *Preiser* v. *Rodriguez, supra*, the court said: "It is clear . . . that the essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and that the traditional function of the writ is to secure release from illegal custody." 411 U.S. at 484.

Initially the Supreme Court held that habeas corpus was appropriate only in those situations in which petitioner's claim would, if upheld, result in an immediate release from a present custody. *McNally* v. *Hill*, 293 U.S. 131 (1934). This was changed in *Peyton* v. *Rowe*, 391 U.S. 54 (1968), in which the court held that habeas corpus was a proper way to attack a consecutive sentence to be served in the future, expressing the view that consecutive sentences resulted in present custody under both judgments, not merely the one imposing the first sentence. This view was expanded in *Carafas* v. *LaVallee*, 391 U.S. 234 (1968), to recognize the propriety of habeas corpus in a case in which petitioner was in custody when the petition had been originally filed but had since been unconditionally released from custody.

See also *Preiser* v. *Rodriguez*, 411 U.S. at 486 et seq. Since *Carafas*, custody has been construed more liberally by the courts so as to make a § 2255 motion or habeas corpus petition proper in more situations. "In custody" now includes a person who is: on parole, *Jones* v. *Cunningham*, 371 U.S. 236 (1963); at large on his own recognizance but subject to several conditions pending execution of his sentence, *Hensley* v. *Municipal Court*, 411 U.S. 345 (1973); or released on bail after conviction pending final disposition of his case, *Lefkowitz* v. *Newsome*, 95 S.Ct. 886 (1975). See also *United States* v. *Re*, 372 F.2d 641 (2d Cir.), cert. denied, 388 U.S. 912 (1967) (on probation); *Walker* v. *North Carolina*, 262 F.Supp. 102 (W.D.N.C. 1966), aff'd per curiam, 372 F.2d 129 (4th Cir.), cert. denied, 388 U.S. 917 (1967) (recipient of a conditionally suspended sentence); *Burris* v. *Ryan*, 397 F.2d 553 (7th Cir. 1968); *Marden* v. *Purdy*, 409 F.2d 784 (5th Cir. 1969) (free on bail); *United States ex rel. Smith* v. *Dibella*, 314 F.Supp. 446 (D.Conn. 1970) (release on own recognizance); *Choung* v. *California*, 320 F.Supp. 625 (E.D.Cal. 1970) (federal stay of state court sentence); *United States ex rel. Meadows* v. *New York*, 426 F.2d 1176 (2d Cir. 1970), cert. denied, 401 U.S. 941 (1971) (subject to parole detainer warrant); *Capler* v. *City of Greenville*, 422 F.2d 299 (5th Cir. 1970) (released on appeal bond); *Glover* v. *North Carolina*, 301 F.Supp. 364 (E.D.N.C. 1969) (sentence served, but as convicted felon disqualified from engaging in several activities).

The courts are not unanimous in dealing with the above situations, and the boundaries of custody remain somewhat unclear. In *Morgan* v. *Thomas*, 321 F.Supp. 565 (S.D.Miss. 1970), the court noted:

> It is axiomatic that actual physical custody or restraint is not required to confer habeas jurisdiction. Rather, the term is synonymous with restraint of liberty. The real question is how much restraint of one's liberty is necessary before the right to apply for the writ comes into play. * * *
>
> It is clear however, that something more than moral restraint is necessary to make a case for habeas corpus.
>
> 321 F.Supp. at 573

*Hammond* v. *Lenfest*, 398 F.2d 705 (2d Cir. 1968), reviewed prior "custody" doctrine and reaffirmed a generalized flexible approach to the issue. In speaking about 28 U.S.C. § 2241, the first section in the habeas corpus statutes, the court said:

> While the language of the Act indicates that a writ of habeas corpus is appropriate only when a petitioner is "in custody," * * * the Act "does not attempt to mark the boundaries of 'custody' nor in any way other than by use of that word attempt to limit the situations in which the writ can be used." * * * And, recent Supreme Court decisions have made clear that "[i]t [habeas corpus] is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty." * * * "[B]esides physical imprisonment, there are other restraints on a man's liberty, restraints not shared by the public generally, which have been thought sufficient in the English-speaking world to support the issuance of habeas corpus."
>
> 398 F.2d at 710-711

There is, as of now, no final list of the situations which are appropriate for habeas corpus relief. It is not the intent of these rules or notes to define or limit "custody."

It is, however, the view of the Advisory Committee that claims of improper conditions of custody or confinement (not related to the propriety of the custody itself), can better be handled by other means such as 42 U.S.C. § 1983 and other related statutes. In *Wilwording* v. *Swanson*, 404 U.S. 249 (1971), the court treated a habeas corpus petition by a state prisoner challenging the conditions of confinement as a claim for relief under 42 U.S.C. § 1983, the Civil Rights Act. Compare *Johnson* v. *Avery*, 393 U.S. 483 (1969).

The distinction between duration of confinement and conditions of confinement may be difficult to draw. Compare *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973), with *Clutchette* v. *Procunier*, 497 F.2d 809 (9th Cir. 1974), modified, 510 F.2d 613 (1975).

## Rule 2. Petition

**(a) Applicants in present custody**

If the applicant is presently in custody pursuant to the state judgment in question, the application shall be in the form of a petition for a writ of habeas corpus in which the state officer having custody of the applicant shall be named as respondent.

**(b) Applicants subject to future custody**

If the applicant is not presently in custody pursuant to the state judgment against which he seeks relief but may be subject to such custody in the future, the application shall be in the form of a petition for a writ of habeas corpus with an added prayer for appropriate relief against the judgment which he seeks to attack. In such a case the officer having present custody of the applicant and the attorney general of the state in which the judgment which he seeks to attack was entered shall each be named as respondents.

**(c) Form of petition**

The petition shall be in substantially the form annexed to these rules, except that any district court may by local rule require that petitions filed with it shall be in a form prescribed by the local rule. Blank petitions in the prescribed form shall be made available without charge by the clerk of the district court to applicants upon their request. It shall specify all the grounds for relief which are available to the petitioner and of which he has or by the exercise of reasonable diligence should have knowledge and shall set forth in summary form the facts supporting each of the grounds thus specified. It shall also state the relief requested. The petition shall be typewritten or legibly handwritten and shall be signed and sworn to by the petitioner.

**(d) Petition to be directed to judgments of one court only**

A petition shall be limited to the assertion of a claim for relief against the judgment or judgments of a single state court (sitting in a county or other appropriate political subdivision). If a petitioner desires to attack the validity of the judgments of two or more state courts under which he is in custody or may be subject to future custody, as the case may be, he shall do so by separate petitions.

**(e) Return of insufficient petition**

If a petition received by the clerk of a district court does not substantially comply with the requirements of rule 2 or rule 3, it may be returned to the petitioner, if a judge of the court so directs, together with a statement of the reason for its return. The clerk shall retain a copy of the petition.

(As amended Pub. L. 94–426, § 2(1), (2), Sept. 28, 1976, 90 Stat. 1334.)

### Advisory Committee Note

Rule 2 describes the requirements of the actual petition, including matters relating to its form, contents, scope, and sufficiency. The rule provides more specific guidance for a petitioner and the court than 28 U.S.C. § 2242, after which it is patterned.

Subdivision (a) provides that an applicant challenging a state judgment, pursuant to which he is presently in custody, must make his application in the form of a petition for a writ of habeas corpus. It also requires that the state officer having custody of the applicant be named as respondent. This is consistent with 28 U.S.C. § 2242, which says in part, [Application for a writ of habeas corpus] shall allege * * * the name of the person who has custody over [the applicant] * * *." The proper person to be served in the usual case is either the warden of the institution in which the petitioner is incarcerated (*Sanders* v. *Bennett*, 148 F.2d 19 (D.C.Cir. 1945)) or the chief officer in charge of state penal institutions.

Subdivision (b) prescribes the procedure to be used for a petition challenging a judgment under which the petitioner will be subject to custody in the future. In this event the relief sought will usually not be released from present custody, but rather for a declaration that the judgment being attacked is invalid. Subdivision (b) thus provides for a prayer for "appropriate relief." It is also provided that the attorney general of the state of the judgment as well as the state officer having actual custody of the petitioner shall be named as respondents. This is appropriate because no one will have custody of the petitioner in the state of the judgment being attacked, and the habeas corpus action will usually be defended by the attorney general. The attorney general is in the best position to inform the court as to who the proper party respondent is. If it is not the attorney general, he can move for a substitution of party.

Since the concept of "custody" requisite to the consideration of a petition for habeas corpus has been enlarged significantly in recent years, it may be worthwhile to spell out the various situations which might arise and who should be named as respondent(s) for each situation.

(1) The applicant is in jail, prison, or other actual physical restraint due to the state action he is attacking. The named respondent shall be the state officer who has official custody of the petitioner (for example, the warden of the prison).

(2) The applicant is on probation or parole due to the state judgment he is attacking. The named respondents shall be the particular probation or parole officer responsible for supervising the applicant, and the official in charge of the parole or probation agency, or the state correctional agency, as appropriate.

(3) The applicant is in custody in any other manner differing from (1) and (2) above due to the effects of the state action he seeks relief from. The named respondent should be the attorney general of the state wherein such action was taken.

(4) The applicant is in jail, prison, or other actual physical restraint but is attacking a state action which will cause him to be kept in custody in the future rather than the government action under which he is presently confined. The named respondents shall be the state or federal officer who has official custody of him at the time the petition is filed and the attorney general of the state whose action subjects the petitioner to future custody.

(5) The applicant is in custody, although not physically restrained, and is attacking a state action which will result in his future custody rather than the government action out of which his present custody arises. The named respondent(s) shall be the attorney general of the state whose action subjects the petitioner to future custody, as well as the government officer who has present official custody of the petitioner if there is such an officer and his identity is ascertainable.

In any of the above situations the judge may require or allow the petitioner to join an additional or different party as a respondent if to do so would serve the ends of justice.

As seen in rule 1 and paragraphs (4) and (5) above, these rules contemplate that a petitioner currently in federal custody will be permitted to apply for habeas relief from a state restraint which is to go into effect in the future. There has been disagreement in the courts as to whether they have jurisdiction of the habeas application under these circumstances (compare *Piper* v. *United States*, 306 F.Supp. 1259 (D.Conn. 1969), with *United States ex rel. Meadows* v. *New York*, 426 F.2d 1176 (2d Cir. 1970), cert. denied, 401 U.S. 941 (1971)). This rule seeks to make clear that they do have such jurisdiction.

Subdivision (c) provides that unless a district court requires otherwise by local rule, the petition must be in the form annexed to these rules. Having a standard prescribed form has several advantages. In the past, petitions have frequently contained mere conclusions of law, unsupported by any facts. Since it is the relationship of the facts to the claim asserted that is important, these petitions were obviously deficient. In addition, lengthy and often illegible petitions, arranged in no logical order, were submitted to judges who have had to spend hours deciphering them. For example, in *Passic* v. *Michigan*, 98 F.Supp. 1015, 1016 (E.D.Mich. 1951), the court dismissed a petition for habeas corpus, describing it as "two thousand pages of irrational, prolix and redundant pleadings * * *."

Administrative convenience, of benefit to both the court and the petitioner, results from the use of a prescribed form. Judge Hubert L. Will briefly described the experience with the use of a standard form in the Northern District of Illinois:

> Our own experience, though somewhat limited, has been quite satisfactory. * * *
>
> In addition, [petitions] almost always contain the necessary basic information * * *. Very rarely do we get the kind of hybrid federal-state habeas corpus petition with civil rights allegations thrown in which were not uncommon in the past. * * * [W]hen a real constitutional issue is raised it is quickly apparent * * *.

33 F.R.D. 363, 384

Approximately 65 to 70% of all districts have adopted forms or local rules which require answers to essentially the same questions as contained in the standard form annexed to these rules. All courts using forms have indicated the petitions are time-saving and more legible. The form is particularly helpful in getting information about whether there has been an exhaustion of state remedies or, at least, where that information can be obtained.

The requirement of a standard form benefits the petitioner as well. His assertions are more readily apparent, and a meritorious claim is more likely to be properly raised and supported. The inclusion in the form of the ten most frequently raised grounds in habeas corpus petitions is intended to encourage the applicant to raise all his asserted grounds in one petition. It may better enable him to recognize if an issue he seeks to raise is cognizable under habeas corpus and hopefully inform him of those issues as to which he must first exhaust his state remedies.

Some commentators have suggested that the use of forms is of little help because the questions usually are too general, amounting to little more than a restatement of the statute. They contend the blanks permit a prisoner to fill in the same ambiguous answers he would have offered without the aid of a form. See Comment, Developments in the Law—Federal Habeas Corpus, 83 Harv.L.Rev. 1038, 1177–1178 (1970). Certainly, as long as the statute requires factual pleading, the adequacy of a petition will continue to be affected largely by the petitioner's intelligence and the legal advice available to him. On balance, however, the use of forms has contributed enough to warrant mandating their use.

Giving the petitioner a list of often-raised grounds may, it is said, encourage perjury. See Comment, Developments in the Law—Federal Habeas Corpus, 83 Harv.L.Rev. 1038, 1178 (1970). Most inmates are aware of, or have access to, some common constitutional grounds for relief. Thus, the risk of perjury is not likely to be substantially increased and the benefit of the list for some inmates seems sufficient to outweigh any slight risk that perjury will increase. There is a penalty for perjury, and this would seem the most appropriate way to try to discourage it.

Legal assistance is increasingly available to inmates either through paraprofessional programs involving law students or special programs staffed by members of the bar. See Jacob and Sharma, Justice After Trial: Prisoners' Need for Legal Services in the Criminal-Correctional Process, 18 Kan.L.Rev. 493 (1970). In these situations, the prescribed form can be filled out more competently, and it does serve to ensure a degree of uniformity in the manner in which habeas corpus claims are presented.

Subdivision (c) directs the clerk of the district court to make available to applicants upon request, without charge, blank petitions in the prescribed form.

Subdivision (c) also requires that all available grounds for relief be presented in the petition, including those grounds of which, by the exercise of reasonable diligence, the petitioner should be aware. This is reinforced by rule 9(b), which allows dismissal of a second petition which fails to allege new grounds or, if new grounds are alleged, the judge finds an inexcusable failure to assert the ground in the prior petition.

Both subdivision (c) and the annexed form require a legibly handwritten or typewritten petition. As required by 28 U.S.C. § 2242, the petition must be signed and sworn to by the petitioner (or someone acting in his behalf).

Subdivision (d) provides that a single petition may assert a claim only against the judgment or judgments of a single state court (*i. e.*, a court of the same county or judicial district or circuit). This permits, but does not require, an attack in a single petition on judgments based upon separate indictments or on separate counts even though sentences were imposed on separate days by the same court. A claim against a judgment of a court of a different political subdivision must be raised by means of a separate petition.

Subdivision (e) allows the clerk to return an insufficient petition to the petitioner, and it must be returned if the clerk is so directed by a judge of the court. Any failure to comply with the requirements of rule 2 or 3 is grounds for insufficiency. In situations where there may be arguable noncompliance with another rule, such as rule 9, the judge, not the clerk, must make the decision. If the petition is returned it must be accompanied by a statement of the reason for its return. No petitioner should be left to speculate as to why or in what manner his petition failed to conform to these rules.

Subdivision (e) also provides that the clerk shall retain one copy of the insufficient petition. If the prisoner files another petition, the clerk will be in a better position to determine the sufficiency of the new petition. If the new petition is insufficient, comparison with the prior petition may indicate whether the prisoner has failed to understand the clerk's prior explanation for its insufficiency, so that the clerk can make another, hopefully successful, attempt at transmitting this information to the petitioner. If the petitioner insists that the original petition was in compliance with the rules, a copy of the original petition is available for the consideration of the judge. It is probably better practice to make a photocopy of a petition which can be corrected by the petitioner, thus saving the petitioner the task of completing an additional copy.

### AMENDMENTS

1976—Subsec. (c). Pub. L. 94-426, § 2(1), inserted "substantially" following "The petition shall be in", and struck out requirement that the petition follow the prescribed form.

Subsec. (e). Pub. L. 94-426, § 2(2), inserted "substantially" following "district court does not", and struck out provision which permitted the clerk to return a petition for noncompliance without a judge so directing.

## Rule 3. Filing Petition

**(a) Place of filing; copies; filing fee**

A petition shall be filed in the office of the clerk of the district court. It shall be accompanied by two conformed copies thereof. It shall also be accompanied by the filing fee prescribed by law unless the petitioner applies for and is given leave to prosecute the petition in forma pauperis. If the petitioner desires to prosecute the petition in forma pauperis, he shall file the affidavit required by 28 U.S.C. § 1915. In all such cases the petition shall also be accompanied by a certificate of the warden or other appropriate officer of the institution in which the petitioner is confined as to the amount of money or securities on deposit to the petitioner's credit in any account in the institution, which certificate may be considered by the court in acting upon his application for leave to proceed in forma pauperis.

**(b) Filing and service**

Upon receipt of the petition and the filing fee, or an order granting leave to the petitioner to proceed in forma pauperis, and having ascertained that the petition appears on its face to comply with rules 2 and 3, the clerk of the district court shall file the petition and enter it on the docket in his office. The filing of the petition shall not require the respondent to answer the petition or otherwise move with respect to it unless so ordered by the court.

### Advisory Committee Note

Rule 3 sets out the procedures to be followed by the petitioner and the court in filing the petition. Some of its provisions are currently dealt with by local rule or practice, while others are innovations. Subdivision (a) specifies the petitioner's responsibilities. It requires that the petition, which must be accompanied by two conformed copies thereof, be filed in the office of the clerk of the district court. The petition must be accompanied by the filing fee prescribed by law (presently $5; see 28 U.S.C. § 1914(a)), unless leave to prosecute the petition in forma pauperis is applied for and granted. In the event the petitioner desires to prosecute the petition in forma pauperis, he must file the affidavit required by 28 U.S.C. § 1915, together with a certificate showing the amount of funds in his institutional account.

Requiring that the petition be filed in the office of the clerk of the district court provides an efficient and uniform system of filing habeas corpus petitions.

Subdivision (b) requires the clerk to file the petition. If the filing fee accompanies the petition, it may be filed immediately, and, if not, it is contemplated that prompt attention will be given to the request to proceed in forma pauperis. The court may delegate the issuance of the order to the clerk in those cases in which it is clear from the petition that there is full compliance with the requirements to proceed in forma pauperis.

Requiring the copies of the petition to be filed with the clerk will have an impact not only upon administrative matters, but upon more basic problems as well. In districts with more than one judge, a petitioner under present circumstances may send a petition to more than one judge. If no central filing system exists for each district, two judges may independently take different action on the same petition. Even if the action taken is consistent, there may be needless duplication of effort.

The requirement of an additional two copies of the form of the petition is a current practice in many courts. An efficient filing system requires one copy for use by the court (central file), one for the respondent (under 3(b), the respondent receives a copy of the petition whether an answer is required or not), and one for petitioner's counsel, if appointed. Since rule 2 provides that blank copies of the petition in the prescribed form are to be furnished to the applicant free of charge, there should be no undue burden created by this requirement.

Attached to copies of the petition supplied in accordance with rule 2 is an affidavit form for the use of petitioners desiring to proceed in forma pauperis. The form requires information concerning the petitioner's financial resources.

In forma pauperis cases, the petition must also be accompanied by a certificate indicating the amount of funds in the petitioner's institution account. Usually the certificate will be from the warden. If the petitioner is on probation or parole, the court might want to require a certificate from the supervising officer. Petitions by persons on probation or parole are not numerous enough, however, to justify making special provision for this situation in the text of the rule.

The certificate will verify the amount of funds credited to the petitioner in an institution account. The district court may by local rule require that any amount credited to the petitioner, in excess of a stated maximum, must be used for the payment of the filing fee. Since prosecuting an action in forma pauperis is a privilege (see *Smart* v. *Heinze*, 347 F.2d 114, 116 (9th Cir. 1965)), it is not to be granted when the petitioner has sufficient resources.

Subdivision (b) details the clerk's duties with regard to filing the petition. If the petition does not appear on its face to comply with the requirements of rules 2 and 3, it may be returned in accordance with rule 2(e). If it appears to comply, it must be filed and entered on the docket in the clerk's office. However, under this subdivision the respondent is not required to answer or otherwise move with respect to the petition unless so ordered by the court.

## Rule 4. Preliminary Consideration by Judge

The original petition shall be presented promptly to a judge of the district court in accordance with the procedure of the court for the assignment of its business. The petition shall be examined promptly by the judge to whom it is assigned. If it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the petitioner to be notified. Otherwise the judge shall order the respondent to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate. In every case a copy of the petition and any order shall be served by certified mail on the respondent and the attorney general of the state involved.

### Advisory Committee Note

Rule 4 outlines the options available to the court after the petition is properly filed. The petition must be promptly presented to and examined by the judge to whom it is assigned. If it plainly appears from the face of the petition and any exhibits attached thereto that the petitioner is not entitled to relief in the district court, the judge must enter an order summarily dismissing the petition and cause the petitioner to be notified. If summary dismissal is not ordered, the judge must order the respondent to file an answer or to otherwise plead to the petition within a time period to be fixed in the order.

28 U.S.C. § 2243 requires that the writ shall be awarded, or an order to show cause issued, "unless it appears from the application that the applicant or person detained is not entitled thereto." Such consideration may properly encompass any exhibits attached to the petition, including, but not limited to, transcripts, sentencing records, and copies of state court opinions. The judge may order any of these items for his consideration if they are not yet included with the petition. See 28 U.S.C. § 753(f) which authorizes payment for transcripts in habeas corpus cases.

It has been suggested that an answer should be required in every habeas proceeding, taking into account the usual petitioner's lack of legal expertise and the important functions served by the return. See Developments in the Law—Federal Habeas Corpus, 83 Harv.L.Rev. 1038, 1178 (1970). However, under § 2243 it is the duty of the court to screen out frivolous applications and eliminate the burden that would be placed on the respondent by ordering an unnecessary answer. *Allen* v. *Perini*, 424 F.2d 134, 141 (6th Cir. 1970). In addition, "notice" pleading is not sufficient, for the petition is expected to state facts that point to a "real possibility of constitutional error." See *Aubut* v. *State of Maine*, 431 F.2d 688, 689 (1st Cir. 1970).

In the event an answer is ordered under rule 4, the court is accorded greater flexibility than under § 2243 in determining within what time period an answer must be made. Under § 2243, the respondent must make a return within three days after being so ordered, with additional time of up to forty days allowed under the Federal Rules of Civil Procedure, Rule 81(a)(2), for good cause. In view of the widespread state of work overload in prosecutors' offices (see, *e. g., Allen*, 424 F.2d at 141), additional time is granted in some jurisdictions as a matter of course. Rule 4, which contains no fixed time requirement, gives the court the discretion to take into account various factors such as the respondent's workload and the availability of transcripts before determining a time within which an answer must be made.

Rule 4 authorizes the judge to "take such other action as the judge deems appropriate." This is designed to afford the judge flexibility in a case where either dismissal or an order to answer may be inappropriate. For example, the judge may want to authorize the respondent to make a motion to dismiss based upon information furnished by respondent, which may show that petitioner's claims have already been decided on the merits in a federal court; that petitioner has failed to exhaust state remedies; that the petitioner is not in custody within the meaning of 28 U.S.C. § 2254; or that a decision in the matter is pending in state court. In these situations, a dismissal may be called for on procedural grounds, which may avoid burdening the respondent with the necessity of filing an answer on the substantive merits of the petition. In other situations, the judge may want to consider a motion from respondent to make the petition more certain. Or the judge may want to dismiss some allegations in the petition, requiring the respondent to answer only those claims which appear to have some arguable merit.

Rule 4 requires that a copy of the petition and any order be served by certified mail on the respondent and the attorney general of the state involved. See 28 U.S.C. § 2252. Presently, the respondent often does not receive a copy of the petition unless the court directs an answer under 28 U.S.C. § 2243. Although the attorney general is served, he is not required to answer if it is more appropriate for some other agency to do so. Although the rule does not specifically so provide, it is assumed that copies of the court orders to respondent will be mailed to petitioner by the court.

## Rule 5. Answer; Contents

The answer shall respond to the allegations of the petition. In addition it shall state whether the petitioner has exhausted his state remedies including any post-conviction remedies available to him under the statutes or procedural rules of the state and including also his right of appeal both from the judgment of conviction and from any adverse judgment or order in the post-conviction proceeding. The answer shall indicate what transcripts (of pretrial, trial, sentencing, and post-conviction proceedings) are available, when they can be furnished, and also what proceedings have been recorded and not transcribed. There shall be attached to the answer such portions of the transcripts as the answering party deems relevant. The court on its own motion or upon request of the petitioner may order that further portions of the existing transcripts be furnished or that certain portions of the non-transcribed proceedings be transcribed and furnished. If a transcript is neither available nor procurable, a narrative summary of the evidence may be submitted. If the petitioner appealed from the judgment of conviction or from an adverse judgment or order in a post-conviction proceeding, a copy of the petitioner's brief on appeal and of the opinion of the appellate court, if any, shall also be filed by the respondent with the answer.

### ADVISORY COMMITTEE NOTE

Rule 5 details the contents of the "answer". (This is a change in terminology from "return," which is still used below when referring to prior practice.) The answer plays an obviously important rule in a habeas proceeding:

> The return serves several important functions: it permits the court and the parties to uncover quickly the disputed issues; it may reveal to the petitioner's attorney grounds for release that the petitioner did not know; and it may demonstrate that the petitioner's claim is wholly without merit.
>
> Developments in the Law—Federal Habeas Corpus, 83 Harv.L.Rev. 1083, 1178 (1970).

The answer must respond to the allegations of the petition. While some districts require this by local rule (see, *e.g.*, E.D.N.C.R. 17(B)), under 28 U.S.C. § 2243 little specificity is demanded. As a result, courts occasionally receive answers which contain only a statement certifying the true cause of detention, or a series of delaying motions such as motions to dismiss. The requirement of the proposed rule that the "answer shall respond to the allegations of the petition" is intended to ensure that a responsive pleading will be filed and thus the functions of the answer fully served.

The answer must also state whether the petitioner has exhausted his state remedies. This is a prerequisite to eligibility for the writ under 28 U.S.C. § 2254(b) and applies to every ground the petitioner raises. Most form petitions now in use contain questions requiring information relevant to whether the petitioner has exhausted his remedies. However, the exhaustion requirement is often not understood by the unrepresented petitioner. The attorney general has both the legal expertise and access to the record and thus is in a much better position to inform the court on the matter of exhaustion of state remedies. An alleged failure to exhaust state remedies as to any ground in the petition may be raised by a motion by the attorney general, thus avoiding the necessity of a formal answer as to that ground.

The rule requires the answer to indicate what transcripts are available, when they can be furnished, and also what proceedings have been recorded and not transcribed. This will serve to inform the court and petitioner as to what factual allegations can be checked against the actual transcripts. The transcripts include pretrial transcripts relating, for example, to pretrial motions to suppress; transcripts of the trial or guilty plea proceeding; and transcripts of any post-conviction proceedings which may have taken place. The respondent is required to furnish those portions of the transcripts which he believes relevant. The court may order the furnishing of additional portions of the transcripts upon the request of petitioner or upon the court's own motion.

Where transcripts are unavailable, the rule provides that a narrative summary of the evidence may be submitted.

Rule 5 (and the general procedure set up by this entire set of rules) does not contemplate a traverse to the answer, except under special circumstances. See advisory committee note to rule 9. Therefore, the old common law assumption of verity of the allegations of a return until impeached, as codified in 28 U.S.C. § 2248, is no longer applicable. The meaning of the section, with its exception to the assumption "to the extent that the judge finds from the evidence that they (the allegations) are not true," has given attorneys and courts a great deal of difficulty. It seems that when the petition and return pose an issue of fact, no traverse is required; *Stewart* v. *Overholser*, 186 F.2d 339 (D.C. Cir. 1950).

> We read § 2248 of the Judicial Code as not requiring a traverse when a factual issue has been clearly framed by the petition and the return or answer. This section provides that the allegations of a return or answer to an order to show cause shall be accepted as true if not traversed, except to the extent the judge finds from the evidence that they are not true.

> This contemplates that where the petition and return or answer do present an issue of fact material to the legality of detention, evidence is required to resolve that issue despite the absence of a traverse. This reference to evidence assumes a hearing on issues raised by the allegations of the petition and the return or answer to the order to show cause.

186 F.2d at 342, n. 5

In actual practice, the traverse tends to be a mere pro forma refutation of the return, serving little if any expository function. In the interests of a more streamlined and manageable habeas corpus procedure, it is not required except in those instances where it will serve a truly useful purpose. Also, under rule 11 the court is given the discretion to incorporate Federal Rules of Civil Procedure when appropriate, so civil rule 15(a) may be used to allow the petitioner to amend his petition when the court feels this is called for by the contents of the answer.

Rule 5 does not indicate who the answer is to be served upon, but it necessarily implies that it will be mailed to the petitioner (or to his attorney if he has one). The number of copies of the answer required is left to the court's discretion. Although the rule requires only a copy of petitioner's brief on appeal, respondent is free also to file a copy of respondent's brief. In practice, courts have found it helpful to have a copy of respondent's brief.

## Rule 6. Discovery

**(a) Leave of court required**

A party shall be entitled to invoke the processes of discovery available under the Federal Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise. If necessary for effective utilization of discovery procedures, counsel shall be appointed by the judge for a petitioner who qualifies for the appointment of counsel under 18 U.S.C. § 3006A(g).

**(b) Requests for discovery**

Requests for discovery shall be accompanied by a statement of the interrogatories or requests for admission and a list of the documents, if any, sought to be produced.

**(c) Expenses**

If the respondent is granted leave to take the deposition of the petitioner or any other person the judge may as a condition of taking it direct that the respondent pay the expenses of travel and subsistence and fees of counsel for the petitioner to attend the taking of the deposition.

### ADVISORY COMMITTEE NOTE

This rule prescribes the procedures governing discovery in habeas corpus cases. Subdivision (a) provides that any party may utilize the processes of discovery available under the Federal Rules of Civil Procedure (rules 26-37) if, and to the extent that, the judge allows. It also provides for the appointment of counsel for a petitioner who qualifies for this when counsel is necessary for effective utilization of discovery procedures permitted by the judge.

Subdivision (a) is consistent with *Harris* v. *Nelson*, 394 U.S. 286 (1969). In that case the court noted,

> [I]t is clear that there was no intention to extend to habeas corpus, as a matter of right, the broad discovery provisions * * * of the new [Federal Rules of Civil Procedure].

394 U.S. at 295

However, citing the lack of methods for securing information in habeas proceedings, the court pointed to an alternative.

> Clearly, in these circumstances * * * the courts may fashion appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with judicial usage. * * * Their authority is expressly confirmed in the All Writs Act, 28 U.S.C. § 1651.

394 U.S. at 299

The court concluded that the issue of discovery in habeas corpus cases could best be dealt with as part of an effort to provide general rules of practice for habeas corpus cases:

> In fact, it is our view that the rulemaking machinery should be invoked to formulate rules of practice with respect to federal habeas corpus and § 2255 proceedings, on a comprehensive basis and not merely one confined to discovery. The problems presented by these proceedings are materially different from those dealt with in the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure, and reliance upon usage and the opaque language of Civil Rule 81(a)(2) is transparently inadequate. In our view the results of a meticulous formulation and adoption of special rules for federal habeas corpus and § 2255 proceedings would promise much benefit.

394 U.S. at 301 n. 7

Discovery may, in appropriate cases, aid in developing facts necessary to decide whether to order an evidentiary hearing or to grant the writ following an evidentiary hearing:

> We are aware that confinement sometimes induces fantasy which has its basis in the paranoia of prison rather than in fact. But where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry. Obviously, in exercising this power, the court may utilize familiar procedures, as appropriate, whether these are found in the civil or criminal rules or elsewhere in the "usages and principles."

Granting discovery is left to the discretion of the court, discretion to be exercised where there is a showing of good cause why discovery should be allowed. Several commentators have suggested that at least some discovery should be permitted without leave of court. It is argued that the courts will be burdened with weighing the propriety of requests to which the discovered party has no objection. Additionally, the availability of protective orders under Fed.R.Civ.R., Rules 30(b) and 31(d) will provide the necessary safeguards. See Developments in the Law—Federal Habeas Corpus, 83 Harv.L.Rev. 1038, 1186-87 (1970); Civil Discovery in Habeas Corpus, 67 Colum.L.Rev. 1296, 1310 (1967).

Nonetheless, it is felt the requirement of prior court approval of all discovery is necessary to prevent abuse, so this requirement is specifically mandated in the rule.

While requests for discovery in habeas proceedings normally follow the granting of an evidentiary hearing, there may be instances in which discovery would be appropriate beforehand. Such an approach was advocated in *Wagner* v. *United States*, 418 F.2d 618, 621 (9th Cir. 1969), where the opinion stated the trial court could permit interrogatories, provide for deposing witnesses, "and take such other prehearing steps as may be appropriate." While this was an action under § 2255, the reasoning would apply equally well to petitions by state prisoners. Such pre-hearing discovery may show an evidentiary hearing to be unnecessary, as when there are "no disputed issues of law or fact." 83 Harv. L.Rev. 1038, 1181 (1970). The court in Harris alluded to such a possibility when it said "the court may * * * authorize such proceedings with respect to development, *before or in conjunction with the hearing* of the facts * * *." [emphasis added] 394 U.S. at 300. Such pre-hearing discovery, like all discovery under rule 6, requires leave of court. In addition, the provisions in rule 7 for the use of an expanded record may eliminate much of the need for this type of discovery. While probably not as frequently sought or granted as discovery in conjunction with a hearing, it may nonetheless serve a valuable function.

In order to make pre-hearing discovery meaningful, subdivision (a) provides that the judge should appoint counsel for a petitioner who is without counsel and qualifies for appointment when this is necessary for the proper utilization of discovery procedures. Rule 8 provides for the appointment of counsel at the evidentiary hearing stage (see rule 8(b) and advisory committee note), but this would not assist the petitioner who seeks to utilize discovery to stave off dismissal of his petition (see rule 9 and advisory committee note) or to demonstrate that an evidentiary hearing is necessary. Thus, if the judge grants a petitioner's request for discovery prior to making a decision as to the necessity for an evidentiary hearing, he should determine whether counsel is necessary for the effective utilization of such discovery and, if so, appoint counsel for the petitioner if the petitioner qualifies for such appointment.

This rule contains very little specificity as to what types and methods of discovery should be made available to the parties in a habeas proceeding, or how, once made available, these discovery procedures should be administered. The purpose of this rule is to get some experience in how discovery would work in actual practice by letting district court judges fashion their own rules in the context of individual cases. When the results of such experience are available it would be desirable to consider whether further, more specific codification should take place.

Subdivision (b) provides for judicial consideration of all matters subject to discovery. A statement of the interrogatories, or requests for admission sought to be answered, and a list of any documents sought to be produced, must accompany a request for discovery. This is to advise the judge of the necessity for discovery and enable him to make certain that the inquiry is relevant and appropriately narrow.

Subdivision (c) refers to the situation where the respondent is granted leave to take the deposition of the petitioner or any other person. In such a case the judge may direct the respondent to pay the expenses and fees of counsel for the petitioner to attend the taking of the deposition, as a condition granting the respondent such leave. While the judge is not required to impose this condition subdivision (c) will give the court the means to do so. Such a provision affords some protection to the indigent petitioner who may be prejudiced by his inability to have counsel, often court-appointed, present at the taking of a deposition. It is recognized that under 18 U.S.C. § 3006A(g), court-appointed counsel in a § 2254 proceeding is entitled to receive up to $250 and reimbursement for expenses reasonably incurred. (Compare Fed.R. Crim.P. 15(c).) Typically, however, this does not adequately reimburse counsel if he must attend the taking of depositions or be involved in other pre-hearing proceedings. Subdivision (c) is intended to provide additional funds, if necessary, to be paid by the state government (respondent) to petitioner's counsel.

Although the rule does not specifically so provide, it is assumed that a petitioner who qualifies for the appointment of counsel under 18 U.S.C. § 3006A(g) and is granted leave to take a deposition will be allowed witness costs. This will include recording and transcription of the witness's statement. Such costs are payable pursuant to 28 U.S.C. § 1825. See Opinion of Comptroller General, February 28, 1974.

Subdivision (c) specifically recognizes the right of the respondent to take the deposition of the petitioner. Although the petitioner could not be called to testify against his will in a criminal trial, it is felt the nature of the habeas proceeding, along with the safeguards accorded by the Fifth Amendment and the presence of counsel, justify this provision. See 83 Harv.L.Rev. 1038, 1183–84 (1970).

### Rule 7. Expansion of Record

**(a) Direction for expansion**

If the petition is not dismissed summarily the judge may direct that the record be expanded by the parties by the inclusion of additional materials relevant to the determination of the merits of the petition.

**(b) Materials to be added**

The expanded record may include, without limitation, letters predating the filing of the petition in the district court, documents, exhibits, and answers under oath, if so directed, to written interrogatories propounded by the judge. Affidavits may be submitted and considered as a part of the record.

**(c) Submission to opposing party**

In any case in which an expanded record is directed, copies of the letters, documents, exhibits, and affidavits proposed to be included shall be submitted to the party against whom they are to be offered, and he shall be afforded an opportunity to admit or deny their correctness.

**(d) Authentication**

The court may require the authentication of any material under subdivision (b) or (c).

#### ADVISORY COMMITTEE NOTE

This rule provides that the judge may direct that the record be expanded. The purpose is to enable the judge to dispose of some habeas petitions not dismissed on the pleadings, without the time and expense required for an evidentiary hearing. An expanded record may also be helpful when an evidentiary hearing is ordered.

The record may be expanded to include additional material relevant to the merits of the petition. While most petitions are dismissed either summarily or after a response has been made, of those that remain, by far the majority require an evidentiary hearing. In the fiscal year ending June 30, 1970, for example, of 8,423 § 2254 cases terminated, 8,231 required court action. Of these, 7,812 were dismissed before a prehearing conference and 469 merited further court action (*e.g.*, expansion of the record, prehearing conference, or an evidentiary hearing). Of the remaining 469 cases, 403 required an evidentiary hearing, often time-consuming, costly, and, at least occasionally, unnecessary. See Director of the Administrative Office of the United States Courts, Annual Report, 245a–245c (table C4) (1970). In some instances these hearings were necessitated by slight omissions in the state record which might have been cured by the use of an expanded record.

Authorizing expansion of the record will, hopefully, eliminate some unnecessary hearings. The value of this approach was articulated in *Raines* v. *United States*, 423 F.2d 526, 529–530 (4th Cir. 1970):

> Unless it is clear from the pleadings and the files and records that the prisoner is entitled to no relief, the statute makes a hearing mandatory. We think there is a permissible intermediate step that may avoid the necessity for an expensive and time consuming evidentiary hearing in every Section 2255 case. It may instead be perfectly appropriate, depending upon the nature of the allegations, for the district court to proceed by requiring that the record be expanded to include letters, documentary evidence, and, in an appropriate case, even affidavits. *United States* v. *Carlino*, 400 F.2d 56 (2nd Cir. 1968); *Mirra* v. *United States*, 379 F.2d 782 (2nd Cir. 1967); *Accardi* v. *United States*, 379 F.2d 312 (2nd Cir. 1967). When the issue is one of credibility, resolution on the basis of affidavits can rarely be conclusive, but that is not to say they may not be helpful.

In *Harris* v. *Nelson*, 394 U.S. 286, 300 (1969), the court said:

> At any time in the proceedings * * * *either on* [*the court's*] *own motion* or upon cause shown by the petitioner, it may issue such writs and take or authorize such proceedings * * * *before* or in conjunction with the hearing of the facts * * * [emphasis added]

Subdivision (b) specifies the materials which may be added to the record. These include, without limitation, letters predating the filing of the petition in the district court, documents, exhibits, and answers under oath directed to written interrogatories propounded by the judge. Under this subdivision affidavits may be submitted and considered part of the record. Subdivision (b) is consistent with 28 U.S.C. §§ 2246 and 2247 and the decision in *Raines* with regard to types of material that may be considered upon application for a writ of habeas corpus. See *United States* v. *Carlino*, 400 F.2d 56, 58 (2d Cir. 1968), and *Machibroda* v. *United States*, 368 U.S. 487 (1962).

Under subdivision (c) all materials proposed to be included in the record must be submitted to the party against whom they are to be offered.

Under subdivision (d) the judge can require authentication if he believes it desirable to do so.

### Rule 8. Evidentiary Hearing

**(a) Determination by court**

If the petition is not dismissed at a previous stage in the proceeding, the judge, after the answer and the transcript and record of state court proceedings are filed, shall, upon a review of those proceedings and of the expanded record, if any, determine whether an evidentiary hearing is required. If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the petition as justice shall require.

**(b) Function of the magistrate**

(1) When designated to do so in accordance with 28 U.S.C. § 636(b), a magistrate may conduct hearings, including evidentiary hearings, on the petition, and submit to a judge of the court proposed findings of fact and recommendations for disposition.

(2) The magistrate shall file proposed findings and recommendations with the court and a copy shall forthwith be mailed to all parties.

(3) Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court.

(4) A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify in whole or in part any findings or recommendations made by the magistrate.

**(c) Appointment of counsel; time for hearing**

If an evidentiary hearing is required the judge shall appoint counsel for a petitioner who qualifies for the appointment of counsel under 18 U.S.C. § 3006A(g) and the hearing shall be conducted as promptly as practicable, having regard for the need of counsel for both parties for adequate time for investigation and preparation. These rules do not limit the appointment of counsel under 18 U.S.C. § 3006A at any stage of the case if the interest of justice so requires.

(As amended Pub. L. 94-426, § 2(5), Sept. 28, 1976, 90 Stat. 1334; Pub. L. 94-577, § 2(a)(1), (b)(1), Oct. 21, 1976, 90 Stat. 2730, 2731.)

ADVISORY COMMITTEE NOTE

This rule outlines the procedure to be followed by the court immediately prior to and after the determination of whether to hold an evidentiary hearing.

The provisions are applicable if the petition has not been dismissed at a previous stage in the proceeding [including a summary dismissal under rule 4; a dismissal pursuant to a motion by the respondent; a dismissal after the answer and petition are considered; or a dismissal after consideration of the pleadings and an expanded record].

If dismissal has not been ordered, the court must determine whether an evidentiary hearing is required. This determination is to be made upon a review of the answer, the transcript and record of state court proceedings, and if there is one, the expanded record. As the United States Supreme Court noted in *Townsend* v. *Sam* 372 U.S. 293, 319 (1963):

> Ordinarily [the complete state-court] record—including the transcript of testimony (or if unavailable some adequate substitute, such as a narrative record), the pleadings, court opinions, and other pertinent documents—is indispensable to determining whether the habeas applicant received a full and fair state-court evidentiary hearing resulting in reliable findings.

Subdivision (a) contemplates that all of these materials, if available, will be taken into account. This is especially important in view of the standard set down in *Townsend* for determining *when* a hearing in the federal habeas proceeding is mandatory.

> The appropriate standard * * * is this: Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding.
>
> 372 U.S. at 312

The circumstances under which a federal hearing is mandatory are now specified in 28 U.S.C. § 2254(d). The 1966 amendment clearly places the burden on the petitioner, when there has already been a state hearing, to show that it was not a fair or adequate hearing for one or more of the specifically enumerated reasons, in order to force a federal evidentiary hearing. Since the function of an evidentiary hearing is to try issues of fact (372 U.S. at 309), such a hearing is unnecessary when only issues of law are raised. See, *e.g.*, *Yeaman* v. *United States*, 326 F.2d 293 (9th Cir. 1963).

In situations in which an evidentiary hearing is not mandatory, the judge may nonetheless decide that an evidentiary hearing is desirable:

> The purpose of the test is to indicate the situations in which the holding of an evidentiary hearing is mandatory. In all other cases where the material facts are in dispute, the holding of such a hearing is in the discretion of the district judge.
>
> 372 U.S. at 318

If the judge decides that an evidentiary hearing is neither required nor desirable, he shall make such a disposition of the petition "as justice shall require." Most habeas petitions are dismissed before the prehearing conference stage (see Director of the Administrative Office of the United States Courts, Annual Report 245a-245c (table C4) (1970)) and of those not dismissed, the majority raise factual issues that necessitate an evidentiary hearing. If no hearing is required, most petitions are dismissed, but in unusual cases the court may grant the relief sought without a hearing. This includes immediate release from custody or nullification of a judgment under which the sentence is to be served in the future.

Subdivision (b) provides that a magistrate, when so empowered by rule of the district court, may recommend to the district judge that an evidentiary hearing be held or that the petition be dismissed, provided he gives the district judge a sufficiently detailed description of the facts so that the judge may decide whether or not to hold an evidentiary hearing. This provision is not inconsistent with the holding in *Wingo* v. *Wedding*, 418 U.S. 461 (1974), that the Federal Magistrates Act did not change the requirement of the habeas corpus statute that federal judges personally conduct habeas evidentiary hearings, and that consequently a local district court rule was invalid insofar as it authorized a magistrate to hold such hearings. 28 U.S.C. § 636(b) provides that a district court may by rule authorize any magistrate to perform certain additional duties, including preliminary review of applications for posttrial relief made by individuals convicted of criminal offenses, and submission of a report and recommendations to facilitate the decision of the district judge having jurisdiction over the case as to whether there should be a hearing.

As noted in *Wingo*, review "by Magistrates of applications for post-trial relief is thus limited to review for the purpose of prposing, not holding, evidentiary hearings."

Utilization of the magistrate as specified in subdivision (b) will aid in the expeditious and fair handling of habeas petitions.

> A qualified, experienced magistrate will, it is hoped, acquire an expertise in examining these [postconviction review] applications and summarizing their important contents for the district judge, thereby facilitating his decisions. Law clerks are presently charged with this responsibility by many judges, but judges have noted that the normal 1-year clerkship does not afford law clerks the time or experience necessary to attain real efficiency in handling such applications.

S. Rep. No. 371, 90th Cong., 1st Sess., 26 (1967)

Under subdivision (c) there are two provisions that differ from the procedure set forth in 28 U.S.C. § 2243. These are the appointment of counsel and standard for determining how soon the hearing will be held.

If an evidentiary hearing is required the judge must appoint counsel for a petitioner who qualified for appointment under the Criminal Justice Act. Currently, the appointment of counsel is not recognized as a right at any stage of a habeas proceeding. See, *e.g.*, *United States ex rel. Marshall* v. *Wilkins*, 338 F.2d 404 (2d Cir. 1964). Some district courts have, however, by local rule, required that counsel must be provided for indigent petitioners in cases requiring a hearing. See, *e.g.*, D.N.M.R. 21(f), E.D. N.Y.R. 26(d). Appointment of counsel at this stage is mandatory under subdivision (c). This requirement will not limit the authority of the court to provide counsel at an earlier stage if it is thought desirable to do so as is done in some courts under current practice. At the evidentiary hearing stage, however, an indigent petitioner's access to counsel should not depend on local practice and, for this reason, the furnishing of counsel is made mandatory.

Counsel can perform a valuable function benefiting both the court and the petitioner. The issues raised can be more clearly identified if both sides have the benefit of trained legal personnel. The presence of counsel at the prehearing conference may help to expedite the evidentiary hearing or make it unnecessary, and counsel will be able to make better use of available prehearing discovery procedures. Compare ABA Project on Standards for Criminal Justice, Standards Relating to Post-Conviction Remedies § 4.4, p. 66 (Approved Draft 1968). At a hearing, the petitioner's claims are more likely to be effectively and properly presented by counsel.

Under 18 U.S.C. § 3006A(g), payment is allowed counsel up to $250, plus reimbursement for expenses reasonably incurred. The standards of indigency under this section are less strict than those regarding eligibility to prosecute a petition in forma pauperis, and thus many who cannot qualify to proceed under 28 U.S.C. § 1915 will be entitled to the benefits of counsel under 18 U.S.C. § 3006A(g). Under rule 6(c), the court may order the respondent to reimburse counsel from state funds for fees and expenses incurred as the result of the utilization of discovery procedures by the respondent.

Subdivision (c) provides that the hearing shall be conducted as promptly as possible, taking into account "the need of counsel for both parties for adequate time for investigation and preparation." This differs from the language of 28 U.S.C. § 2243, which requires that the day for the hearing be set "not more than five days after the return unless for good cause additional time is allowed." This time limit fails to take into account the function that may be served by a prehearing conference and the time required to prepare adequately for an evidentiary hearing. Although "additional time" is often allowed under § 2243, subdivision (c) provides more flexibility to take account of the complexity of the case, the availability of important materials, the workload of the attorney general, and the time required by appointed counsel to prepare.

While the rule does not make specific provision for a prehearing conference, the omission is not intended to cast doubt upon the value of such a conference:

> The conference may limit the questions to be resolved, identify areas of agreement and dispute, and explore evidentiary problems that may be expected to arise. * * * [S]uch conferences may also disclose that a hearing is unnecessary * * *.
>
> ABA Project on Standards for Criminal Justice, Standards Relating to Post-Conviction Remedies § 4.6, commentary pp. 74-75. (Approved Draft, 1968.)

See also Developments in the Law—Federal Habeas Corpus, 83 Harv.L.Rev. 1038, 1188 (1970).

The rule does not contain a specific provision on the subpoenaing of witnesses. It is left to local practice to determine the method for doing this. The implementation of 28 U.S.C. § 1825 on the payment of witness fees is dealt with in an opinion of the Comptroller General, February 28, 1974.

### AMENDMENTS

1976—Subsec. (b). Pub. L. 94-577, § 2(a)(1), substituted provisions which authorized magistrates, when designated to do so in accordance with section 636(b) of this title, to conduct hearings, including evidentiary hearings, on the petition and to submit to a judge of the court proposed findings of fact and recommendations for disposition, which directed the magistrate to file proposed findings and recommendations with the court with copies furnished to all parties, which allowed parties thus served 10 days to file written objections thereto, and which directed a judge of the court to make de novo determinations of the objected-to portions and to accept, reject, or modify the findings or recommendations for provisions under which the magistrate had been empowered only to recommend to the district judge that an evidentiary hearing be held or that the petition be dismissed.

Subsec. (c). Pub. L. 94-577, § 2(b)(1), substituted "and the hearing shall be conducted" for "and shall conduct the hearing".

Pub. L. 94-426 provided that these rules not limit the appointment of counsel under section 3006A of title 18, if the interest of justice so require.

### EFFECTIVE DATE OF 1976 AMENDMENT

Section 2(c) of Pub. L. 94-577 provided that: "The amendments made by this section [amending subdivs. (b) and (c) of this rule and Rule 8(b), (c) of the Rules Governing Proceedings Under Section 2255 of this title] shall take effect with respect to petitions under section 2254 and motions under section 2255 of title 28 of the United States Code filed on or after Feburary 1, 1977."

## Rule 9. Delayed or Successive Petitions

### (a) Delayed petitions

A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

**(b) Successive petitions**

A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

(As amended Pub. L. 94-426, § 2(7), (8), Sept. 28, 1976, 90 Stat. 1335.)

### ADVISORY COMMITTEE NOTE

This rule is intended to minimize abuse of the writ of habeas corpus by limiting the right to assert stale claims and to file multiple petitions. Subdivision (a) deals with the delayed petition. Subdivision (b) deals with the second or successive petition.

Subdivision (a) provides that a petition attacking the judgment of a state court may be dismissed on the grounds of delay if the petitioner knew or should have known of the existence of the grounds he is presently asserting in the petition and the delay has resulted in the state being prejudiced in its ability to respond to the petition. If the delay is more than five years after the judgment of conviction, prejudice is presumed, although this presumption is rebuttable by the petitioner. Otherwise, the state has the burden of showing such prejudice.

The assertion of stale claims is a problem which is not likely to decrease in frequency. Following the decisions in *Jones* v. *Cunningham*, 371 U.S. 236 (1963), and *Benson* v. *California*, 328 F.2d 159 (9th Cir. 1964), the concept of custody expanded greatly, lengthening the time period during which a habeas corpus petition may be filed. The petitioner who is not unconditionally discharged may be on parole or probation for many years. He may at some date, perhaps ten or fifteen years after conviction, decide to challenge the state court judgment. The grounds most often troublesome to the courts are ineffective counsel, denial of right of appeal, plea of guilty unlawfully induced, use of a coerced confession, and illegally constituted jury. The latter four grounds are often interlocked with the allegation of ineffective counsel. When they are asserted after the passage of many years, both the attorney for the defendant and the state have difficulty in ascertaining what the facts are. It often develops that the defense attorney has little or no recollection as to what took place and that many of the participants in the trial are dead or their whereabouts unknown. The court reporter's notes may have been lost or destroyed, thus eliminating any exact record of what transpired. If the case was decided on a guilty plea, even if the record is intact, it may not satisfactorily reveal the extent of the defense attorney's efforts in behalf of the petitioner. As a consequence, there is obvious difficulty in investigating petitioner's allegations.

The interest of both the petitioner and the government can best be served if claims are raised while the evidence is still fresh. The American Bar Association has recognized the interest of the state in protecting itself against stale claims by limiting the right to raise such claims after completion of service of a sentence imposed pursuant to a challenged judgment. See ABA Standards Relating to Post-Conviction Remedies § 2.4 (c), p. 45 (Approved Draft, 1968). Subdivision (a) is not limited to those who have completed their sentence. Its reach is broader, extending to all instances where delay by the petitioner has prejudiced the state, subject to the qualifications and conditions contained in the subdivision.

In *McMann* v. *Richardson*, 397 U.S. 759 (1970), the court made reference to the issue of the stale claim:

> What is at stake in this phase of the case is not the integrity of the state convictions obtained on guilty pleas, *but whether, years later,* defendants must be permitted to withdraw their pleas, which were perfectly valid when made, and be given another choice between admitting their guilt and putting the State to its proof. [Emphasis added.]

397 U.S. at 773

The court refused to allow this, intimating its dislike of collateral attacks on sentences long since imposed which disrupt the state's interest in finality of convictions which were constitutionally valid when obtained.

Subdivision (a) is not a statute of limitations. Rather, the limitation is based on the equitable doctrine of laches. "Laches is such delay in enforcing one's rights as works disadvantage to another." 30A C.J.S. Equity § 112, p. 19. Also, the language of the subdivision, "a petition *may* be dismissed" [emphasis added], is permissive rather than mandatory. This clearly allows the court which is considering the petition to use discretion in assessing the equities of the particular situation.

The use of a flexible rule analogous to laches to bar the assertion of stale claims is suggested in ABA Standards Relating to Post-Conviction Remedies § 2.4, commentary at 48 (Approved Draft, 1968). Additionally, in *Fay* v. *Noia*, 372 U.S. 391 (1963), the Supreme Court noted:

> Furthermore, habeas corpus has traditionally been regarded as governed by equitable principles. *United States ex rel. Smith* v. *Baldi*, 344 U.S. 561, 573 (dissenting opinion). Among them is the principle that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks.

372 U.S. at 438

Finally, the doctrine of laches has been applied with reference to another postconviction remedy, the writ of coram nobis. See 24 C.J.S. Criminal Law § 1606(25), p. 779.

The standard used for determining if the petitioner shall be barred from asserting his claim is consistent with that used in laches provisions generally. The petitioner is held to a standard of reasonable diligence. Any inference or presumption arising by reason of the failure to attack collaterally a conviction may be disregarded where (1) there has been a change of law or fact (new evidence) or (2) where the court, in the interest of justice, feels that the collateral attack should be entertained and the prisoner makes a proper showing as to why he has not asserted a particular ground for relief.

Subdivision (a) establishes the presumption that the passage of more than five years from the time of the judgment of conviction to the time of filing a habeas petition is prejudicial to the state. "Presumption" has the meaning given it by Fed.R.Evid. 301. The prisoner has "the burden of going forward with evidence to rebut or meet the presumption" that the state has not been prejudiced by the passage of a substantial period of time. This does not impose too heavy a burden on the petitioner. He usually knows what persons are important to the issue of whether the state has been prejudiced. Rule 6 can be used by the court to allow petitioner liberal discovery to learn whether witnesses have died or whether other circumstances prejudicial to the state have occurred. Even if the petitioner should fail to overcome the presumption of prejudice to the state, he is not automatically barred from asserting his claim. As discussed previously, he may proceed if he neither knew nor, by the exercise of reasonable diligence, could have known of the grounds for relief.

The presumption of prejudice does not come into play if the time lag is not more than five years.

The time limitation should have a positive effect in encouraging petitioners who have knowledge of it to assert all their claims as soon after conviction as possible. The implementation of this rule can be substantially furthered by the development of greater legal resources for prisoners. See ABA Standards Relating to Post-Conviction Remedies § 3.1, pp. 49-50 (Approved Draft, 1968).

Subdivision (a) does not constitute an abridgement or modification of a substantive right under 28 U.S.C. § 2072. There are safeguards for the hardship case. The rule provides a flexible standard for determining when a petition will be barred.

Subdivision (b) deals with the problem of successive habeas petitions. It provides that the judge may dismiss a second or successive petition (1) if it fails to allege new or different grounds for relief or (2) if new or different grounds for relief are alleged and the judge finds the failure of the petitioner to assert those grounds in a prior petition is inexcusable.

In *Sanders* v. *United States*, 373 U.S. 1 (1963), the court, in dealing with the problem of successive applications, stated:

> Controlling weight *may* be given to denial of a prior application for federal habeas corpus or § 2255 relief only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application. [Emphasis added.]

373 U.S. at 15

The requirement is that the prior determination of the same ground has been on the merits. This requirement is in 28 U.S.C. § 2244(b) and has been reiterated in many cases since *Sanders*. See *Gains* v. *Allgood*, 391 F.2d 692 (5th Cir. 1968); *Hutchinson* v. *Craven*, 415 F.2d 278 (9th Cir. 1969); *Brown* v. *Peyton*, 435 F.2d 1352 (4th Cir. 1970).

With reference to a successive application asserting a new ground or one not previously decided on the merits, the court in *Sanders* noted:

> In either case, full consideration of the merits of the new application can be avoided only if there has been an abuse of the writ * * * and this the Government has the burden of pleading. * * *
>
> Thus, for example, if a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, * * * he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground.

373 U.S. at 17-18

Subdivision (b) has incorporated this principle and requires that the judge find petitioner's failure to have asserted the new grounds in the prior petition to be inexcusable.

*Sanders*, 18 U.S.C. § 2244, and subdivision (b) make it clear that the court has discretion to entertain a successive application.

The burden is on the government to plead abuse of the writ. See *Sanders* v. *United States*, 373 U.S. 1, 10 (1963); *Dixon* v. *Jacobs*, 427 F.2d 589, 596 (D.C.Cir. 1970); cf. *Johnson* v. *Copinger*, 420 F.2d 395 (4th Cir. 1969). Once the government has done this, the petitioner has the burden of proving that he has not abused the writ. In *Price* v. *Johnston*, 334 U.S. 266, 292 (1948), the court said:

> [I]f the Government chooses * * * to claim that the prisoner has abused the writ of *habeas corpus*, it rests with the Government to make that claim with clarity and particularity in its return to the order to show cause. That is not an intolerable burden. The Government is usually well acquainted with the facts that are necessary to make such a claim. Once a particular abuse has been alleged, the prisoner has the burden of answering that allegation and of proving that he has not abused the writ.

Subdivision (b) is consistent with the important and well established purpose of habeas corpus. It does not eliminate a remedy to which the petitioner is rightfully entitled. However, in *Sanders*, the court pointed out:

> Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay.

373 U.S. at 18

There are instances in which petitioner's failure to assert a ground in a prior petition is excusable. A retroactive change in the law and newly discovered evidence are examples. In rare instances, the court may feel a need to entertain a petition alleging grounds that have already been decided on the merits. *Sanders*, 373 U.S. at 1, 16. However, abusive use of the writ should be discouraged, and instances of abuse are frequent enough to require a means of dealing with them. For example, a successive application, already decided on the merits, may be submitted in the hope of getting before a different judge in multijudge courts. A known ground may be deliberately withheld in the hope of getting two or more hearings or in the hope that delay will result in witnesses and records being lost. There are instances in which a petitioner will have three or four petitions pending at the same time in the same court. There are many hundreds of cases where the application is at least the second one by the petitioner. This subdivision is aimed at screening out the abusive petitions from this large volume, so that the more meritorious petitions can get quicker and fuller consideration.

The form petition, supplied in accordance with rule 2(c), encourages the petitioner to raise all of his available grounds in one petition. It sets out the most common grounds asserted so that these may be brought to his attention.

Some commentators contend that the problem of abuse of the writ of habeas corpus is greatly overstated:

> Most prisoners, of course, are interested in being released as soon as possible; only rarely will one inexcusably neglect to raise all available issues in his first federal application. The purpose of the "abuse" bar is apparently to deter repetitious applications from those few bored or vindictive prisoners * * *.

83 Harv.L.Rev. at 1153-1154

See also ABA Standards Relating to Post-Conviction Remedies § 6.2, commentary at 92 (Approved Draft, 1968), which states: "The occasional, highly litigious prisoner stands out as the rarest exception." While no recent systematic study of repetitious applications exists, there is no reason to believe that the problem has decreased in significance in relation to the total number of § 2254 petitions filed. That number has increased from 584 in 1949 to 12,088 in 1971. See Director of the Administrative Office of the United States Courts, Annual Report, table 16 (1971). It is appropriate that action be taken by rule to allow the courts to deal with this problem, whatever its specific magnitude. The bar set up by subdivision (b) is not one of rigid application, but rather is within the discretion of the courts on a case-by-case basis.

If it appears to the court after examining the petition and answer (where appropriate) that there is a high probability that the petition will be barred under either subdivision of rule 9, the court ought to afford petitioner an opportunity to explain his apparent abuse. One way of doing this is by the use of the form annexed hereto. The use of a form will ensure a full airing of the issue so that the court is in a better position to decide whether the petition should be barred. This conforms with *Johnson* v. *Copinger*, 420 F.2d 395 (4th Cir. 1969), where the court stated:

> [T]he petitioner is obligated to present facts demonstrating that his earlier failure to raise his claims is excusable and does not amount to an abuse of the writ. However, it is inherent in this obligation placed upon the petitioner that he must be given an opportunity to make his explanation, if he has one. If he is not afforded such an opportunity, the require-

> ment that he satisfy the court that he has not abused the writ is meaningless. Nor do we think that a procedure which allows the imposition of a forfeiture for abuse of the writ, without allowing the petitioner an opportunity to be heard on the issue, comports with the minimum requirements of fairness.

420 F.2d at 399

Use of the recommended form will contribute to an orderly handling of habeas petitions and will contribute to the ability of the court to distinguish the excusable from the inexcusable delay or failure to assert a ground for relief in a prior petition.

AMENDMENTS

1976—Subsec. (a). Pub.L. 94-426, § 2(7), struck out provision which established a rebuttable presumption of prejudice to the state if the petition was filed more than five years after conviction and started the running of the five year period, where a petition challenged the validity of an action after conviction, from the time of the order of such action.

Subsec. (b). Pub. L. 94-426, § 2(8), substituted "constituted an abuse of the writ" for "is not excusable".

### Rule 10. Powers of Magistrates

**The duties imposed upon the judge of the district court by rules 2, 3, 4, 6, and 7 may be performed by a United States magistrate if and to the extent that he is so empowered by rule of the district court, and to the extent the district court has established standards and criteria for the performance of such duties, except that when such duties involve the making of an order, under rule 4, dismissing the petition the magistrate shall submit to the court his report as to the facts and his recommendation with respect to the order to be made by the court.**

(As amended Pub.L. 94-426, § 2(11), Sept. 28, 1976, 90 Stat. 1335.)

ADVISORY COMMITTEE NOTE

Under this rule the duties imposed upon the judge of the district court by rules 2, 3, 4, 6, and 7 may be performed by a magistrate if and to the extent he is empowered to do so by a rule of the district court. However, when such duties involve the making of an order under rule 4 disposing of the petition, that order must be made by the court. The magistrate in such instances must submit to the court his report as to the facts and his recommendation with respect to the order.

The Federal Magistrates Act allows magistrates, when empowered by local rule, to perform certain functions in proceedings for post-trial relief. See 28 U.S.C. § 636(b)(3). The performance of such functions, when authorized, is intended to "afford some degree of relief to district judges and their law clerks, who are presently burdened with burgeoning numbers of habeas corpus petitions and applications under 28 U.S.C. § 2255." Committee on the Judiciary, The Federal Magistrates Act, S.Rep. No. 371, 90th Cong., 1st sess., 26 (1967).

> Under 28 U.S.C. § 636(b), any district court,
> by the concurrence of a majority of all the judges of such district court, may establish rules pursuant to which any full-time United States magistrate * * * may be assigned within the territorial jurisdiction of such court such additional duties as are not inconsistent with the Constitution and laws of the United States.

The proposed rule recognizes the limitations imposed by 28 U.S.C. § 636(b) upon the powers of magistrates to act in federal postconviction proceedings. These limitations are: (1) that the magistrate may act only pursuant to a rule passed by the majority of the judges in the district court in which the magistrate serves, and (2) that the duties performed by the magistrate pursuant to such rule be consistant with the Constitution and laws of the United States.

It has been suggested that magistrates be empowered by law to hold hearings and make final decisions in habeas proceedings. See Proposed Reformation of Federal Habeas Corpus Procedure: Use of Federal Magistrates, 54 Iowa L.Rev. 1147, 1158 (1969). However, the Federal Magistrates Act does not authorize such use of magistrates. *Wingo* v. *Wedding*, 418 U.S. 461 (1974). See advisory committee note to rule 8. While the use of magistrates can help alleviate the strain imposed on the district courts by the large number of unmeritorious habeas petitions, neither 28 U.S.C. § 636(b) nor this rule contemplate the abdication by the court of its decision-making responsibility. See also Developments in the Law—Federal Habeas Corpus, 83 Harv. L.Rev. 1038, 1188 (1970)

Where a full-time magistrate is not available, the duties contemplated by this rule may be assigned to a part-time magistrate.

AMENDMENTS

1976—Pub. L. 94-426 inserted ", and to the extent the district court has established standards and criteria for the performance of such duties" following "rule of the district court".

### Rule 11. Federal Rules of Civil Procedure; Extent of Applicability

**The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate, to petitions filed under these rules.**

ADVISORY COMMITTEE NOTE

Habeas corpus proceedings are characterized as civil in nature. See *e.g., Fisher* v. *Baker*, 203 U.S. 174, 181 (1906). However, under Fed.R.Civ.P. 81(a)(2), the applicability of the civil rules to habeas corpus actions has been limited, although the various courts which have considered this problem have had difficulty in setting out the boundaries of this limitation. See *Harris* v. *Nelson*, 394 U.S. 286 (1969) at 289, footnote 1. Rule 11 is intended to conform with the Supreme Court's approach in the *Harris* case. There the court was dealing with the petitioner's contention that Civil Rule 33 granting the right to discovery via written interrogatories is wholly applicable to habeas corpus proceedings. The court held:

> We agree with the Ninth Circuit that Rule 33 of the Federal Rules of Civil Procedure is not applicable to habeas corpus proceedings and that 28 U.S.C. § 2246 does not authorize interrogatories except in limited circumstances not applicable to this case; but we conclude that, in appropriate circumstances, a district court, confronted by a petition for habeas corpus which establishes a prima facie case for relief, may use or authorize the use of suitable discovery procedures, including interrogatories, reasonably fashioned to elicit facts necessary to help the court to "dispose of the matter as law and justice require" 28 U.S.C. § 2243.

394 U.S. at 290

The court then went on to consider the contention that the "conformity" provision of Rule 81(a)(2) should be rigidly applied so that the civil rules would be applicable only to the extent that habeas corpus practice had conformed to the practice in civil actions at the time of the adoption of the Federal Rules of Civil Procedure on September 16, 1938. The court said:

> Although there is little direct evidence, relevant to the present problem, of the purpose of the "conformity" provision of Rule 81(a)(2), the concern of the draftsmen, as a general matter, seems to have been to provide for the continuing applicability of the "civil" rules in their new form to those areas of practice in habeas corpus and other enumerated proceedings in which the "specified" proceedings had theretofore utilized the modes of civil practice. Otherwise, those proceedings were to be considered outside of the scope of the rules without prejudice, of course, to the use of particular rules by analogy or otherwise, where appropriate.

394 U.S. at 294

The court then reiterated its commitment to judicial discretion in formulating rules and procedures for habeas corpus proceedings by stating:

> [T]he habeas corpus jurisdiction and the duty to exercise it being present, the courts may fashion appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with judicial usage. Where their duties require it, this is the inescapable obligation of the courts. Their authority is expressly confirmed in the All Writs Act, 28 U.S.C. § 1651.

394 U.S. at 299

Rule 6 of these proposed rules deals specifically with the issue of discovery in habeas actions in a manner consistent with *Harris*. Rule 11 extends this approach to allow the court considering the petition to use any of the rules of civil procedure (unless inconsistent with these rules of habeas corpus) when in its discretion the court decides they are appropriate under the circumstances of the particular case. The court does not have to rigidly apply rules which would be inconsistent or inequitable in the overall framework of habeas corpus. Rule 11 merely recognizes and affirms their discretionary power to use their judgment in promoting the ends of justice.

Rule 11 permits application of the civil rules only when it would be appropriate to do so. Illustrative of an inappropriate application is that rejected by the Supreme Court in *Pitchess* v. *Davis*, 95 S.Ct. 1748 (1975), holding that Fed.R.Civ.P. 60(b) should not be applied in a habeas case when it would have the effect of altering the statutory exhaustion requirement of 28 U.S.C. § 2254.

## MODEL FORM FOR USE IN APPLICATIONS FOR HABEAS CORPUS UNDER 28 U.S.C. § 2254

Name ____________________
Prison number ____________________
____________________
Place of confinement ____________________
United States District Court ________ District of ________
Case No. ____________________
(To be supplied by Clerk of U.S. District Court)

____________________, PETITIONER
(Full name)

v.

____________________, RESPONDENT
(Name of Warden, Superintendent, Jailor, or authorized person having custody of petitioner)

and

THE ATTORNEY GENERAL OF THE STATE OF ____________________

ADDITIONAL RESPONDENT.

(If petitioner is attacking a judgment which imposed a sentence to be served in the *future*, petitioner must fill in the name of the state where the judgment was entered. If petitioner has a sentence to be served in the *future* under a federal judgment which he wishes to attack, he should file a motion under 28 U.S.C. § 2255, in the federal court which entered the judgment.)

## PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

### Instructions—Read Carefully

(1) This petition must be legibly handwritten or typewritten, signed by the petitioner and sworn to before a notary public or institutional officer authorized to administer an oath. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form.

(2) Additional pages are not permitted except with respect to the *facts* which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) Upon receipt of a fee of $5 your petition will be filed if it is in proper order.

(4) If you do not have the necessary filing fee, you may request permission to proceed *in forma pauperis*, in which event you must execute the affidavit on the last page, setting forth information establishing your inability to prepay the fees and costs or give security therefor. If you wish to proceed *in forma pauperis*, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution. If your prison account exceeds $——, you must pay the filing fee as required by the rule of the district court.

(5) Only judgments entered by one court may be challenged in a single petition. If you seek to challenge judgments entered by different courts either in the same state or in different states, you must file separate petitions as to each court.

(6) Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the petition you file seeking from any judgment of conviction.

(7) When the petition is fully completed, *the original and two copies* must be mailed to the Clerk of the United States District Court whose address is
____________________

(8) Petitions which do not conform to these instructions will be returned with a notation as to the deficiency.

### PETITION

1. Name and location of court which entered the judgment of conviction under attack ____________________
____________________
2. Date of judgment of conviction ____________________
3. Length of sentence ____________________
4. Nature of offense involved (all counts) ____________________
____________________
____________________
____________________
5. What was your plea? (Check one)
   (a) Not guilty ☐
   (b) Guilty ☐
   (c) Nolo contendere ☐
   If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:
   ____________________
   ____________________
   ____________________
6. Kind of trial: (Check one)
   (a) Jury ☐
   (b) Judge only ☐
7. Did you testify at the trial?
   Yes ☐ No ☐
8. Did you appeal from the judgment of conviction?
   Yes ☐ No ☐

9. If you did appeal, answer the following:
   (a) Name of court
   (b) Result
   (c) Date of result

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?
    Yes ☐ No ☐

11. If your answer to 10 was "yes," give the following information:
    (a) (1) Name of court
        (2) Nature of proceeding
        (3) Grounds raised
        (4) Did you receive an evidentiary hearing on your petition, application or motion?
            Yes ☐ No ☐
        (5) Result
        (6) Date of result
    (b) As to any second petition, application or motion give the same information:
        (1) Name of court
        (2) Nature of proceeding
        (3) Grounds raised
        (4) Did you receive an evidentiary hearing on your petition, application or motion?
            Yes ☐ No ☐
        (5) Result
        (6) Date of result
    (c) As to any third petition, application or motion, give the same information:
        (1) Name of court
        (2) Nature of proceeding
        (3) Grounds raised
        (4) Did you receive an evidentiary hearing on your petition, application or motion?
            Yes ☐ No ☐
        (5) Result
        (6) Date of result
    (d) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?
        (1) First petition, etc. Yes ☐ No ☐
        (2) Second petition, etc. Yes ☐ No ☐
        (3) Third petition, etc. Yes ☐ No ☐
    (e) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

    Caution: In order to proceed in the federal court, you must ordinarily first exhaust your state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

    For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you you base your allegations that you are being held in custody unlawfully.

    Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
(b) Conviction obtained by use of coerced confession.
(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
(e) Conviction obtained by a violation of the privilege against self-incrimination.
(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
(g) Conviction obtained by a violation of the protection against double jeopardy.
(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impanelled.
(i) Denial of effective assistance of counsel.
(j) Denial of right of appeal.

A. Ground one:

Supporting FACTS (tell your story *briefly* without citing cases or law):

B. Ground two:

Supporting FACTS (tell your story *briefly* without citing cases or law):

C. Ground three:

Supporting FACTS (tell your story *briefly* without citing cases or law):

**D. Ground four:** ________________

________________

**Supporting FACTS (tell your story *briefly* without citing cases or law):** ________________

________________

________________

________________

________________

________________

**13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them:**

________________

________________

________________

**14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?**

**Yes ☐ No ☐**

**15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:**

**(a) At preliminary hearing** ________________

________________

**(b) At arraignment and plea** ________________

________________

**(c) At trial** ________________

________________

**(d) At sentencing** ________________

________________

**(e) On appeal** ________________

________________

**(f) In any post-conviction proceeding** ________________

________________

________________

**(g) On appeal from any adverse ruling in a post-conviction proceeding** ________________

________________

________________

**16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?**

**Yes ☐ No ☐**

**17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?**

**Yes ☐ No ☐**

**(a) If so, give name and location of court which imposed sentence to be served in the future:**

________________

________________

**(b) And give date and length of sentence to be served in the future:**

________________

________________

**(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future**

**Yes ☐ No ☐**

**Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.**

**Executed at** ________________

________________

**on** ________________**, 19**____**.**

| | |
|---|---|
| ________________ | ________________ |
| **Signature of Attorney (if any)** | **Signature of Petitioner** |

## IN FORMA PAUPERIS AFFIDAVIT

________________

**[Insert appropriate court]**

| | |
|---|---|
| ________________ | **AFFIDAVIT IN** |
| **(Petitioner)** | **SUPPORT** |
| | **OF REQUEST** |
| **v.** | **TO PROCEED** |
| ________________ | |
| **(Respondent(s))** | **IN FORMA PAUPERIS** |

**I,** ________________**, being first duly sworn, depose and say that I am the petitioner in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to relief.**

**I further swear that the responses which I have made to questions and instructions below are true.**

**1. Are you presently employed? Yes ☐ No ☐**

**a. If the answer is "yes," state the amount of your salary or wages per month, and give the name and address of your employer.**

________________

________________

**b. If the answer is "no," state the date of last employment and the amount of the salary and wages per month which you received.**

________________

________________

**2. Have you received within the past twelve months any money from any of the following sources?**

**a. Business, profession or form of self-employment? Yes ☐ No ☐**

**b. Rent payments, interest or dividends? Yes ☐ No ☐**

**c. Pensions, annuities or life insurance payments? Yes ☐ No ☐**

**d. Gifts or inheritances? Yes ☐ No ☐**

**e. Any other sources? Yes ☐ No ☐**

**If the answer to any of the above is "yes," describe each source of money and state the amount received from each during the past twelve months.**

________________

________________

________________

________________

**3. Do you own cash, or do you have money in a checking or savings account?**

**Yes ☐ No ☐ (Include any funds in prison accounts.)**

**If the answer is "yes," state the total value of the items owned.**

________________

________________

________________

**4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?**

**Yes ☐ No ☐**

**If the answer is "yes," describe the property and state its approximate value.**

________________

________________

________________

**5. List the persons who are dependent upon you for support, state your relationship to those persons,**

and indicate how much you contribute toward their support.

______________________________________

______________________________________

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

______________________
(PETITIONER'S SIGNATURE)

State of ————————
County (City) of ————————

———————— (Name of Petitioner), being first duly sworn under oath, presents that he has read and subscribed to the above and states that the information therein is true and correct.

______________________
SIGNATURE OF PETITIONER
(REQUIRED AS TO EACH PETITIONER)

Subscribed and sworn to before me this
——— day of ————, 19—.

______________________
NOTARY PUBLIC OR OTHER
PERSON AUTHORIZED TO
ADMINISTER AN OATH

### Certificate

I hereby certify that the petitioner herein has the sum of $——— on account to his credit at the ——— institution where he is confined. I further certify that petitioner likewise has the following securities to his credit according to the records of said ——— institution:

______________________________________

______________________________________

______________________________________

______________________________________

______________________
AUTHORIZED OFFICER OF
INSTITUTION

## MODEL FORM FOR USE IN 28 U.S.C. § 2254 CASES INVOLVING A RULE 9 ISSUE

### Form No. 9

United States District Court,

———————— District of ————————

Case No. ————

————————, PETITIONER

v.

————————, RESPONDENT

and

————, ADDITIONAL RESPONDENT

### Petitioner's Response as to Why His Petition Should Not Be Barred Under Rule 9

### Explanation and Instructions—Read Carefully

**(I) Rule 9. Delayed or successive petitions**

**(a) Delayed petitions.** A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred. If the petition is filed more than five years after the judgment of conviction, there shall be a presumption, rebuttable by the petitioner, that there is prejudice to the state. When a petition challenges the validity of an action, such a revocation of probation or parole, which occurs after judgment of conviction, the five-year period as to that action shall start to run at the time the order in the challenged action took place.

**(b) Successive petitions.** A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition is not excusable.

(II) Your petition for habeas corpus has been found to be subject to dismissal under rule 9( ) for the following reason(s):

______________________________________

______________________________________

______________________________________

______________________________________

(III) This form has been sent so that you may explain why your petition contains the defect(s) noted in (II) above. It is required that you fill out this form and send it back to the court within ———days. Failure to do so will result in the automatic dismissal of your petition.

(IV) When you have fully completed this form, the original and two copies must be mailed to the Clerk of the United States District Court whose address is

______________________________________

______________________________________

(V) This response must be legibly handwritten or typewritten, signed by the petitioner, and sworn to before a notary public or institutional officer authorized to administer an oath. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form.

(VI) Additional pages are not permitted except with respect to the *facts* which you rely upon in item 4 or 5 in the response. Any citation of authorities should be kept to an absolute minimum and is only appropriate if there has been a change in the law since the judgment you are attacking was rendered.

(VII) Respond to 4 *or* 5 below, not to both, unless (II) above indicates that you must answer both sections.

### RESPONSE

1. Have you had the assistance of an attorney, other law-trained personnel, or writ writers since the conviction your petition is attacking was entered?
Yes ☐ No ☐

2. If you checked "yes" above, specify as precisely as you can the period(s) of time during which you received such assistance, up to and including the present.

______________________________________

3. Describe the nature of the assistance, including the names of those who rendered it to you.

______________________________________

______________________________________

______________________________________

______________________________________

4. If your petition is in jeopardy because of delay prejudicial to the state under rule 9(a), explain why you feel the delay has not been prejudicial and/or why the delay is excusable under the terms of 9(a). This should be done by relying upon FACTS, not your opinions or conclusions.

______________________________________

______________________________________

______________________________________

______________________________________

______________________________________

5. If your petition is in jeopardy under rule 9(b) because it asserts the same grounds as a previous petition, explain why you feel it deserves a reconsideration. If its fault under rule 9(b) is that it asserts new grounds which should have been included in a prior petition, explain why you are raising these grounds now rather than previously. Your expla-

nation should rely on FACTS, not your opinions or conclusions.

______________________________

______________________________

______________________________

______________________________

______________________________

______________________________

______________________________

State of ______________

County (City) of ______________

______________ (Name of Petitioner), being first duly sworn under oath presents that he has read and subscribed to the above and states that the information therein is true and correct.

______________

SIGNATURE OF PETITIONER (REQUIRED AS TO EACH PETITIONER)

Subscribed and sworn to before me this ______ day of ______, 19—.

______________

NOTARY PUBLIC OR OTHER PERSON AUTHORIZED TO ADMINISTER AN OATH

## § 2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(June 25, 1948, ch. 646, 62 Stat. 967; May 24, 1949, ch. 139, § 114, 63 Stat. 105.)

### HISTORICAL AND REVISION NOTES

#### 1948 ACT

This section restates, clarifies and simplifies the procedure in the nature of the ancient writ of error coram nobis. It provides an expeditious remedy for correcting erroneous sentences without resort to habeas corpus. It has the approval of the Judicial Conference of the United States. Its principal provisions are incorporated in H.R. 4233, Seventy-ninth Congress.

#### 1949 ACT

This amendment conforms language of section 2255 of title 28, U.S.C., with that of section 1651 of such title and makes it clear that the section is applicable in the district courts in the Territories and possessions.

### AMENDMENTS

1949—Act May 24, 1949, substituted "court established by Act of Congress" for "court of the United States" in the first par.

### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 753, 1825 of this title; title 18 section 3006A.

### APPROVAL AND EFFECTIVE DATE OF RULES GOVERNING SECTION 2254 CASES AND SECTION 2255 PROCEEDINGS FOR UNITED STATES DISTRICT COURTS

Pub. L. 94-426, § 1, Sept. 28, 1976, 90 Stat. 1334, provided: "That the rules governing section 2254 cases in the United States district courts and the rules governing section 2255 proceedings for the United States district courts, as proposed by the United States Supreme Court, which were delayed by the Act entitled 'An Act to delay the effective date of certain proposed amendments to the Federal Rules of Criminal Procedure and certain other rules promulgated by the United States Supreme Court' (Public Law 94-349), are approved with the amendments set forth in section 2 of this Act and shall take effect as so amended, with respect to petitions under section 2254 and motions under section 2255 of title 28 of the United States Code filed on or after February 1, 1977."

### POSTPONEMENT OF EFFECTIVE DATE OF PROPOSED RULES AND FORMS GOVERNING PROCEEDINGS UNDER THIS SECTION AND SECTION 2254 OF THIS TITLE

Rules and forms governing proceedings under this section and section 2254 of this title proposed by Supreme Court order of Apr. 26, 1976, effective 30 days after adjournment sine die of 94th Congress, or until and to the extent approved by Act of Congress, whichever is earlier, see section 2 of Pub. L. 94-349, set out as a note under section 2071 of this title.

## RULES GOVERNING SECTION 2255 PROCEEDINGS FOR THE UNITED STATES DISTRICT COURTS

**Effective February 1, 1977**

Rule
1. Scope of rules.
2. Motion.
3. Filing motion.
4. Preliminary consideration by judge.
5. Answers; contents.
6. Discovery.
7. Expansion of record.

Rule
8. Evidentiary hearing.
9. Delayed or successive motions.
10. Powers of magistrates.
11. Time for appeal.
12. Federal Rules of Criminal and Civil Procedure; extent of applicability.

### APPENDIX OF FORMS

Model form for motions under 28 U.S.C. § 2255.
Model form for use in 28 U.S.C. § 2255 cases involving a Rule 9 issue.

#### Effective Date of Rules; Effective Date of 1975 Amendment

Rules, and the amendments thereto by Pub. L. 94-426, Sept. 28, 1976, 90 Stat. 1334, effective with respect to petitions under section 2254 of this title and motions under section 2255 of this title filed on or after Feb. 1, 1977, see section 1 of Pub. L. 94-426, set out as a note above.

## Rule 1. Scope of Rules

These rules govern the procedure in the district court on a motion under 28 U.S.C. § 2255:

(1) by a person in custody pursuant to a judgment of that court for a determination that the judgment was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such judgment, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack; and

(2) by a person in custody pursuant to a judgment of a state or other federal court and subject to future custody under a judgment of the district court for a determination that such future custody will be in violation of the Constitution or laws of the United States, or that the district court was without jurisdiction to impose such judgment, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.

#### Advisory Committee Note

The basic scope of this postconviction remedy is prescribed by 28 U.S.C. § 2255. Under these rules the person seeking relief from federal custody files a motion to vacate, set aside, or correct sentence, rather than a petition for habeas corpus. This is consistent with the terminology used in section 2255 and indicates the difference between this remedy and federal habeas for a state prisoner. Also, habeas corpus is available to the person in federal custody if his "remedy by motion is inadequate or ineffective to test the legality of his detention."

Whereas sections 2241-2254 (dealing with federal habeas corpus for those in state custody) speak of the district court judge "issuing the writ" as the operative remedy, section 2255 provides that, if the judge finds the movant's assertions to be meritorious, he "shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." This is possible because a motion under § 2255 is a further step in the movant's criminal case and not a separate civil action, as appears from the legislative history of section 2 of S. 20, 80th Congress, the provisions of which were incorporated by the same Congress in title 28 U.S.C. as § 2255. In reporting S. 20 favorably the Senate Judiciary Committee said (Sen. Rep. 1526, 80th Cong. 2d Sess., p. 2):

The two main advantages of such motion remedy over the present habeas corpus are as follows:

First, habeas corpus is a separate civil action and not a further step in the criminal case in which petitioner is sentenced (*Ex parte Tom Tong*, 108 U.S. 556, 559 (1883)). It is not a determination of guilt or innocence of the charge upon which petitioner was sentenced. Where a prisoner sustains his right to discharge in habeas corpus, it is usually because some right—such as lack of counsel—has been denied which reflects no determination of his guilt or innocence but affects solely the fairness of his earlier criminal trial. Even under the broad power in the statute "to dispose of the party as law and justice require" (28 U.S.C.A., sec. 461), the court or judge is by no means in the same advantageous position in habeas corpus to do justice as would be so if the matter were determined in the criminal proceeding (see *Medley*, petitioner, 134 U.S. 160, 174 (1890)). For instance, the judge (by habeas corpus) cannot grant a new trial in the criminal case. Since the motion remedy is in the criminal proceeding, this section 2 affords the opportunity and expressly gives the broad powers to set aside the judgment and to "discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate."

The fact that a motion under § 2255 is a further step in the movant's criminal case rather than a separate civil action has significance at several points in these rules. See, *e.g.*, advisory committee note to rule 3 (re no filing fee), advisory committee note to rule 4 (re availability of files, etc., relating to the judgment), advisory committee note to rule 6 (re availability of discovery under criminal proceedure rules), advisory committee note to rule 11 (re no extension of time for appeal), and advisory committee not to rule 12 (re applicability of federal criminal rules). However, the fact that Congress has characterized the motion as a further step in the criminal proceedings does *not* mean that proceedings upon such a motion are of necessity governed by the legal principles which are applicable at a criminal trial regarding such matters as counsel, presence, confrontation, self-incrimination, and burden of proof.

The challenge of decisions such as the revocation of probation or parole are not appropriately dealt with under 28 U.S.C. § 2255, which is a continuation of the original criminal action. Other remedies, such as habeas corpus, are available in such situations.

Although rule 1 indicates that these rules apply to a motion for a determination that the judgment was imposed "in violation of the . . . laws of the United States," the language of 28 U.S.C. § 2255, it is not the intent of these rules to define or limit what is encompassed within that phrase. See *Davis* v. *United States*, 417 U.S. 333 (1974), holding that it is not true "that every asserted error of law can be raised on a § 2255 motion," and that the appropriate inquiry is "whether the claimed error of law was a fundamental defect which inherently results in a complete miscarriage of justice,' and whether [i]t . . . present[s] exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent.'"

For a discussion of the "custody" requirement and the intended limited scope of this remedy, see advisory committee note to § 2254 rule 1.

## Rule 2. Motion

**(a) Nature of application for relief**

If the person is presently in custody pursuant to the federal judgment in question, or if not presently in custody may be subject to such custody in the future pursuant to such judgment, the application for relief shall be in the form of a motion to vacate, set aside, or correct the sentence.

**(b) Form of motion**

The motion shall be in substantially the form annexed to these rules, except that any district court may by local rule require that motions filed with it shall be in a form prescribed by the local rule. Blank motions in the prescribed form shall be made available without charge by the clerk of the district court to applicants upon their request. It shall specify all the grounds for relief which are available to the movant and of which he has or, by the exercise of reasonable diligence, should have knowledge and shall set forth in summary form the facts supporting each of the grounds thus specified. It shall also state the relief requested. The motion shall be typewritten or legibly handwritten and shall be signed and sworn to by the movant.

**(c) Motion to be directed to one judgment only**

A motion shall be limited to the assertion of a claim for relief against one judgment only of the district court. If a movant desires to attack the validity of other judgments of that or any other district court under which he is in custody or may be subject to future custody, as the case may be, he shall do so by separate motions.

**(d) Return of insufficient motion**

If a motion received by the clerk of a district court does not substantially comply with the requirements of rule 2 or rule 3, it may be returned to the movant, if a judge of the court so directs, together with a statement of the reason for its return. The clerk shall retain a copy of the motion.

(As amended Pub. L. 94-426, § 2(3), (4), Sept. 28, 1976, 90 Stat. 1334.)

### ADVISORY COMMITTEE NOTE

Under these rules the application for relief is in the form of a motion rather than a petition (see rule 1 and advisory committee note). Therefore, there is no requirement that the movant name a respondent. This is consistent with 28 U.S.C. § 2255. The United States Attorney for the district in which the judgment under attack was entered is the proper party to oppose the motion since the federal government is the movant's adversary of record.

If the movant is attacking a federal judgment which will subject him to future custody, he must be in present custody (see rule 1 and advisory committee note) as the result of a state or federal governmental action. He need not alter the nature of the motion by trying to include the government officer who presently has official custody of him as a psuedo-respondent, or third-party plaintiff, or other fabrication. The court hearing his motion attacking the future custody can exercise jurisdiction over those having him in present custody without the use of artificial pleading devices.

There is presently a split among the courts as to whether a person currently in state custody may use a § 2255 motion to obtain relief from a federal judgment under which he will be subjected to custody in the future. Negative, see *Newton* v. *United States*, 329 F.Supp. 90 (S.D. Texas 1971); affirmative, see *Desmond* v. *The United States Board of Parole*, 397 F.2d 386 (1st Cir. 1968), cert. denied, 393 U.S. 919 (1968); and *Paalino* v. *United States*, 314 F.Supp. 875 (C.D.Cal. 1970). It is intended that these rules settle the matter in favor of the prisoner's being able to file a § 2255 motion for relief under those circumstances. The proper district in which to file such a motion is the one in which is situated the court which rendered the sentence under attack.

Under rule 35, Federal Rules of Criminal Procedure, the court may correct an illegal sentence or a sentence imposed in an illegal manner, or may reduce the sentence. This remedy should be used, rather than a motion under these § 2255 rules, whenever applicable, but there is some overlap between the two proceedings which has caused the courts difficulty.

The movant should not be barred from an appropriate remedy because he has misstyled his motion. See *United States* v. *Morgan*, 346 U.S. 502, 505 (1954). The court should construe it as whichever one is proper under the circumstances and decide it on its merits. For a § 2255 motion construed as a rule 35 motion, see *Heflin* v. *United States*, 358 U.S. 415 (1959); and *United States* v. *Coke*, 404 F.2d 836 (2d Cir. 1968). For writ of error coram nobis treated as a rule 35 motion, see *Hawkins* v. *United States*, 324 F.Supp. 223 (E.D.Texas, Tyler Division 1971). For a rule 35 motion treated as a § 2255 motion, see *Moss* v. *United States*, 263 F.2d 615 (5th Cir. 1959); *Jones* v. *United States*, 400 F.2d 892 (8th Cir. 1968), cert. denied 394 U.S. 991 (1969); and *United States* v. *Brown*, 413 F.2d 878 (9th Cir. 1969), cert. denied, 397 U.S. 947 (1970).

One area of difference between § 2255 and rule 35 motions is that for the latter there is no requirement that the movant be "in custody." *Heflin* v. *United States*, 358 U.S. 415, 418, 422 (1959); *Duggins* v. *United States*, 240 F.2d 479, 483 (6th Cir. 1957). Compare with rule 1 and advisory committee note for § 2255 motions. The importance of this distinction has decreased since *Peyton* v. *Rowe*, 391 U.S. 54 (1968), but it might still make a difference in particular situations.

A rule 35 motion is used to attack the sentence imposed, not the basis for the sentence. The court in *Gilinsky* v. *United States*, 335 F.2d 914, 916 (9th Cir. 1964), stated, "a Rule 35 motion presupposes a valid conviction. * * * [C]ollateral attack on errors alledgedly committed at trial is not permissible under Rule 35." By illustration the court noted at page 917: "a Rule 35 proceeding contemplates the correction of a sentence of a court having jurisdiction. * * * [J]urisdictional defects * * * involve a collateral attack, they must ordinarily be presented under 28 U.S.C. § 2255." In *United States* v. *Semet*, 295 F.Supp. 1084 (E.D. Okla. 1968), the prisoner moved under rule 35 and § 2255 to invalidate the sentence he was serving on the grounds of his failure to understand the charge to which he pleaded guilty. The court said:

> As regards Defendant's Motion under Rule 35, said Motion must be denied as its presupposes a valid conviction of the offense with which he was charged and may be used only to attack the sentence. It may not be used to examine errors occurring prior to the imposition of sentence.
>
> 295 F.Supp. at 1085

See also: *Moss* v. *United States*, 263 F.2d at 616; *Duggins* v. *United States*, 240 F. 2d at 484; *Migdal* v. *United States*, 298 F.2d 513, 514 (9th Cir. 1961); *Jones* v. *United States*, 400 F.2d at 894; *United States* v. *Coke*, 404 F.2d at 847; and *United States* v. *Brown*, 413 F.2d at 879.

A major difficulty in deciding whether rule 35 or § 2255 is the proper remedy is the uncertainty as to what is meant by an "illegal sentence." The Supreme Court dealt with this issue in *Hill* v. *United States*, 368 U.S. 424 (1962). The prisoner brought a § 2255 motion to vacate sentence on the ground that he had not been given a Fed.R.Crim. P. 32(a) opportunity to make a statement in his own behalf at the time of sentencing. The majority held this was not an error subject to collateral attack under § 2255. The five-member majority considered the motion as one brought pursuant to rule 35, but denied relief, stating:

> [T]he narrow function of Rule 35 is to permit correction at any time of an illegal *sentence*, not to re-examine errors occurring at the trial or other proceedings prior to the imposition of sentence. The sentence in this case was not illegal. The punishment meted out was not in excess of that prescribed by the relevant statutes, multiple terms were not imposed for the same offense, nor were the terms of the sentence itself legally or constitutionally invalid in any other respect.
>
> 368 U.S. at 430

The four dissenters felt the majority definition of "illegal" was too narrow.

> [Rule 35] provides for the correction of an "illegal sentence" without regard to the reasons why that sentence is illegal and contains not a single word to

> support the Court's conclusion that only a sentence illegal by reason of the punishment it imposes is "illegal" within the meaning of the Rule. I would have thought that a sentence imposed in an illegal manner—whether the amount or form of the punishment meted out constitutes an additional violation of law or not—would be recognized as an "illegal sentence" under any normal reading of the English language.

368 U.S. at 431-432

The 1966 amendment of rule 35 added language permitting correction of a sentence imposed in an "illegal manner." However, there is a 120-day time limit on a motion to do this, and the added language does not clarify the intent of the rule or its relation to § 2255.

The courts have been flexible in considering motions under circumstances in which relief might appear to be precluded by *Hill* v. *United States*. In *Peterson* v. *United States*, 432 F.2d 545 (8th Cir. 1970), the court was confronted with a motion for reduction of sentence by a prisoner claiming to have received a harsher sentence than his codefendants because he stood trial rather than plead guilty. He alleged that this violated his constitutional right to a jury trial. The court ruled that, even though it was past the 120-day time period for a motion to reduce sentence, the claim was still cognizable under rule 35 as a motion to correct an illegal sentence.

The courts have made even greater use of § 2255 in these types of situations. In *United States* v. *Lewis*, 392 F.2d 440 (4th Cir. 1968), the prisoner moved under § 2255 and rule 35 for relief from a sentence he claimed was the result of the judge's misunderstanding of the relevant sentencing law. The court held that he could not get relief under rule 35 because it was past the 120 days for correction of a sentence imposed in an illegal manner and under *Hill* v. *United States* it was not an illegal sentence. However, § 2255 was applicable because of its "otherwise subject to collateral attack" language. The flaw was not a mere trial error relating to the finding of guilt, but a rare and unusual error which amounted to "exceptional circumstances" embraced in § 2255's words "collateral attack." See 368 U.S. at 444 for discussion of other cases allowing use of § 2255 to attack the sentence itself in similar circumstances, especially where the judge has sentenced out of a misapprehension of the law.

In *United States* v. *McCarthy*, 433 F.2d 591, 592 (1st Cir. 1970), the court allowed a prisoner who was past the time limit for a proper rule 35 motion to use § 2255 to attack the sentence which he received upon a plea of guilty on the ground that it was induced by an unfulfilled promise of the prosecutor to recommend leniency. The court specifically noted that under § 2255 this was a proper collateral attack on the sentence and there was no need to attack the conviction as well.

The court in *United States* v. *Malcolm*, 432 F.2d 809, 814, 818 (2d Cir. 1970), allowed a prisoner to challenge his sentence under § 2255 without attacking the conviction. It held rule 35 inapplicable because the sentence was not illegal on its face, but the manner in which the sentence was imposed raised a question of the denial of due process in the sentencing itself which was cognizable under § 2255.

The flexible approach taken by the courts in the above cases seems to be the reasonable way to handle these situations in which rule 35 and § 2255 appear to overlap. For a further discussion of this problem, see C. Wright, Federal Practice and Procedure; Criminal §§ 581-587 (1969, Supp. 1975).

See the advisory committee note to rule 2 of the § 2254 rules for further discussion of the purposes and intent of rule 2 of these § 2255 rules.

AMENDMENTS

1976—Subsec. (b). Pub. L. 94-426, § 2(3), inserted "substantially" following "The motion shall be in", and struck out requirement that the motion follow the prescribed form.

Subsec. (d). Pub. L. 94-426, § 2(4), inserted "substantially" following "district court does not", and struck out provision which permitted the clerk to return a motion for noncompliance without a judge so directing.

## Rule 3. Filing Motion

**(a) Place of filing; copies**

A motion under these rules shall be filed in the office of the clerk of the district court. It shall be accompanied by two conformed copies thereof.

**(b) Filing and service**

Upon receipt of the motion and having ascertained that it appears on its face to comply with rules 2 and 3, the clerk of the district court shall file the motion and enter it on the docket in his office in the criminal action in which was entered the judgment to which it is directed. He shall thereupon deliver or serve a copy of the motion together with a notice of its filing on the United States Attorney of the district in which the judgment under attack was entered. The filing of the motion shall not require said United States Attorney to answer the motion or otherwise move with respect to it unless so ordered by the court.

ADVISORY COMMITTEE NOTE

There is no filing fee required of a movant under these rules. This is a change from the practice of charging $15 and is done to recognize specifically the nature of a § 2255 motion as being a continuation of the criminal case whose judgment is under attack.

The long-standing practice of requiring a $15 filing fee has followed from 28 U.S.C. § 1914(a) whereby "parties instituting any civil action * * * pay a filing fee of $15, except that on an application for a writ of habeas corpus the filing fee shall be $5." This has been held to apply to a proceeding under § 2255 despite the rationale that such a proceeding is a motion and thus a continuation of the criminal action. (See note to rule 1.)

> A motion under Section 2255 is a civil action and the clerk has no choice but to charge a $15.00 filing fee unless by leave of court it is filed in forma pauperis.

*McCune* v. *United States*, 406 F.2d 417, 419 (6th Cir. 1969).

Although the motion has been considered to be a new civil action in the nature of habeas corpus for filing purposes, the reduced fee for habeas has been held not applicable. The Tenth Circuit considered the specific issue in *Martin* v. *United States*, 273 F.2d 775 (10th Cir. 1960), cert. denied, 365 U.S. 853 (1961), holding that the reduced fee was exclusive to habeas petitions.

> Counsel for Martin insists that, if a docket fee must be paid, the amount is $5 rather than $15 and bases his contention on the exception contained in 28 U.S.C. § 1914 that in habeas corpus the fee is $5. This reads into § 1914 language which is not there. While an application under § 2255 may afford the same relief as that previously obtainable by habeas corpus, it is not a petition for a writ of habeas corpus. A change in § 1914 must come from Congress.

273 F.2d at 778

Although for most situations § 2255 is intended to provide to the federal prisoner a remedy equivalent to habeas corpus as used by state prisoners, there is a major distinction between the two. Calling a § 2255 request for relief a motion rather than a petition militates toward charging no new filing fee, not an increased one. In the absence of convincing evidence to the contrary, there is no reason to suppose that Congress did not mean what it said in making a § 2255 action a motion. Therefore, as in other motions filed in a criminal action, there is no requirement of a filing fee. It is appropriate that the present situation of docketing a § 2255 motion as a new action and charging a $15 filing fee be remedied by the rule when the whole question of § 2255 motions is thoroughly thought through and organized.

Even though there is no need to have a forma pauperis affidavit to proceed with the action since there is no requirement of a fee for filing the motion the affidavit remains attached to the form to be supplied potential movants. Most such movants are indigent, and this is a convenient way of getting this into the official record so that the judge may appoint counsel, order the government to pay witness fees, allow docketing of an appeal, and grant any other rights to which an indigent is entitled in the course of a § 2255 motion, when appropriate to the particular situation, without the need for an indigency petition and adjudication at such later point in the proceeding. This should result in a streamlining of the process to allow quicker disposition of these motions.

For further discussion of this rule, see the advisory committee note to rule 3 of the § 2254 rules.

## Rule 4. Preliminary Consideration by Judge

**(a) Reference to judge; dismissal or order to answer**

The original motion shall be presented promptly to the judge of the district court who presided at the movant's trial and sentenced him, or, if the judge who imposed sentence was not the trial judge, then it shall go to the judge who was in charge of that part of the proceedings being attacked by the movant. If the appropriate judge is unavailable to consider the motion, it shall be presented to another judge of the district in accordance with the procedure of the court for the assignment of its business.

**(b) Initial consideration by judge**

The motion, together with all the files, records, transcripts, and correspondence relating to the judgment under attack, shall be examined promptly by the judge to whom it is assigned. If it plainly appears from the face of the motion and any annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the movant to be notified. Otherwise, the judge shall order the United States Attorney to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate.

### ADVISORY COMMITTEE NOTE

Rule 4 outlines the procedure for assigning the motion to a specific judge of the district court and the options available to the judge and the government after the motion is properly filed.

The long-standing majority practice in assigning motions made pursuant to § 2255 has been for the trial judge to determine the merits of the motion. In cases where the § 2255 motion is directed against the sentence, the merits have traditionally been decided by the judge who imposed sentence. The reasoning for this was first noted in *Currell* v. *United States*, 173 F.2d 348, 348–349 (4th Cir. 1949):

> Complaint is made that the judge who tried the case passed upon the motion. Not only was there no impropriety in this, but it is highly desirable in such cases that the motions be passed on by the judge who is familiar with the facts and circumstances surrounding the trial, and is consequently not likely to be misled by false allegations as to what occurred.

This case, and its reasoning, has been almost unanimously endorsed by other courts dealing with the issue.

Commentators have been critical of having the motion decided by the trial judge. See Developments in the Law—Federal Habeas Corpus, 83 Harv.L.Rev. 1038, 1206–1208 (1970).

> [T]he trial judge may have become so involved with the decision that it will be difficult for him to review it objectively. Nothing in the legislative history suggests that "court" refers to a specific judge, and the procedural advantages of section 2255 are available whether or not the trial judge presides at the hearing.
>
> The theory that Congress intended the trial judge to preside at a section 2255 hearing apparently originated in *Carvell* v. *United States*, 173 F.2d 348 (4th Cir. 1949) (per curiam), where the panel of judges included Chief Judge Parker of the Fourth Circuit, chairman of the Judicial Conference committee which drafted section 2255. But the legislative history does not indicate that Congress wanted the trial judge to preside. Indeed the advantages of section 2255 can all be achieved if the case is heard in the sentencing district, regardless of which judge hears it. According to the Senate committee report the purpose of the bill was to make the proceeding a part of the criminal action so the court could resentence the applicant, or grant him a new trial. (A judge presiding over a habeas corpus action does not have these powers.) In addition, Congress did not want the cases heard in the district of confinement because that tended to concentrate the burden on a few districts, and made it difficult for witnesses and records to be produced.
>
> 83 Harv.L.Rev. at 1207–1208

The Court of Appeals for the First Circuit has held that a judge other than the trial judge should rule on the 2255 motion. See *Halliday* v. *United States*, 380 F.2d 270 (1st Cir. 1967).

There is a procedure by which the movant can have a judge other than the trial judge decide his motion in courts adhering to the majority rule. He can file an affidavit alleging bias in order to disqualify the trial judge. And there are circumstances in which the trial judge will, on his own, disqualify himself. See, *e.g.*, *Webster* v. *United States*, 330 F.Supp. 1080 (1972). However, there has been some questioning of the effectiveness of this procedure. See Developments in the Law—Federal Habeas Corpus, 83 Harv.L.Rev. 1038, 1200–1207 (1970).

Subdivision (a) adopts the majority rule and provides that the trial judge, or sentencing judge if different and appropriate for the particular motion, will decide the motion made pursuant to these rules, recognizing that, under some circumstances, he may want to disqualify himself. A movant is not without remedy if he feels this is unfair to him. He can file an affidavit of bias. And there is the right to appellate review if the trial judge refuses to grant his motion. Because the trial judge is thoroughly familiar with the case, there is obvious administrative advantage in giving him the first opportunity to decide whether there are grounds for granting the motion.

Since the motion is part of the criminal action in which was entered the judgment to which it is directed, the files, records, transcripts, and correspondence relating to that judgment are automatically available to the judge in his consideration of the motion. He no longer need order them incorporated for that purpose.

Rule 4 has its basis in § 2255 (rather than 28 U.S.C. § 2243 in the corresponding habeas corpus rule) which does not have a specific time limitation as to when the answer must be made. Also, under § 2255, the United States Attorney for the district is the party served with the notice and a copy of the motion and required to answer (when appropriate). Subdivision (b) continues this practice since there is no respondent involved in the motion (unlike habeas) and the United States Attorney, as prosecutor in the case in question, is the most appropriate one to defend the judgment and oppose the motion.

The judge has discretion to require an answer or other appropriate response from the United States Attorney. See advisory committee note to rule 4 of the § 2254 rules.

### Rule 5. Answer; Contents

**(a) Contents of answer**

The answer shall respond to the allegations of the motion. In addition it shall state whether the movant has used any other available federal remedies including any prior post-conviction motions under these rules or those existing previous to the adoption of the present rules. The answer shall also state whether an evidentiary hearing was accorded the movant in a federal court.

**(b) Supplementing the answer**

The court shall examine its files and records to determine whether it has available copies of transcripts and briefs whose existence the answer has indicated. If any of these items should be absent, the government shall be ordered to supplement its answer by filing the needed records. The court shall allow the government an appropriate period of time in which to do so, without unduly delaying the consideration of the motion.

#### ADVISORY COMMITTEE NOTE

Unlike the habeas corpus statutes (see 28 U.S.C. §§ 2243, 2248) § 2255 does not specifically call for a return or answer by the United States Attorney or set any time limits as to when one must be submitted. The general practice, however, if the motion is not summarily dismissed, is for the government to file an answer to the motion as well as counter-affidavits, when appropriate. Rule 4 provides for an answer to the motion by the United States Attorney, and rule 5 indicates what its contents should be.

There is no requirement that the movant exhaust his remedies prior to seeking relief under § 2255. However, the courts have held that such a motion is inappropriate if the movant is simultaneously appealing the decision.

> We are of the view that there is no jurisdictional bar to the District Court's entertaining a Section 2255 motion during the pendency of a direct appeal but that the orderly administration of criminal law precludes considering such a motion absent extraordinary circumstances.
>
> *Womack* v. *United States*, 395 F.2d 630, 631 (D.C.Cir. 1968)

Also see *Masters* v. *Eide*, 353 F.2d 517 (8th Cir. 1965). The answer may thus cut short consideration of the motion if it discloses the taking of an appeal which was omitted from the form motion filed by the movant.

There is nothing in § 2255 which corresponds to the § 2248 requirement of a traverse to the answer. Numerous cases have held that the government's answer and affidavits are not conclusive against the movant, and if they raise disputed issues of fact a hearing must be held. *Machibroda* v. *United States*, 368 U.S. 487, 494, 495 (1962); *United States* v. *Salerno*, 290 F.2d 105, 106 (2d Cir. 1961); *Romero* v. *United States*, 327 F.2d 711, 712 (5th Cir. 1964); *Scott* v. *United States*, 349 F.2d 641, 642, 643 (6th Cir. 1965); *Schiebelhut* v. *United States*, 357 F.2d 743, 745 (6th Cir. 1966); and *Del Piano* v. *United States*, 362 F.2d 931, 932, 933 (3d Cir. 1966). None of these cases make any mention of a traverse by the movant to the government's answer. As under rule 5 of the § 2254 rules, there is no intention here that such a traverse be required, except under special circumstances. See advisory committee note to rule 9.

Subdivision (b) provides for the government to supplement its answers with appropriate copies of transcripts or briefs if for some reason the judge does not already have them under his control. This is because the government will in all probability have easier access to such papers than the movant, and it will conserve the court's time to have the government produce them rather than the movant, who would in most instances have to apply in forma pauperis for the government to supply them for him anyway.

For further discussion, see the advisory committee note to rule 5 of the § 2254 rules.

### Rule 6. Discovery

**(a) Leave of court required**

A party may invoke the processes of discovery available under the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure or elsewhere in the usages and principles of law if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise. If necessary for effective utilization of discovery procedures, counsel shall be appointed by the judge for a movant who qualifies for appointment of counsel under 18 U.S.C. § 3006A(g).

**(b) Requests for discovery**

Requests for discovery shall be accompanied by a statement of the interrogatories or requests for admission and a list of the documents, if any, sought to be produced.

**(c) Expenses**

If the government is granted leave to take the deposition of the movant or any other person, the judge may as a condition of taking it direct that the government pay the expenses of travel and subsistence and fees of counsel for the movant to attend the taking of the deposition.

#### ADVISORY COMMITTEE NOTE

This rule differs from the corresponding discovery rule under the § 2254 rules in that it includes the processes of discovery available under the Federal Rules of Criminal Procedure as well as the civil. This is because of the nature of a § 2255 motion as a continuing part of the criminal proceeding (see advisory committee note to rule 1) as well as a remedy analogous to habeas corpus by state prisoners.

See the advisory committee note to rule 6 of the § 2254 rules. The discussion there is fully applicable to discovery under these rules for § 2255 motions.

### Rule 7. Expansion of Record

**(a) Direction for expansion**

If the motion is not dismissed summarily, the judge may direct that the record be expanded by the parties by the inclusion of additional materials relevant to the determination of the merits of the motion.

**(b) Materials to be added**

The expanded record may include, without limitation, letters predating the filing of the motion in the district court, documents, exhibits, and answers under oath, if so directed, to written interrogatories propounded by the judge. Affidavits may be submitted and considered as a part of the record.

**(c) Submission to opposing party**

In any case in which an expanded record is directed, copies of the letters, documents, exhibits, and affidavits proposed to be included shall be submitted to the party against whom they are to be offered, and he shall be afforded an opportunity to admit or deny their correctness.

**(d) Authentication**

The court may require the authentication of any material under subdivision (b) or (c).

ADVISORY COMMITTEE NOTE

It is less likely that the court will feel the need to expand the record in a § 2255 proceeding than in a habeas corpus proceeding, because the trial (or sentencing) judge is the one hearing the motion (see rule 4) and should already have a complete file on the case in his possession. However, rule 7 provides a convenient method for supplementing his file if the case warrants it.

See the advisory committee note to rule 7 of the § 2254 rules for a full discussion of reasons and procedures for expanding the record.

### Rule 8. Evidentiary Hearing

**(a) Determination by court**

If the motion has not been dismissed at a previous stage in the proceeding, the judge, after the answer is filed and any transcripts or records of prior court actions in the matter are in his possession, shall, upon a review of those proceedings and of the expanded record, if any, determine whether an evidentiary hearing is required. If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the motion as justice dictates.

**(b) Function of the magistrate**

(1) When designated to do so in accordance with 28 U.S.C. § 636(b), a magistrate may conduct hearings, including evidentiary hearings, on the motion, and submit to a judge of the court proposed findings and recommendations for disposition.

(2) The magistrate shall file proposed findings and recommendations with the court and a copy shall forthwith be mailed to all parties.

(3) Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court.

(4) A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify in whole or in part any findings or recommendations made by the magistrate.

**(c) Appointment of counsel; time for hearing**

If an evidentiary hearing is required, the judge shall appoint counsel for a movant who qualifies for the appointment of counsel under 18 U.S.C. § 3006A(g) and the hearing shall be conducted as promptly as practicable, having regard for the need of counsel for both parties for adequate time for investigation and preparation. These rules do not limit the appointment of counsel under 18 U.S.C. § 3006A at any stage of the proceeding if the interest of justice so requires.

(As amended Pub. L. 94–426, § 2(6), Sept. 28, 1976, 90 Stat. 1335; Pub. L. 94–577, § 2(a)(2), (b)(2), Oct. 21, 1976, 90 Stat. 2730, 2731.)

ADVISORY COMMITTEE NOTE

The standards for § 2255 hearings are esentially the same as for evidentiary hearings under a habeas petition, except that the previous federal fact-finding proceeding is in issue rather than the state's. Also § 2255 does not set specific time limits for holding the hearing, as does § 2243 for a habeas action. With these minor differences in mind, see the advisory committee note to rule 8 of § 2254 rules, which is applicable to rule 8 of these § 2255 rules.

AMENDMENTS

1976—Subsec. (b). Pub. L. 94–577, § 2(a)(2), substituted provisions which authorized magistrates, when designated to do so in accordance with section 636(b) of this title, to conduct hearings, including evidentiary hearings, on the petition and to submit to a judge of the court proposed findings of fact and recommendations for disposition, which directed the magistrate to file proposed findings and recommendations with the court with copies furnished to all parties, which allowed parties thus served 10 days to file written objections thereto, and which directed a judge of the court to make de novo determinations of the objected-to portions and to accept, reject, or modify the findings or recommendations for provisions under which the magistrate had been empowered only to recommend to the district judge that an evidentiary hearing be held or that the petition be dismissed.

Subsec. (c). Pub. L. 94–577, § 2(b)(2), substituted "and the hearing shall be conducted" for "and shall conduct the hearing."

Pub. L. 94–426 provided that these rules not limit the appointment of counsel under section 3006A of title 18, if the interest of justice so require.

EFFECTIVE DATE OF 1976 AMENDMENT

Amendments made by Pub. L. 94–577 effective with respect to motions under section 2255 of this title filed on or after Feb. 1, 1977, see section 2(c) of Pub. L. 94–577, set out as a note under Rule 8 of the Rules Governing Cases Under Section 2254 of this title.

### Rule 9. Delayed or Successive Motions

**(a) Delayed motions**

A motion for relief made pursuant to these rules may be dismissed if it appears that the government has been prejudiced in its ability to respond to the motion by delay in its filing unless the movant shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the government occurred.

**(b) Successive motions**

A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.

(As amended Pub. L. 94–426, § 2(9), (10), Sept. 28, 1976, 90 Stat. 1335.)

ADVISORY COMMITTEE NOTE

Unlike the statutory provisions on habeas corpus (28 U.S.C. §§ 2241–2254), § 2255 specifically provides that "a motion for such relief may be made *at any time.*" [Emphasis added.] Subdivision (a) provides that delayed motions may be barred from consideration if the government has been prejudiced in its ability to respond to the motion by the delay and the movant's failure to seek relief earlier is not excusable within the terms of the rule. Case law, dealing with this issue, is in conflict.

Some courts have held that the literal language of § 2255 precludes any possible time bar to a motion brought under it. In *Heflin* v. *United States*, 358 U.S. 415 (1959), the concurring opinion noted:

> The statute [28 U.S.C. § 2255] further provides; "A motion * * * may be made at any time." This * * * simply means that, as in habeas corpus, there is no statute of limitations, no *res judicata*, and that the doctrine of laches is inapplicable.

358 U.S. at 420

*McKinney* v. *United States*, 208 F.2d 844 (D.C.Cir. 1953) reversed the district court's dismissal of a § 2255 motion for being too late, the court stating:

> McKinney's present application for relief comes late in the day: he has served some fifteen years in prison. But tardiness is irrelevant where a constitutional issue is raised and where the prisoner is still confined.

208 F.2d at 846, 847

In accord, see: *Juelich* v. *United States*, 300 F.2d 381, 383 (5th Cir. 1962); *Conners* v. *United States*, 431 F.2d 1207, 1208 (9th Cir. 1970); *Sturrup* v. *United States*, 218 F.Supp. 279, 281 (E.D.N.Car. 1963); and *Banks* v. *United States*, 319 F.Supp. 649, 652 (S.D.N.Y. 1970).

It has also been held that delay in filing a § 2255 motion does not bar the movant because of lack of reasonable diligence in pressing the claim.

> The statute [28 U.S.C. § 2255], when it states that the motion may be made at any time, excludes the addition of a showing of diligence in delayed filings. A number of courts have considered contentions similar to those made here and have concluded that there are no time limitations. This result excludes the requirement of diligence which is in reality a time limitation.

*Haier* v. *United States*, 334 F.2d 441, 442 (10th Cir. 1964)

Other courts have recognized that delay may have a negative effect on the movant. In *Raines* v. *United States*, 423 F.2d 526 (4th Cir. 1970), the court stated:

> [B]oth petitioners' silence for extended periods, one for 28 months and the other for nine years, serves to render their allegations less believable. "Although a delay in filing a section 2255 motion is not a controlling element * * * it may merit some consideration * * *."

423 F.2d at 531

In *Aiken* v. *United States*, 191 F.Supp. 43, 50 (M.D.N.Car. 1961), aff'd 296 F.2d 604 (4th Cir. 1961), the court said: "While motions under 28 U.S.C. § 2255 may be made at any time, the lapse of time affects the good faith and credibility of the moving party." For similar conclusions, see: *Parker* v. *United States*, 358 F.2d 50, 54 n. 4 (7th Cir. 1965), cert. denied, 386 U.S. 916 (1967); *Le Clair* v. *United States*, 241 F.Supp. 819, 824 (N.D. Ind. 1965); *Malone* v. *United States*, 299 F.2d 254, 256 (6th Cir. 1962), cert. denied, 371 U.S. 863 (1962); *Howell* v. *United States*, 442 F.2d 265, 274 (7th Cir. 1971); and *United States* v. *Wiggins*, 184 F. Supp. 673, 676 (D.C.Cir. 1960).

There have been holdings by some courts that a delay in filing a § 2255 motion operates to increase the burden of proof which the movant must meet to obtain relief. The reasons for this, as expressed in *United States* v. *Bostic*, 206 F.Supp. 855 (D.C.Cir. 1962), are equitable in nature.

> Obviously, the burden of proof on a motion to vacate a sentence under 28 U.S.C. § 2255 is on the moving party. . . . The burden is particularly heavy if the issue is one of fact and a long time has elapsed since the trial of the case. While neither the statute of limitations nor laches can bar the assertion of a constitutional right, nevertheless, the passage of time may make it impracticable to retry a case if the motion is granted and a new trial is ordered. No doubt, at times such a motion is a product of an afterthought. Long delay may raise a question of good faith.

206 F.Supp. at 856–857

See also *United States* v. *Wiggins*, 184 F.Supp. at 676.

A requirement that the movant display reasonable diligence in filing a § 2255 motion has been adopted by some courts dealing with delayed motions. The court in *United States* v. *Moore*, 166 F.2d 102 (7th Cir. 1948), cert. denied, 334 U.S. 849 (1948), did this, again for equitable reasons.

> [W]e agree with the District Court that the petitioner has too long slept upon his rights. * * * [A]pparently there is no limitation of time within which * * * a motion to vacate may be filed, except that an applicant must show reasonable diligence in presenting his claim. * * *
>
> The reasons which support the rule requiring diligence seem obvious. * * * Law enforcement officials change, witnesses die, memories grow dim. The prosecuting tribunal is put to a disadvantage if an unexpected retrial should be necessary after long passage of time.

166 F.2d at 105

In accord see *Desmond* v. *United States*, 333 F.2d 378, 381 (1st Cir. 1964), on remand, 345 F.2d 225 (1st Cir. 1965).

One of the major arguments advanced by the courts which would penalize a movant who waits an unduly long time before filing a § 2255 motion is that such delay is highly prejudicial to the prosecution. In Desmond v. United States, writing of a § 2255 motion alleging denial of effective appeal because of deception by movant's own counsel, the court said:

> [A]pplications for relief such as this must be made promptly. It will not do for a prisoner to wait until government witnesses have become unavailable as by death, serious illness or absence from the country, or until the memory of available government witnesses has faded. It will not even do for a prisoner to wait any longer than is reasonably necessary to prepare appropriate moving papers, however inartistic, after discovery of the deception practiced upon him by his attorney.

333 F.2d at 381

In a similar vein are *United States* v. *Moore* and *United States* v. *Bostic*, supra, and *United States* v. *Wiggins*, 184 F. Supp. at 676.

Subdivision (a) provides a flexible, equitable time limitation based on laches to prevent movants from withholding their claims so as to prejudice the government both in meeting the allegations of the motion and in any possible retrial. It includes a reasonable diligence requirement for ascertaining possible grounds for relief. If the delay is found to be excusable, or nonprejudicial to the government, the time bar is inoperative.

Subdivision (b) is consistent with the language of § 2255 and relevant case law.

The annexed form is intended to serve the same purpose as the comparable one included in the § 2254 rules.

For further discussion applicable to this rule, see the advisory committee note to rule 9 of the § 2254 rules.

### AMENDMENTS

1976—Subsec. (a). Pub. L. 94-426, § 2(9), struck out provision which established a rebuttable presumption of prejudice to government if the petition was filed more than five years after conviction.

Subsec. (b). Pub. L. 94-426, § 2(10), substituted "constituted an abuse of the procedure governed by these rules" for "is not excusable".

### Rule 10. Powers of Magistrates

**The duties imposed upon the judge of the district court by rules 2, 3, 4, 6, and 7 may be performed by a United States magistrate if and to the extent that he is so empowered by rule of the district court, and to the extent the district court has established standards and criteria for the performance of such duties, except that, when such duties involve the making of an order under rule 4 dismissing the motion, the magistrate shall submit to the court his report as to the facts and his recommendation with respect to the order to be made by the court.**

(As amended Pub. L. 94-426, § 2(12), Sept. 28, 1976, 90 Stat. 1335.)

#### ADVISORY COMMITTEE NOTE

See the advisory committee note to rule 10 of the § 2254 rules for a discussion fully applicable here as well.

#### AMENDMENTS

1976—Pub. L. 94-426 inserted ", and to the extent the district court has established standards and criteria for the performance of such duties," following "rule of the district court".

### Rule 11. Time for Appeal

**Nothing in these rules shall be construed as extending the time to appeal from the original judgment of conviction in the district court.**

#### ADVISORY COMMITTEE NOTE

Rule 11 is intended to make clear that, although a § 2255 action is a continuation of the criminal case, the bringing of a § 2255 action does not extend the time.

### Rule 12. Federal Rules of Criminal and Civil Procedure; Extent of Applicability

**If no procedure is specifically prescribed by these rules, the district court may proceed in any lawful manner not inconsistent with these rules, or any applicable statute, and may apply the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure, whichever it deems most appropriate, to motions filed under these rules.**

#### ADVISORY COMMITTEE NOTE

This rule differs from rule 11 of the § 2254 rules in that it includes the Federal Rules of Criminal Procedure as well as the civil. This is because of the nature of a § 2255 motion as a continuing part of the criminal proceeding (see advisory committee note to rule 1) as well as a remedy analogous to habeas corpus by state prisoners.

Since § 2255 has been considered analogous to habeas as respects the restrictions in Fed.R.Civ.P. 81(a)(2) (see *Sullivan* v. *United States*, 198 F.Supp. 624 (S.D.N.Y. 1961)), rule 12 is needed. For discussion, see the advisory committee note to rule 11 of the § 2254 rules.

#### REFERENCES IN TEXT

The Federal Rules of Criminal Procedure, referred to in text, are classified generally to the Appendix of Title 18, Crimes and Criminal Procedure.

The Federal Rules of Civil Procedure, referred to in text, are classified generally to the Appendix of this title.

### MODEL FORM FOR MOTIONS UNDER 28 U.S.C. § 2255

Name ______
Prison Number ______
Place of Confinement ______
United States District Court ______ District of ______
Case No. ______ (to be supplied by Clerk of U.S. District Court) United States,

v.

______
(full name of movant)

(If movant has a sentence to be served in the *future* under a federal judgment which he wishes to attack, he should file a motion in the federal court which entered the judgment.)

### MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

#### Instructions—Read Carefully

(1) This motion must be legibly handwritten or typewritten, signed by the movant and sworn to before a notary public or institutional officer authorized to administer an oath. Any false statement of a material fact may serve as a basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form.

(2) Additional pages are not permitted except with respect to the *facts* which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) Upon receipt, your motion will be filed if it is in proper order. No fee is required with this motion.

(4) If you do not have the necessary funds for transcripts, counsel, appeal, and other costs connected with a motion of this type, you may request permission to proceed *in forma pauperis* in which event you must execute the affidavit on the last page, setting forth information establishing your inability to pay the costs. If you wish to proceed *in forma pauperis*, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

(5) Only judgments entered by one court may be challenged in a single motion. If you seek to challenge judgments entered by different judges or divisions either in the same district or in different districts, you must file separate motions as to each such judgment.

(6) Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the motion you file seeking relief from any judgment of conviction.

(7) When the motion is fully completed, the *original and two copies* must be mailed to the Clerk of the United States District Court whose address is ______

(8) Motions which do not conform to these instructions will be returned with a notation as to the deficiency.

#### MOTION

1. Name and location of court which entered the judgment of conviction under attack ______
2. Date of judgment of conviction ______
3. Length of sentence ______
4. Nature of offense involved (all counts) ______
______
______
______

5. What was your plea? (Check one)
   (a) Not guilty ☐
   (b) Guilty ☐
   (c) Nolo contendere ☐

   If you entered a guilty plea to one count or indictment, and a not guilty plea to another court or indictment, give details:
   ______________________________
   ______________________________
   ______________________________

6. Kind of trial: (Check one)
   (a) Jury ☐
   (b) Judge only ☐

7. Did you testify at the trial?
   Yes ☐ No ☐

8. Did you appeal from the judgment of conviction?
   Yes ☐ No ☐

9. If you did appeal, answer the following:
   (a) Name of court ______________
   (b) Result ______________
   (c) Date of result ______________

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any federal court?
    Yes ☐ No ☐

11. If your answer to 10 was "yes," give the following information:
    (a) (1) Name of court ______________
    (2) Nature of proceeding ______________
    ______________________________
    (3) Grounds raised ______________
    ______________________________
    ______________________________
    ______________________________
    ______________________________
    (4) Did you receive an evidentiary hearing on your petition, application or motion?
    Yes ☐ No ☐
    (5) Result ______________
    (6) Date of result ______________

    (b) As to any second petition, application or motion give the same information:
    (1) Name of court ______________
    (2) Nature of proceeding ______________
    ______________________________
    (3) Grounds raised ______________
    ______________________________
    ______________________________
    ______________________________
    ______________________________
    (4) Did you receive an evidentiary hearing on your petition, application or motion?
    Yes ☐ No ☐
    (5) Result ______________
    (6) Date of result ______________

    (c) As to any third petition, application or motion, give the same information:
    (1) Name of court ______________
    (2) Nature of proceeding ______________
    ______________________________
    (3) Grounds raised ______________
    ______________________________
    ______________________________
    ______________________________
    ______________________________
    (4) Did you receive an evidentiary hearing on your petition, application or motion?
    Yes ☐ No ☐

    (d) Did you appeal, to an appellate federal court having jurisdiction, the result of action taken on any petition, application or motion?
    (1) First petition, etc. Yes ☐ No ☐
    (2) Second petition, etc. Yes ☐ No ☐
    (3) Third petition, etc. Yes ☐ No ☐

    (e) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not:
    ______________________________
    ______________________________
    ______________________________
    ______________________________
    ______________________________

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the facts supporting each ground. If ncessary, you may attach pages stating additional grounds and *facts* supporting same.

    CAUTION: If you fail to set forth all grounds in this motion, you may be barred from presenting additional grounds at a later date.

    For your information, the following is a list of the most frequently raised grounds for relief in these proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you have other than those listed. However, *you should raise in this motion all available grounds* (relating to this conviction) on which you based your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The motion will be returned to you if you merely check (a) through (j) or any one of the grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily or with understanding of the nature of the charge and the consequences of the plea.
(b) Conviction obtained by use of coerced confession.
(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
(e) Conviction obtained by a violation of the privilege against self-incrimination.
(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
(g) Conviction obtained by a violation of the protection against double jeopardy.
(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impanelled.
(i) Denial of effective assistance of counsel.
(j) Denial of right of appeal.

A. Ground one: ______________
______________________________

Supporting FACTS (tell your story *briefly* without citing cases or law): ______________
______________________________
______________________________
______________________________
______________________________
______________________________
______________________________
______________________________
______________________________

B. Ground two: ______________________

______________________

Supporting FACTS (tell your story *briefly* without citing cases or law): ______________

______________________

______________________

______________________

______________________

C. Ground three: ______________________

______________________

Supporting FACTS (tell your story *briefly* without citing cases or law): ______________

______________________

______________________

______________________

______________________

D. Ground four: ______________________

______________________

Supporting FACTS (tell your story *briefly* without citing cases or law): ______________

______________________

______________________

______________________

______________________

______________________

13. If any of the grounds listed in 12A, B, C, and D were not previously presented, state *briefly* what grounds were not so presented, and give your reasons for not presenting them:

______________________

______________________

______________________

______________________

14. Do you have any petition or appeal now pending in any court as to the judgment under attack?
Yes ☐ No ☐

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked therein:

(a) At preliminary hearing ______________

______________________

(b) At arraignment and plea ______________

______________________

(c) At trial ______________

______________________

(d) At sentencing ______________

______________________

(e) On appeal ______________

______________________

(f) In any post-conviction proceeding ______________

______________________

(g) On appeal from any adverse ruling in a post-conviction proceeding ______________

______________________

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time?
Yes ☐ No ☐

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes ☐ No ☐

(a) If so, give name and location of court which imposed sentence to be served in the future:

______________________

______________________

(b) And give date and length of sentence to be served in the future:

______________________

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
Yes ☐ No ☐

Wherefore, movant prays that the Court grant him all relief to which he may be entitled in this proceeding.

Executed at ______________________

______________________

on ______________________, 19___

______________ ______________
Signature of Attorney (if any) Signature of Movant

IN FORMA PAUPERIS AFFIDAVIT

______________________

[Insert appropriate court]

United States
v.
______________
(Movant)

AFFIDAVIT IN SUPPORT OF REQUEST TO PROCEED *IN FORMA PAUPERIS,*

I, ______________, being first duly sworn, depose and say that I am the movant in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs give security therefor, I state that because of my poverty, I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to relief.

I further swear that the responses which I have made to questions and instructions below are true.

1. Are you presently employed? Yes ☐ No ☐
   a. If the answer is "yes," state the amount of your salary or wages per month, and give the name and address of your employer.

   ______________________

   ______________________

   b. If the answer is "no," state the date of last employment and the amount of the salary and wages per month which you received.

   ______________________

   ______________________

2. Have you received within the past twelve months any money from any of the following sources?
   a. Business, profession or form of self-employment? Yes ☐ No ☐
   b. Rent payments, interest or dividends? Yes ☐ No ☐
   c. Pensions, annuities or life insurance payments? Yes ☐ No ☐
   d. Gifts or inheritances? Yes ☐ No ☐
   e. Any other sources? Yes ☐ No ☐

   If the answer to any of the above is "yes," describe each source of money and state the amount received from each during the past twelve months.

   ______________________

   ______________________

   ______________________

3. Do you own any cash, or do you have money in a checking or savings account?
   Yes ☐ No ☐ (Include any funds in prison accounts)
   If the answer is "yes," state the total value of the items owned.
   ______________________________
   ______________________________
   ______________________________

4. Do you own real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?
   Yes ☐ No ☐
   If the answer is "yes," describe the property and state its approximate value.
   ______________________________
   ______________________________

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support.
   ______________________________
   ______________________________

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

______________________________
(MOVANT'S SIGNATURE)

State of ______________________
County (City) of ______________________

______________________ (Name of Movant), being first duly sworn under oath, presents that he has read and subscribed to the above and states that the information therein is true and correct.

______________________________
SIGNATURE OF MOVANT
(REQUIRED AS TO EACH MOVANT)

Subscribed and sworn to before me this ——— day of ———, 19—.

______________________________
NOTARY PUBLIC OR OTHER
PERSON AUTHORIZED TO
ADMINISTER AN OATH

### CERTIFICATE

I hereby certify that the movant herein has the sum of $——— on account to his credit at the ——— institution where he is confined. I further certify that movant likewise has the following securities to his credit according to the records of said ——— institution:

______________________________
______________________________
______________________________
______________________________

______________________________
AUTHORIZED OFFICER OF
INSTITUTION

## MODEL FORM FOR USE IN 28 U.S.C. § 2255 CASES INVOLVING A RULE 9 ISSUE

Form No. 9

United States District Court

——————— District of ———————

Case No. ———

United States

v.

______________________
(Name of Movant)

*Movant's Response as to Why His Motion Should Not be Barred Under Rule 9*

Explanation and Instructions—Read Carefully

**(I) Rule 9. Delayed or Successive Motions.**

**(a) Delayed motions.** A motion for relief made pursuant to these rules may be dismissed if it appears that the government has been prejudiced in its ability to respond to the motion by delay in its filing unless the movant shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the government occurred. If the motion is filed more than five years after the judgment of conviction, there shall be a presumption, rebuttable by the movant, that there is prejudice to the government.

**(b) Successive motions.** A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant to assert those grounds in a prior motion is not excusable.

(II) Your motion to vacate, set aside, or correct sentence has been found to be subject to dismissal under rule 9 ( ) for the following reason(s):
______________________________
______________________________
______________________________
______________________________

(III) This form has been sent so that you may explain why your motion contains the defect(s) noted in (II) above. It is required that you fill out this form and send it back to the court within ——— days. Failure to do so will result in the automatic dismissal of your motion.

(IV) When you have fully completed this form, the original and two copies must be mailed to the Clerk of the United States District Court whose address is
______________________________
______________________________

(V) This response must be legibly handwritten or typewritten, signed by the movant, and sworn to before a notary public or institutional officer authorized to administer an oath. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form.

(VI) Additional pages are not permitted except with respect to the *facts* which you rely upon in item 4 or 5 in the response. Any citation of authorities should be kept to an absolute minimum and is only appropriate if there has been a change in the law since the judgment you are attacking was rendered.

(VII) Respond to 4 *or* 5, not to both, unless (II) above indicates that you must answer both sections.

### RESPONSE

1. Have you had the assistance of an attorney, other law-trained personnel, or writ writers since the conviction your motion is attacking was entered?
   Yes ☐ No ☐

2. If you checked "Yes" above, specify as precisely as you can the period(s) of time during which you received such assistance, up to and including the present.
   ______________________________

3. Describe the nature of the assistance, including the names of those who rendered it to you.
   ______________________________
   ______________________________
   ______________________________
   ______________________________

4. If your motion is in jeopardy because of delay prejudicial to the government under rule 9(a), explain why you feel the delay has not been prejudicial and/or why the delay is excusable under the terms

of 9(a). This should be done by relying upon FACTS, not your opinions or conclusions.

5. If your motion is in jeopardy under rule 9(b) because it asserts the same grounds as a previous motion, explain why you feel it deserves a reconsideration. If its fault under rule 9(b) is that it asserts new grounds which should have been included in a prior motion, explain why you are raising these grounds now rather than previously. Your explanation should rely on FACTS, not your opinions or conclusions.

State of ____________________

County (City) of ____________________

____________________ (Name of Movant), being first duly sworn under oath, presents that he has read and subscribed to the above and states that the information therein is true and correct.

____________________

SIGNATURE OF MOVANT (REQUIRED AS TO EACH MOVANT)

Subscribed and sworn to before me this ———— day of ————, 19—.

____________________

NOTARY PUBLIC OR OTHER PERSON AUTHORIZED TO ADMINISTER AN OATH

## CHAPTER 155—INJUNCTIONS; THREE-JUDGE COURTS

Sec.

2281. Repealed.
2282. Repealed.
2283. Stay of State court proceedings.
2284. Three-judge district court; when required; composition; procedure.[1]

### AMENDMENTS

1976—Pub. L. 94-381, § 4, Aug. 12, 1976, 90 Stat. 1119, repealed item 2281 "Injunction against enforcement of State statute; three-judge court required", item 2282 "Injunction against enforcement of Federal statute; three-judge court required", and added "when required" following "district court" in item 2284.

### [§ 2281. Repealed. Pub. L. 94-381, § 1, Aug. 12, 1976, 90 Stat. 1119]

Section, act June 25, 1948, ch. 646, 62 Stat. 968, provided that an interlocutory or permanent injunction restraining the enforcement, operation or execution of a State statute on grounds of unconstitutionality should not be granted unless the application has been heard and determined by a three-judge district court.

### EFFECTIVE DATE OF REPEAL

Repeal of section by Pub. L. 94-381 not applicable to any action commenced on or before Aug. 12, 1976, see section 7 of Pub. L. 94-381 set out as an Effective Date of 1976 Amendment note under section 2284 of this title.

### [§ 2282. Repealed. Pub. L. 94-381, § 2, Aug. 12, 1976, 90 Stat. 1119]

Section, act June 25, 1948, ch. 646, 62 Stat. 968, provided that an interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress on grounds of unconstitutionality should not be granted unless the application therefor has been heard and determined by a three-judge district court.

### EFFECTIVE DATE OF REPEAL

Repeal of section by Pub. L. 94-381 not applicable to any action commenced on or before Aug. 12, 1976, see section 7 of Pub. L. 94-381 set out as an Effective Date of 1976 Amendment note under section 2284 of this title.

### § 2283. Stay of State court proceedings

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

(June 25, 1948, ch. 646, 62 Stat. 968.)

### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 379 (Mar. 3, 1911, ch. 231, § 265, 36 Stat. 1162).

An exception as to acts of Congress relating to bankruptcy was omitted and the general exception substituted to cover all exceptions.

The phrase "in aid of its jurisdiction" was added to conform to section 1651 of this title and to make clear the recognized power of the Federal courts to stay proceedings in State cases removed to the district courts.

The exceptions specifically include the words "to protect or "effectuate its judgments," for lack of which the Supreme Court held that the Federal courts are without power to enjoin relitigation of cases and controversies fully adjudicated by such courts. (See *Toucey* v. *New York Life Insurance Co.*, 62 S.Ct. 139, 314 U.S. 118, 86 L.Ed. 100. A vigorous dissenting opinion (62 S.Ct. 148) notes that at the time of the 1911 revision of the Judicial Code, the power of the courts, of the United States to protect their judgments was unquestioned and that the revisers of that code noted no change and Congress intended no change).

Therefore the revised section restores the basic law as generally understood and interpreted prior to the Toucey decision.

Changes were made in phraseology.

### § 2284. Three-judge court; when required; composition; procedure

(a) A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.

(b) In any action required to be heard and determined by a district court of three judges under subsection (a) of this section, the composition and procedure of the court shall be as follows:

(1) Upon the filing of a request for three judges, the judge to whom the request is presented shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. The judges so designated, and the judge to whom the request was presented,

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[1] So in original. Does not conform to section catchline.

shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action is against a State, or officer or agency thereof, at least five days' notice of hearing of the action shall be given by registered or certified mail to the Governor and attorney general of the State. The hearing shall be given precedence and held at the earliest practicable day.

(3) A single judge may conduct all proceedings except the trial, and enter all orders permitted by the rules of civil procedure except as provided in this subsection. He may grant a temporary restraining order on a specific finding, based on evidence submitted, that specified irreparable damage will result if the order is not granted, which order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the district court of three judges of an application for a preliminary injunction. A single judge shall not appoint a master, or order a reference, or hear and determine any application for a preliminary or permanent injunction or motion to vacate such an injunction, or enter judgment on the merits. Any action of a single judge may be reviewed by the full court at any time before final judgment.

(June 25, 1948, ch. 646, 62 Stat. 968; June 11, 1960, Pub. L. 86-507, § 1(19), 74 Stat. 201; Aug. 12, 1976, Pub. L. 94-381, § 3, 90 Stat. 1119.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., §§ 47, 47a, 380, 380a, and 792 (Mar. 3, 1911, ch. 231, §§ 210, 266, 36 Stat. 1150, 1162; Mar. 4, 1943, ch. 160, 37 Stat. 1013; Oct. 22, 1913, ch. 32, 38 Stat. 220; Feb. 13, 1925, ch. 229, § 1, 43 Stat. 938; Aug. 24, 1937, ch. 754, § 3, 50 Stat. 752; Apr. 6, 1942, ch. 210, § 3, 56 Stat. 199).

Provisions of sections 47, 47a, 380, and 380a of title 28, U.S.C., 1940 ed., relating to the Supreme Court's jurisdiction of direct appeals appear in section 1253 of this title.

Provisions of sections 47, 380, and 380a of title 28, U.S.C., 1940 ed., requiring applications for injunctions restraining the enforcement, operation or execution of Federal or State statutes or orders of the Interstate Commerce Commission to be heard and determined by three-judge district courts appear in sections 2281, 2282, and 2325 of this title.

The provision for notice to the United States attorney for the district where the action is pending was added because of the necessity of the United States attorney's preparation for hearing as soon as possible, to expedite such a case.

Provisions of sections 47, 47a, 380, and 380a of title 28, U.S.C., 1940 ed., respecting time for direct appeal appear in section 2101 of this title.

This revised section represents an effort to provide a uniform method of convoking three-judge district courts, and for procedure therein. It follows recommendations of a committee appointed by the Judicial Conference of the United States, composed of Circuit Judges Evan A. Evans, Kimbrough Stone, Orie L. Phillips, and Albert B. Maris.

The committee pointed out that section 380a of title 28, U.S.C., 1940 ed., is the latest and "most carefully drawn expression by Congress on the subject." Consequently, this section follows closely such section 380a and eliminates the discrepancies between sections 47, 47a, 380, and 380a of such title.

This section governs only the composition and procedure of three-judge district courts. The requirement that applications for injunctions be heard and determined by such courts will appear in other sections of this and other titles of the United States Code as Congress may enact from time to time. For example, see sections 2281, 2282, and 2325 of this title, sections 1213, 1215, 1255 of title 11, U.S.C., 1940 ed., Bankruptcy, section 28 of title 15, U.S.C., 1940 ed., Commerce and Trade, and section 44 of title 49, U.S.C., 1940 ed., Transportation.

United States District Judge W. Calvin Chestnut, has referred to the provisions relating to enforcement or setting aside or orders of the Interstate Commerce Commission as unfortunately lengthy and prolix. He has urged revision to insure uniform procedure in the several classes of so-called three-judge cases.

The provision that such notice shall be given by the clerk by registered mail, and shall be complete on the mailing thereof follows, substantially, rules 4(d)(4) and 5(b) of the Federal Rules of Civil Procedure.

Changes were made in phraseology.

### References in Text

The rules of civil procedure, referred to in subsec. (b)(3), are classified generally to the Appendix of this title.

### Amendments

1976—Pub. L. 94-381 substituted "Three-judge court; when required" for "Three-judge district court" in section catchline, and generally revised the section to alter the method by which three-judge courts are composed, the procedure used by such courts, and to conform its requirements to the repeal of sections 2281 and 2282 of this title.

1960—Pub. L. 86-507 substituted "by registered mail or by certified mail by the clerk and" for "by registered mail by the clerk, and".

### Effective Date of 1976 Amendment

Section 7 of Pub. L. 94-381 provided that: "This Act [amending this section and section 2403 of this title and repealing sections 2281 and 2282 of this title] shall not apply to any action commenced on or before the date of enactment [Aug. 12, 1976]."

### Actions Challenging Appointment of Attorney General on Grounds of Violation of Constitutional Provisions Governing Compensation and Other Emoluments

Pub. L. 93-178, § 2, Dec. 10, 1973, 87 Stat. 697, provided that:

"(a) Any person aggrieved by an action of the Attorney General may bring a civil action in the appropriate district court to contest the constitutionality of the appointment and continuance in office of the Attorney General on the ground that such appointment and continuance in office is in violation of article I, section 6, clause 2, of the Constitution. The United States district courts shall have exclusive jurisdiction, without regard to the sum or value of the matter in controversy, to determine the validity of such appointment and continuance in office.

"(b) Any action brought under this section shall be heard and determined by a panel of three judges in accordance with the provisions of section 2284 of title 28, United States Code. Any appeal from the action of a court convened pursuant to such section shall lie to the Supreme Court.

"(c) Any judge designated to hear any action brought under this section shall cause such action to be in every way expedited."

### Section Referred to in Other Sections

This section is referred to in title 26 sections 9010, 9011; title 42 sections 1973b, 1973c, 1973h, 1973aa-2, 1973bb.

## CHAPTER 157—INTERSTATE COMMERCE COMMISSION ORDERS; ENFORCEMENT AND REVIEW

Sec.
2321. Judicial review of Commission's orders and decisions; procedure generally; process.
2322. United States as party
2323. Duties of Attorney General; intervenors.
[2324, 2325. Repealed.]

#### Amendments

1975—Pub. L. 93-584, § 8, Jan. 2, 1975, 88 Stat. 1918, substituted "Judicial Review of Commission's orders and decisions; procedure generally; process" for "Procedure generally; process" in item 2321 and struck out items 2324 and 2325.

#### Cross References

Review of orders of Federal agencies, see section 701 et seq. of Title 5, Government Organization and Employees.

### § 2321. Judicial review of Commission's orders and decisions; procedure generally; process

(a) Except as otherwise provided by an Act of Congress, a proceeding to enjoin or suspend, in whole or in part, a rule, regulation, or order of the Interstate Commerce Commission shall be brought in the court of appeals as provided by and in the manner prescribed in chapter 158 of this title.

(b) The procedure in the district courts in actions to enforce, in whole or in part, any order of the Interstate Commerce Commission other than for payment of money or the collection of fines, penalties, and forfeitures, shall be as provided in this chapter.

(c) The orders, writs, and process of the district courts may, in the cases specified in subsection (b) and in the cases and proceedings under section 20 of the Act of February 4, 1887, as amended (24 Stat. 386; 49 U.S.C. 20), section 23 of the Act of May 16, 1942, as amended (56 Stat. 301; 49 U.S.C. 23), and section 3 of the Act of February 19, 1903, as amended (32 Stat. 848; 49 U.S.C. 43), run, be served and be returnable anywhere in the United States.

(June 25, 1948, ch. 646, 62 Stat. 969; May 24, 1949, ch. 139, § 115, 63 Stat. 105; Jan. 2, 1975, Pub. L. 93-584, § 5, 88 Stat. 1917.)

#### Historical and Revision Notes

##### 1948 Act

Based on title 28, U.S.C., 1940 ed., § 44 (Oct. 22, 1913, ch. 32, 38 Stat. 220.)

Word "actions" was substituted for "cases," in view of rule 2 of the Federal Rules of Civil Procedure.

The exception as to procedure in the infliction of criminal punishment was omitted as unnecessary, as Title 18, U.S.C., Crimes and Criminal Procedure, and the Federal Rules of Criminal Procedure govern procedure in criminal matters.

Changes were made in phraseology.

##### 1949 Act

This section corrects, in section 2321 of title 28, U.S.C., the reference to certain sections in title 49, U.S.C. The provisions which were formerly set out as section 49 of such title 49, are now set out as section 23 of such title.

#### References in Text

Section 23 of the Act of May 16, 1942, as amended, referred to in subsec. (c), probably means section 23 of the act of Feb. 4, 1887, which was originally section 10 of act Mar. 2, 1889, ch. 382, 25 Stat. 862, but was renumbered to be section 23 of the Interstate Commerce Act of Feb. 4, 1887, by act May 16, 1942. Such section 23 is classified to section 23 of Title 49, Transportation.

#### Amendments

1975—Subsec. (a). Pub. L. 93-584 designated existing provisions as subsecs. (b) and (c), and added subsec. (a).

Subsec. (b). Pub. L. 93-584 designated existing first par. as subsec. (b), and in subsec. (b) as so designated, substituted "in whole or in part, any order of the Interstate Commerce Commission other than for", for "suspend, enjoin, annual or set aside in whole or in part any order of the Interstate Commerce Commission other than for the".

Subsec. (c). Pub. L. 93-584 designated existing second par. as subsec. (c), and in subsec. (c) as so designated, substituted reference to subsec. (b) of this section for reference to this section and added references to the dates of enactment, statute citations and code references of sections 20, 23 and 43 of Title 49.

1949—Act May 24, 1949, substituted "20, 23, and 43" for "20, 43, and 49" in the second par.

#### Effective Date of 1975 Amendment

Section 10 of Pub. L. 93-584 provided that: "This Act [amending sections 1336, 1398, 2321, 2323, 2341, and 2342 of this title, and section 305 of Title 49, Transportation, and repealing sections 2324 and 2325 of this title] shall not apply to any action commenced on or before the last day of the first month beginning after the date of enactment [Jan. 2, 1975]. However, actions to enjoin or suspend orders of the Interstate Commerce Commission which are pending when this Act becomes effective shall not be affected thereby, but shall proceed to final disposition under the law existing on the date they were commenced."

#### Section Referred to in Other Sections

This section is referred to in sections 2322, 2323, 2342 of this title.

### § 2322. United States as party

All actions specified in section 2321 of this title shall be brought by or against the United States.

(June 25, 1948, ch. 646, 62 Stat. 969.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 48 (Mar. 3, 1911, ch. 231, § 211, 36 Stat. 1150; Oct. 22, 1913, ch. 32, 38 Stat. 219).

Word "actions" was substituted for "cases and proceedings", in view of Rule 2 of the Federal Rules of Civil Procedure.

A provision authorizing intervention by the United States was omitted. The United States, under the provisions of this section, is a necessary and indispensable original party, and hence intervention is unnecessary. (See *Lambert Run Coal Co.* v. *Baltimore & O. R. Co.*, 1922, 42 S.Ct. 349, 258 U.S. 377, 66 L.Ed. 671.)

### § 2323. Duties of Attorney General; intervenors

The Attorney General shall represent the Government in the actions specified in section 2321 of this title and in actions under section 20 of the Act of February 4, 1887, as amended (24 Stat. 386; 49 U.S.C. 20), section 23 of the Act of May 16, 1942, as amended (56 Stat. 301; 49 U.S.C. 23), and section 3 of the Act of February 19, 1903, as amended (32 Stat. 848; 49 U.S.C. 43).

The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.

Communities, associations, corporations, firms, and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid sections may intervene in said action at any time after commencement thereof.

The Attorney General shall not dispose of or discontinue said action or proceeding over the objection of such party or intervenor, who may prosecute, defend, or continue said action or proceeding unaffected by the action or nonaction of the Attorney General therein.

(June 25, 1948, ch. 646, 62 Stat. 970; May 24, 1949, ch. 139, § 116, 63 Stat. 105; Jan. 2, 1975, Pub. L. 93-584, § 6, 88 Stat. 1917.)

#### HISTORICAL AND REVISION NOTES

#### 1948 ACT

Based on title 28, U.S.C., 1940 ed., § 45a (Mar. 3, 1911, ch. 231, §§ 212, 213, 36 Stat. 1150, 1151; Oct. 22, 1913, ch. 32, 38 Stat. 220).

The provision in the second sentence of section 45a of title 28, U.S.C., 1940 ed., authorizing the Attorney General to employ and compensate special attorneys was omitted as covered by sections 503 and 508 of this title. The provision in the same sentence authorizing the court to make rules for the conduct and procedure of actions under this section were omitted as covered by the Federal Rules of Civil Procedure and section 2071 of this title relating to authority of district courts to promulgate local rules of procedure.

The last paragraph of section 45a of title 28, U.S.C., 1940 ed., was omitted as merely repetitive of the language immediately following the first proviso.

Word "action" was substituted for "suit" in conformity with Rule 2 of the Federal Rules of Civil Procedure.

Changes were made in phraseology.

#### 1949 ACT

This section corrects, in section 2323 of title 28, U.S.C., the reference to certain sections in title 49, U.S.C. The provisions which were formerly set out as section 49 of such title 49 are now set out as section 23 of such title.

#### REFERENCES IN TEXT

Section 23 of the Act of May 16, 1942, as amended, referred to in undesignated par. (1), probably means section 23 of act Feb. 4, 1887, which was originally section 10 of act Mar. 2, 1889, ch. 382, 35 Stat. 862, but was renumbered to be section 23 of the Interstate Commerce Act of Feb. 4, 1887 by act May 16, 1942. Such section 23 is classified to section 23 of Title 49, Transportation.

#### AMENDMENTS

1975—Pub. L. 93-584 in provisions relating to the representation of the Government by the Attorney General, struck out reference to the district courts and the Supreme Court of the United States upon appeal from the district courts as the courts in which the Attorney General can represent the United States.

1949—Act May 24, 1949, substituted "20, 23, and 43" for "20, 43, and 49" in the first par.

#### EFFECTIVE DATE OF 1975 AMENDMENT

Amendment by Pub. L. 93-584 not applicable to actions commenced on or before the last day of the first month beginning after Jan. 2, 1975, and actions to enjoin or suspend orders of the Interstate Commerce Commission which are pending when this amendment becomes effective shall not be affected thereby, but shall proceed to final disposition under the law existing on the date they were commenced, see section 10 of Pub. L. 93-584, set out as an Effective Date of 1975 Amendment note under section 2321 of this title.

### [§§ 2324, 2325. Repealed. Pub. L. 93-584, § 7, Jan. 2, 1975, 88 Stat. 1918]

Section 2324, act June 25, 1948, ch. 646, 62 Stat. 970, related to the power of the court to restrain or suspend the operation of orders of Interstate Commerce Commission pending the final hearing and determination of the action.

Section 2325, act June 25, 1948, ch. 646, 62 Stat. 970, related to the requirement of a three judge district court to hear and determine interlocutory or permanent injunctions restraining the enforcement, operation or execution of orders of Interstate Commerce Commission.

#### EFFECTIVE DATE OF REPEAL

Repeal of sections applicable to actions commenced on or before the last day of the first month beginning after Jan. 2, 1975, and actions to enjoin or suspend orders of the Interstate Commerce Commission which are pending when this repeal becomes effective shall not be affected thereby, but shall proceed to final disposition under the law existing on the date they were commenced, see section 10 of Pub. L. 93-584, set out as an Effective Date of 1975 Amendment note under section 2321 of this title.

## CHAPTER 158—ORDERS OF FEDERAL AGENCIES; REVIEW

Sec.

2341. Definitions.
2342. Jurisdiction of court of appeals.
2343. Venue.
2344. Review of orders; time; notice; contents of petitions; service.
2345. Prehearing conference.
2346. Certification of record on review.
2347. Petitions to review; proceedings.
2348. Representation in proceeding; intervention.
2349. Jurisdiction of the proceeding.
2350. Review in Supreme Court on certiorari or certification.
2351. Enforcement of orders by district courts.
[2352. Repealed.]
2353. Decision of the Plant Variety Protection Office.[1]

#### AMENDMENTS

1966—Pub. L. 89-773, § 4, Nov. 6, 1966, 80 Stat. 1323, eliminated item 2352.

Pub. L. 89-554, § 4(e), Sept. 6, 1966, 80 Stat. 621, added chapter 158 and items 2341 to 2352.

#### CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in section 2321 of this title; title 8 section 1105a; title 39 section 3628; title 42 section 2239; title 47 section 402; title 50 section 167h.

### § 2341. Definitions

As used in this chapter—

(1) "clerk" means the clerk of the court in which the petition for the review of an order, reviewable under this chapter, is filed;

(2) "petitioner" means the party or parties by whom a petition to review an order, reviewable under this chapter, is filed; and

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[1] Item 2353 is editorially inserted. Section 2353 was enacted by Pub. L. 91-577, title III, § 143(c), Dec. 24, 1970, 84 Stat. 1559, without amending analysis to include such item.

(3) "agency" means—

(A) the Commission, when the order sought to be reviewed was entered by the Federal Communications Commission, the Federal Maritime Commission, the Interstate Commerce Commission, or the Atomic Energy Commission, as the case may be;

(B) the Secretary, when the order was entered by the Secretary of Agriculture; and

(C) the Administration, when the order was entered by the Maritime Administration.

(Added Pub. L. 89-554, § 4(e), Sept. 6, 1966, 80 Stat. 622, and amended Pub. L. 93-584, § 3, Jan. 2, 1975, 88 Stat. 1917.)

#### HISTORICAL AND REVISION NOTES

| *Derivation* | *U.S. Code* | *Revised Statutes and Statutes at Large* |
|---|---|---|
| ................. | 5 U.S.C. 1031 | Dec. 29, 1950, ch. 1189, § 1, 64 Stat. 1129.<br>Aug. 30, 1954, ch. 1073, § 2(a), 68 Stat. 961. |

Subsection (a) of former section 1031 of title 5 is omitted as unnecessary because the term "court of appeals" as used in title 28 means a United States Court of Appeals and no additional definition is necessary.

In paragraph (3), reference to the United States Maritime Commission is omitted because that Commission was abolished by 1950 Reorg. Plan No. 21, § 306, eff. May 24, 1950, 64 Stat. 1277. Reference to "Federal Maritime Commission" is substituted for "Federal Maritime Board" on authority of 1961 Reorg. Plan No. 7, eff. Aug. 12, 1961, 75 Stat. 840.

#### AMENDMENTS

1975—Par. (3)(A). Pub. L. 93-584 added reference to the Interstate Commerce Commission.

#### EFFECTIVE DATE OF 1975 AMENDMENT

Amendment by Pub. L. 93-584 not applicable to actions commenced on or before the last day of the first month beginning after Jan. 2, 1975, and actions to enjoin or suspend orders of the Interstate Commerce Commission which are pending when this amendment becomes effective shall not be affected thereby, but shall proceed to final disposition under the law existing on the date they were commenced, see section 10 of Pub. L. 93-584, set out as an Effective Date of 1975 Amendment note under section 2321 of this title.

#### ATOMIC ENERGY COMMISSION

The Atomic Energy Commission was abolished and all functions of the Commission, the Chairman, the members of the Commission, and the officers and components of the Commission were transferred to and vested in the Administrator of the Energy Research and Development Administration, with certain exceptions, by Pub. L. 93-438, Oct. 11, 1974, 88 Stat. 1233. See section 5814 of Title 42, The Public Health and Welfare.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 7 section 2149.

### § 2342. Jurisdiction of court of appeals

The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

(1) all final orders of the Federal Communication Commission made reviewable by section 402(a) of title 47;

(2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under sections 210(e), 217a, and 499g(a) of title 7;

(3) such final orders of the Federal Maritime Commission or the Maritime Administration entered under chapters 23 and 23A of title 46 as are subject to judicial review under section 830 of title 46;

(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42; and

(5) all rules, regulations, or final orders of the Interstate Commerce Commission made reviewable by section 2321 of this title.

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

(Added Pub. L. 89-554, § 4(e), Sept. 6, 1966, 80 Stat. 622, and amended Pub. L. 93-584, § 4, Jan. 2, 1975, 88 Stat. 1917.)

#### HISTORICAL AND REVISION NOTES

| *Derivation* | *U.S. Code* | *Revised Statutes and Statutes at Large* |
|---|---|---|
| ................. | 5 U.S.C. 1032 | Dec. 29, 1950, ch. 1189, § 2, 64 Stat. 1129.<br>Aug. 30, 1954, ch. 1073, § 2(b), 68 Stat. 961. |

The words "have exclusive jurisdiction" are substituted for "shall have exclusive jurisdiction".

In paragraph (1), the word "by" is substituted for "in accordance with".

In paragraph (3), the word "now" is omitted as unnecessary. The word "under" is substituted for "pursuant to the provisions of". Reference to "Federal Maritime Commission" is substituted for "Federal Maritime Board" on authority of 1961 Reorg. Plan No. 7, eff. Aug. 12, 1961, 75 Stat. 840. Reference to the United States Maritime Commission is omitted because that Commission was abolished by 1950 Reorg. Plan No. 21, § 306, eff. May 24, 1951, 64 Stat. 1277, and any existing rights are preserved by technical sections 7 and 8.

#### AMENDMENTS

1975—Pub. L. 93-584 added par. (5).

#### EFFECTIVE DATE OF 1975 AMENDMENT

Amendment by Pub. L. 93-584 not applicable to actions commenced on or before the last day of the first month beginning after Jan. 2, 1975, and actions to enjoin or suspend orders of the Interstate Commerce Commission which are pending when this amendment becomes effective shall not be affected thereby, but shall proceed to final disposition under the law existing on the date they were commenced, see section 10 of Pub. L. 93-584, set out as an Effective Date of 1975 Amendment note under section 2321 of this title.

#### ATOMIC ENERGY COMMISSION

The Atomic Energy Commission was abolished and all functions of the Commission, the Chairman, the members of the Commission, and the officers and components of the Commission were transferred to and vested in the Administrator of the Energy Research and Development Administration, with certain exceptions, by Pub. L. 93-438, Oct. 11, 1974, 88 Stat. 1233. See section 5814 of Title 42, The Public Health and Welfare.

### § 2343. Venue

The venue of a proceeding under this chapter is in the judicial circuit in which the petitioner resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit.

(Added Pub. L. 89-554, § 4(e), Sept. 6, 1966, 80 Stat. 622.)

HISTORICAL AND REVISION NOTES

| *Derivation* | *U.S. Code* | *Revised Statutes and Statutes at Large* |
|---|---|---|
| ................. | 5 U.S.C. 1033 | Dec. 29, 1950, ch. 1189, § 3, 64 Stat. 1130. |

The section is reorganized for clarity and conciseness. The word "is" is substituted for "shall be". The word "petitioner" is substituted for "party or any of the parties filing the petition for review" in view of the definition of "petitioner" in section 2341 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 7 sections 2149, 2461.

### § 2344. Review of orders; time; notice; contents of petition; service

On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. The action shall be against the United States. The petition shall contain a concise statement of—

(1) the nature of the proceedings as to which review is sought;

(2) the facts on which venue is based;

(3) the grounds on which relief sought; and

(4) the relief prayed.

The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition on the agency and on the Attorney General by registered mail, with request for a return receipt.

(Added Pub. L. 89-554, § 4(e), Sept. 6, 1966, 80 Stat. 622.)

HISTORICAL AND REVISION NOTES

| *Derivation* | *U.S. Code* | *Revised Statutes and Statutes at Large* |
|---|---|---|
| ................. | 5 U.S.C. 1034 | Dec. 29, 1950, ch. 1189, § 4, 64 Stat. 1130. |

The section is reorganized, with minor changes in phraseology. The words "as prescribed by section 1033 of this title" are omitted as surplusage. The words "of the United States" following "Attorney General" are omitted as unnecessary.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 2342 of this title; title 7 section 2149.

### § 2345. Prehearing conference

The court of appeals may hold a prehearing conference or direct a judge of the court to hold a prehearing conference.

(Added Pub. L. 89-554, § 4(e), Sept. 6, 1966, 80 Stat. 622.)

HISTORICAL AND REVISION NOTES

| *Derivation* | *U.S. Code* | *Revised Statutes and Statutes at Large* |
|---|---|---|
| ................. | 5 U.S.C. 1035 | Dec. 29, 1950, ch. 1189, § 5, 64 Stat. 1130. |

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 7 section 2149.

### § 2346. Certification of record on review

Unless the proceeding has been terminated on a motion to dismiss the petition, the agency shall file in the office of the clerk the record on review as provided by section 2112 of this title.

(Added Pub. L. 89-554, § 4(e), Sept. 6, 1966, 80 Stat. 623.)

HISTORICAL AND REVISION NOTES

| *Derivation* | *U.S. Code* | *Revised Statutes and Statutes at Large* |
|---|---|---|
| ................. | 5 U.S.C. 1036 | Dec. 29, 1950, ch. 1189, § 6, 64 Stat. 1130.<br>Aug. 28, 1958, Pub. L. 85-791, § 31(a), 72 Stat. 951. |

The words "of the court of appeals in which the proceeding is pending" are omitted as unnecessary in view of the definition of "clerk" in section 2341 of this title, and by reason of the exclusive jurisdiction of the court of appeals set forth in section 2342 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 7 section 2149.

### § 2347. Petitions to review; proceedings

(a) Unless determined on a motion to dismiss, petitions to review orders reviewable under this chapter are heard in the court of appeals on the record of the pleadings, evidence adduced and proceedings before the agency, when the agency has held a hearing whether or not required to do so by law.

(b) When the agency has not held a hearing before taking the action of which review is sought by the petition, the court of appeals shall determine whether a hearing is required by law. After that determination, the court shall—

(1) remand the proceedings to the agency to hold a hearing, when a hearing is required by law;

(2) pass on the issues presented, when a hearing is not required by law and it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; or

(3) transfer the proceedings to a district court for the district in which the petitioner resides or has its principal office for a hearing and determination as if the proceedings were originally initiated in the district court, when a hearing is not required by law and a genuine issue of material fact is presented. The procedure in these cases in the district court is governed by the Federal Rules of Civil Procedure.

(c) If a party to a proceeding to review applies to the court of appeals in which the proceeding is pending for leave to adduce additional evidence and shows to the satisfaction of the court that—

(1) the additional evidence is material; and

(2) there were reasonable grounds for failure to adduce the evidence before the agency;

the court may order the additional evidence and any counterevidence the opposite party desires to offer to be taken by the agency. The agency may modify its findings of fact, or make new findings, by reason of the additional evidence so taken, and may modify or set aside its order, and shall file in the court the additional

**evidence, the modified findings or new findings, and the modified order or the order setting aside the original order.**

**(Added Pub. L. 89-554, § 4(e), Sept. 16, 1966, 80 Stat. 623.)**

### HISTORICAL AND REVISION NOTES

| *Derivation* | *U.S. Code* | *Revised Statutes and Statutes at Large* |
|---|---|---|
| .................. | 5 U.S.C. 1037 | Dec. 29, 1950, ch. 1189, § 7, 64 Stat. 1130.<br>Aug. 28, 1958, Pub. L. 85-791, § 31(b), 72 Stat. 951. |

The headnotes of the subsections are omitted as unnecessary and to conform to the style of title 28.

In subsection (a), the words "the petition" following "on a motion to dismiss" are omitted as unnecessary. The word "are" is substituted for "shall be". The words "in fact" following "when the agency has" are omitted as unnecessary.

In subsection (b)(3), the words "United States" preceding "district court" are omitted as unnecessary because the term "district court" as used in title 28 means a United States district court. See section 451 of title 28, United States Code. The words "or any petitioner" are omitted as unnecessary in view of the definition of "petitioner" in section 2341 of this title. In the last sentence, the word "is" is substituted for "shall be".

In subsection (c), the words "applies" and "shows" are substituted for "shall apply" and "shall show", respectively.

### REFERENCES IN TEXT

The Federal Rules of Civil Procedure, referred to in subsec. (b)(3), are classified generally to the Appendix of this title.

### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 7 section 2149.

## § 2348. Representation in proceeding; intervention

**The Attorney General is responsible for and has control of the interests of the Government in all court procedings under this chapter. The agency, and any party in interest in the proceeding before the agency whose interests will be affected if an order of the agency is or is not enjoined, set aside, or suspended, may appear as parties thereto of their own motion and as of right, and be represented by counsel in any proceeding to review the order. Communities, associations, corporations, firms, and individuals, whose interests are affected by the order of the agency, may intervene in any proceeding to review the order. The Attorney General may not dispose of or discontinue the proceeding to review over the objection of any party or intervenor, but any intervenor may prosecute, defend, or continue the proceeding unaffected by the action or inaction of the Attorney General.**

**(Added Pub. L. 89-554, § 4(e), Sept. 6, 1966, 80 Stat. 623.)**

### HISTORICAL AND REVISION NOTES

| *Derivation* | *U.S. Code* | *Revised Statutes and Statutes at Large* |
|---|---|---|
| .................. | 5 U.S.C. 1038 | Dec. 29, 1950, ch. 1189, § 8, 64 Stat. 1131. |

In the first sentence, the words "is responsible for and has control" are substituted for "shall be responsible for and have charge and control".

In the last sentence, the word "may" is substituted for "shall". The word "aforesaid" following "any party or intervenor" is omitted as unnecessary. The words "any intervenor" and "inaction" are substituted for "said intervenor or intervenors" and "nonaction", respectively.

### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 7 section 2149.

## § 2349. Jurisdiction of the proceeding

**(a) The court of appeals has jurisdiction of the proceeding on the filing and service of a petition to review. The court of appeals in which the record on review is filed, on the filing, has jurisdiction to vacate stay orders or interlocutory injunctions previously granted by any court, and has exclusive jurisdiction to make and enter, on the petition, evidence, and proceedings set forth in the record on review, a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency.**

**(b) The filing of the petition to review does not of itself stay or suspend the operation of the order of the agency, but the court of appeals in its discretion may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the petition. When the petitioner makes application for an interlocutory injunction restraining or suspending the enforcement, operation, or execution of, or setting aside, in whole or in part, any order reviewable under this chapter, at least 5 days' notice of the hearing thereon shall be given to the agency and to the Attorney General. In a case in which irreparable damage would otherwise result to the petitioner, the court of appeals may, on hearing, after reasonable notice to the agency and to the Attorney General, order a temporary stay or suspension, in whole or in part, of the operation of the order of the agency for not more than 60 days from the date of the order pending the hearing on the application for the interlocutory injunction, in which case the order of the court of appeals shall contain a specific finding, based on evidence submitted to the court of appeals, and identified by reference thereto, that irreparable damage would result to the petitioner and specifying the nature of the damage. The court of appeals, at the time of hearing the application for an interlocutory injunction, on a like finding, may continue the temporary stay or suspension, in whole or in part, until decision on the application. The hearing on an application for an interlocutory injunction shall be given preference and expedited and shall be heard at the earliest practicable date after the expiration of the notice of hearing on the application. On the final hearing of any proceeding to review any order under this chapter, the same requirements as to precedence and expedition apply.**

**(Added Pub. L. 89-554, § 4(e), Sept. 6, 1966, 80 Stat. 624.)**

HISTORICAL AND REVISION NOTES

| *Derivation* | *U.S. Code* | *Revised Statutes and Statutes at Large* |
|---|---|---|
| ................. | 5 U.S.C. 1039 | Dec. 29, 1950, ch. 1189, § 9, 64 Stat. 1131.<br>Sept. 13, 1961, Pub. L. 87-225, § 1, 75 Stat. 497. |

The headnotes of the subsections are omitted as unnecessary and to conform to the style of title 28.

In subsection (a), the words "has jurisdiction" and "has exclusive jurisdiction" are substituted for "shall have jurisdiction" and "shall have exclusive jurisdiction", respectively. The words "previously granted" are substituted for "theretofore granted" as the preferred expression.

In subsection (b), the words "does not" are substituted for "shall not". The words "of the United States" following "Attorney General" are omitted as unnecessary. The words "In a case in which" are substituted for "In cases where". The word "result" is substituted for "ensue". In the fourth sentence, the words "provided for above" following the last word "application" are omitted as unnecessary. In the last sentence, the word "applies" is substituted for "shall apply".

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 2350 of this title; title 7 section 2149.

### § 2350. Review in Supreme Court on certiorari or certification

(a) An order granting or denying an interlocutory injunction under section 2349(b) of this title and a final judgment of the court of appeals in a proceeding to review under this chapter are subject to review by the Supreme Court on a writ of certiorari as provided by section 1254(1) of this title. Application for the writ shall be made within 45 days after entry of the order and within 90 days after entry of the judgment, as the case may be. The United States, the agency, or an aggrieved party may file a petition for a writ of certiorari.

(b) The provisions of section 1254(3) of this title, regarding certification, and of section 2101(f) of this title, regarding stays, also apply to proceedings under this chapter.

(Added Pub. L. 89-554, § 4(e), Sept. 6, 1966, 80 Stat. 624.)

HISTORICAL AND REVISION NOTES

| *Derivation* | *U.S. Code* | *Revised Statutes and Statutes at Large* |
|---|---|---|
| ................. | 5 U.S.C. 1040 | Dec. 29, 1950, ch. 1189, § 10, 64 Stat. 1132. |

The words "of the United States" following "Supreme Court" are omitted as unnecessary because the term "Supreme Court" as used in title 28 means the Supreme Court of the United States.

The words "section 2101(f) of this title" are substituted for "section 2101(e) of Title 28" on authority of the Act of May 24, 1949, ch. 139, § 106(b), 63 Stat. 104, which redesignated subsection (e) of section 2101 as subsection (f).

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 7 section 2149.

### § 2351. Enforcement of orders by district courts

The several district courts have jurisdiction specifically to enforce, and to enjoin and restrain any person from violating any order issued under section 193 of title 7.

(Added Pub. L. 89-554, § 4(e), Sept. 6, 1966, 80 Stat. 624.)

HISTORICAL AND REVISION NOTES

| *Derivation* | *U.S. Code* | *Revised Statutes and Statutes at Large* |
|---|---|---|
| ................. | 5 U.S.C. 1042 | Dec. 29, 1950, ch. 1189, § 12, 64 Stat. 1132. |

The words "United States" preceding "district court" are omitted as unnecessary because the term "district court" as used in title 28 means a United States district court. See section 451 of title 28, United States Code. The words "have jurisdiction" are substituted for "are vested with jurisdiction". The words "heretofore or hereafter" following "order" are omitted as unnecessary and any existing rights and liabilities are preserved by technical sections 7 and 8.

### [§ 2352. Repealed. Pub. L. 89-773, § 4, Nov. 6, 1966, 80 Stat. 1323]

Section, Pub. L. 89-554, § 4(e), Sept. 6, 1966, 80 Stat. 624, directed the several courts of appeals to adopt and promulgate rules, subject to the approval of the Judicial Conference of the United States, governing the practice and procedure, including prehearing conference procedure, in proceedings to review orders under this chapter. See section 2072 of this title.

SAVINGS PROVISIONS

Section 4 of Pub. L. 89-773 provided in part that the repeal of this section shall not operate to invalidate or repeal rules adopted under the authority of this section prior to the enactment of Pub. L. 89-773, which rules shall remain in effect until superseded by rules prescribed under authority of section 2072 of this title as amended by Pub. L. 89-773.

### § 2353. Decision of the Plant Variety Protection Office[1]

The Court of Appeals has nonexclusive jurisdiction to hear appeals under section 71 of the Plant Variety Protection Act.

(Added Pub. L. 91-577, title III, § 143(c), Dec. 24, 1970, 84 Stat. 1559.)

REFERENCES IN TEXT

Section 71 of the Plant Variety Protection Act, referred to in text, section 2461 of Title 7, Agriculture.

EFFECTIVE DATE

Section effective Dec. 24, 1970, see section 141 of Pub. L. 91-577, set out as an Effective Date note under section 2321 of Title 7, Agriculture.

## CHAPTER 159—INTERPLEADER

Sec.
2361. Process and procedure.

### § 2361. Process and procedure

In any civil action of interpleader or in the nature of interpleader under section 1335 of this title, a district court may issue its process for all claimants and enter its order restraining them from instituting or prosecuting any proceeding in any State or United States court affecting the property, instrument or obligation involved in the interpleader action until further order of the court. Such process and order shall be returnable at such time as the court or judge thereof directs, and shall be addressed to and served by the United States marshals for

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[1] Section catchline is editorially inserted. Section enacted without a catchline.

**the respective districts where the claimants reside or may be found.**

**Such district court shall hear and determine the case, and may discharge the plaintiff from further liability, make the injunction permanent, and make all appropriate orders to enforce its judgment.**

(June 25, 1948, ch. 646, 62 Stat. 970; May 24, 1949, ch. 139, § 117, 63 Stat. 105.)

### HISTORICAL AND REVISION NOTES

### 1948 ACT

Based on title 28, U.S.C., 1940 ed., § 41(26) (Mar. 3, 1911, ch. 231, § 24, par. 26, as added Jan. 20, 1936, ch. 13, § 1, 49 Stat. 1096).

Jurisdiction and venue provisions of section 41(26) of title 28, U.S.C., 1940 ed., appear in sections 1335 and 1397 of this title.

Subsection (e) of section 41(26) of title 28, U.S.C., 1940 ed., relating to defense in nature of interpleader and joinder of additional parties, was omitted as unnecessary, such matters being governed by the Federal Rules of Civil Procedure.

Words, "Notwithstanding any provision of part I of this title to the contrary" were omitted as unnecessary, since the revised title contains no "contrary provisions."

Changes were made in phraseology.

### 1949 ACT

This section makes clear that section 2361 of title 28, U.S.C., applies only to statutory actions and not to general equity interpleader suits in which the jurisdictional amount and diversity of citizenship requirements are the same as in other diversity cases.

### AMENDMENTS

1949—Act May 24, 1949, amended section by substituting "In any civil action of interpleader or in the nature of interpleader under section 1335 under this title" for "In any interpleader action,", and inserting "or prosecuting" between "instituting" and "any proceeding".

## CHAPTER 161—UNITED STATES AS PARTY GENERALLY

Sec.

2401. Time for commencing action against United States.
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### HISTORICAL AND REVISION NOTES

### 1949 ACT

This section amends the analysis of chapter 161 of title 28, U.S.C., to conform item 2411 therein with the catch line of section 2411 of such title as amended by another section of this bill.

### AMENDMENTS

1976—Pub. L. 94-381, § 6, Aug. 12, 1976, 90 Stat. 1120, added "or a State" following "United States" in item 2403.

1972—Pub. L. 92-562, § 3(b), Oct. 25, 1972, 86 Stat. 1177, added item 2409a.

1966—Pub. L. 89-505, § 2, July 18, 1966, 80 Stat. 305, added items 2415 and 2416.

1961—Pub. L. 87-187, § 2, Aug. 30, 1961, 75 Stat. 416, substituted "and compromise settlements" for "against the United States" in item 2414.

1954—Act July 30, 1954, ch. 648, § 2(b), 68 Stat. 589, deleted the word "denied" in item 2402.

1949—Act May 24, 1949, ch. 139, § 118, 63 Stat, 105, substituted "Interest" for "Interest on judgments against United States" in item 2411.

### CROSS REFERENCES

Third party tort liability to United States for hospital and medical care, see section 2651 et seq. of Title 42, The Public Health and Welfare.

## § 2401. Time for commencing action against United States

**(a) Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.**

**(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.**

(June 25, 1948, ch. 646, 62 Stat. 971; Apr. 25, 1949, ch. 92, § 1, 63 Stat. 62; Sept. 8, 1959, Pub. L. 86-238, § 1(3), 73 Stat. 472; July 18, 1966, Pub. L. 89-506, § 7, 80 Stat. 307.)

### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§ 41(20), 942 (Mar. 3, 1911, ch. 231, § 24, part 20, 36 Stat. 1093; Nov. 23, 1921, ch. 136, § 1310(c), 42 Stat. 311; June 2, 1924, 4:01 p.m., ch. 234, § 1025(c), 43 Stat. 348; Feb. 24, 1925, ch. 309, 43 Stat. 972; Feb. 26, 1926, ch. 27, §§ 1122(c), 1200, 44 Stat. 121, 125; Aug. 2, 1946, ch. 753, § 420, 60 Stat. 845).

Section consolidates provision in section 41(20) of title 28, U.S.C., 1940 ed., as to time limitation for bringing actions against the United States under section 1346(a) of this title, with section 942 of said title 28.

Words "or within one year after the date of enactment of this Act whichever is later", in section 942 of title 28, U.S.C., 1940 ed., were omitted as executed.

Provisions of section 41(20) of title 28, U.S.C., 1940 ed., relating to jurisdiction of district courts and trial by the court of actions against the United States are the basis of sections 1346(a) and 2402 of this title.

Words in subsec. (a) of this revised section, "person under legal disability or beyond the seas at the time the claim accrues" were substituted for "claims of married women, first accrued during marriage, of persons under the age of twenty-one years, first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim." (See reviser's note under section 2501 of this title.)

Words in section 41(20) of title 28, U.S.C., 1940 ed., "nor shall any of the said disabilities operate cumulatively" were omitted. (See reviser's note under section 2501 of this title.)

A provision in section 41(20) of title 28, U.S.C., 1940 ed., that disabilities other than those specifically mentioned should not prevent any action from being barred was omitted as superfluous.

Subsection (b) of the revised section simplifies and restates said section 942 of title 28, U.S.C., 1940 ed., without change of substance.

Changes were made in phraseology.

### SENATE REVISION AMENDMENT

Subsection (b) amended in the Senate to insert the 1 year limitation on the bringing of tort actions and to include the limitation upon the time in which tort claims not exceeding $1000 must be presented to the appropriate Federal agencies for administrative disposition. 80th Congress Senate Report No. 1559, Amendment No. 48.

### AMENDMENTS

1966—Subsec. (b). Pub. L. 89-506 struck out provisions dealing with a tort claim of $2,500 or under as a special category of tort claim requiring preliminary administrative action and substituted provisions requiring presentation of all tort claims to the appropriate Federal agency in writing within two years after the claim accrues and commencement of an action within six months of the date of mailing of notice of final denial of the claim by the agency to which it was presented for provisions requiring commencement of an action within two years after the claim accrues.

1959—Subsec. (b). Pub. L. 86-238 substituted "$2,500" for "$1,000" in two instances.

1949—Subsec. (b). Act Apr. 25, 1949, the time limitation on bringing tort actions from 1 year to 2 years.

### EFFECTIVE DATE OF 1966 AMENDMENT

Amendment by Pub. L. 89-506 applicable to claims accruing six months or more after July 18, 1966, see section 10 of Pub. L. 89-506, set out as an Effective Date of 1966 Amendment note under section 2672 of this title.

### CROSS REFERENCES

Settlement of claims incident to activities of the Coast Guard, see Title 14, Coast Guard.

### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 2671 of this title; title 42 section 247b; title 49 section 1540.

## § 2402. Jury trial in actions against United States

Any action against the United States under section 1346 shall be tried by the court without a jury, except that any action against the United States under section 1346(a)(1) shall, at the request of either party to such action, be tried by the court with a jury.

(June 25, 1948, ch. 646, 62 Stat. 971; July 30, 1954, ch. 648, § 2(a), 68 Stat. 589.)

### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§ 41(20), 931(a) (Mar. 3, 1911, ch. 231, § 24, par. 20, 36 Stat. 1093; Nov. 23, 1921, ch. 136, § 1310(c), 42 Stat. 311; June 2, 1924, 4:01 p.m., ch. 234, § 1025(c), 43 Stat. 348; Feb. 24, 1925, ch. 309, 43 Stat. 972; Feb. 26, 1926, ch. 27, §§ 1122(c), 1200, 44 Stat. 121, 125; Aug. 2, 1946, ch. 753, § 410(a), 60 Stat. 843).

Section consolidates non-jury provisions of sections 41(20) and 931(a) of title 28, U.S.C., 1940 ed. For other provisions of said section 931(a) relating to tort claims, see Distribution Table.

Word "actions" was substituted for "suits", in view of Rule 2 of the Federal Rules of Civil Procedure.

Provisions of title 28, U.S.C., 1940 ed., § 41(20) relating to jurisdiction of district courts and time for bringing actions against the United States are the basis of sections 1346 and 2401 of this title.

### AMENDMENTS

1954—Act July 30, 1954, permitted a jury trial at the request of either party in actions under section 1346(a)(1) of this title.

## § 2403. Intervention by United States or a State; constitutional question

(a) In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The United States shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

(b) In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

(June 25, 1948, ch. 646, 62 Stat. 971; Aug. 12, 1976, Pub. L. 94-381, § 5, 90 Stat. 1120.)

### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 401 (Aug. 24, 1937, ch. 754, § 1, 50 Stat. 751).

Word "action" was added before "suit or proceeding", in view of Rule 2 of the Federal Rules of Civil Procedure.

Since this section applies to all Federal courts, the word "suit" was not required to be deleted by such rule.

"Court of the United States" is defined in section 451 of this title. Direct appeal from decisions invalidating Acts of Congress is provided by section 1252 of this title.

Changes were made in phraseology.

### AMENDMENTS

1976—Pub. L. 94-381, § 5(b), added "or a State" following "United States" in section catchline.

Subsecs. (a), (b). Pub. L. 94-381, § 5(a), designated existing provisions as subsec. (a), and added subsec. (b).

### EFFECTIVE DATE OF 1976 AMENDMENT

Amendment by Pub. L. 94-381 not applicable to any action commenced on or before Aug. 12, 1976, see section 7 of Pub. L. 94-381, set out as an Effective Date of 1976 Amendment note under section 2284 of this title.

### § 2404. Death of defendant in damage action

A civil action for damages commenced by or on behalf of the United States or in which it is interested shall not abate on the death of a defendant but shall survive and be enforceable against his estate as well as against surviving defendants.

(June 25, 1948, ch. 646, 62 Stat. 971.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 780a (June 16, 1933, ch. 103, 48 Stat. 311).

Substitution of parties, see rule 25(a) of the Federal Rules of Civil Procedure.

Changes in phraseology were made.

### § 2405. Garnishment

In any action or suit commenced by the United States against a corporation for the recovery of money upon a bill, note, or other security, the debtors of the corporation may be summoned as garnishees. Any person so summoned shall appear in open court and depose in writing to the amount of his indebtedness to the corporation at the time of the service of the summons and at the time of making the deposition, and judgment may be entered in favor of the United States for the sum admitted by the garnishee to be due the corporation as if it had been due the United States. A judgment shall not be entered against any garnishee until after judgment has been rendered against the corporation, nor until the sum in which the garnishee is indebted is actually due.

When any garnishee deposes in open court that he is not and was not at the time of the service of the summons indebted to the corporation, an issue may be tendered by the United States upon such deposition. If, upon the trial of that issue, a verdict is rendered against the garnishee, judgment shall be entered in favor of the United States, pursuant to such verdict, with costs.

Any garnishee who fails to appear at the term to which he is summoned shall be subject to attachment for contempt.

(June 25, 1948, ch. 646, 62 Stat. 971.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§ 748, 749, and 750 (R.S. §§ 935, 936, 937).

Changes were made in phraseology.

### § 2406. Credits in actions by United States; prior disallowance

In an action by the United States against an individual, evidence supporting the defendant's claim for a credit shall not be admitted unless he first proves that such claim has been disallowed, in whole or in part, by the General Accounting Office, or that he has, at the time of the trial, obtained possession of vouchers not previously procurable and has been prevented from presenting such claim to the General Accounting Office by absence from the United States or unavoidable accident.

(June 25, 1948, ch. 646, 62 Stat. 972.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 774 (R.S., §§ 236, 951; June 10, 1921, ch. 18, §§ 304, 305, 42 Stat. 24).

Word "action" was substituted for "suits", in view of Rule 2 of the Federal Rules of Civil Procedure.

Section 774 of title 28, U.S.C., 1940 ed., provided that "no claim for a credit shall be admitted, upon trial", etc. This was changed to "evidence supporting the defendant's claim for a credit shall not be admitted", to clarify the meaning of the section. The case of *U.S.* v. *Heard*, D.C.Va. 1940, 32 F.Supp. 39, reviews the conflicting decisions on the question whether compliance with the section must be pleaded, and offers persuasive argument that it need not be, and that the section was designed as a rule of evidence. The wording of the remainder of the section also supports this conclusion, as pointed out by Judge Learned Hand in *U.S.* v. *Standard Aircraft Corp.*, D.C.N.Y. 1926, 16 F.2d 307, followed in the Heard case.

Changes in phraseology were made.

#### CROSS REFERENCES

Third party tort liability for hospital and medical care, see section 2651 et seq. of Title 42, The Public Health and Welfare.

### § 2407. Delinquents for public money; judgment at return term; continuance

In an action by the United States against any person accountable for public money who fails to pay into the Treasury the sum reported due the United States, upon the adjustment of his account the court shall grant judgment upon motion unless a continuance is granted as specified in this section.

A continuance may be granted if the defendant, in open court and in the presence of the United States attorney, states under oath that he is equitably entitled to credits which have been disallowed by the General Accounting Office prior to the commencement of the action, specifying each particular claim so rejected, and stating that he cannot safely come to trial.

A continuance may also be granted if such an action is commenced on a bond or other sealed instrument and the court requires the original instrument to be produced.

(June 25, 1948, ch. 646, 62 Stat. 972.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 781 (R.S. § 957; June 10, 1921, ch. 18, § 304, 42 Stat. 24).

Word "action" was substituted for "suit", in view of Rule 2 of the Federal Rules of Civil Procedure.

Words "court requires the original instrument to be produced" were substituted for "defendant pleads non est factum, verifying such plea or motion by his oath, and the court thereupon requires the production of the original bond, contract, or other paper certified in the affidavit". The plea of non est factum is obsolete under Rule 7(c) of the Federal Rules of Civil Procedure. Furthermore, the words deleted are superfluous, since a court would not require the production of an original instrument unless the proper procedure were taken to require such production.

Changes were made in phraseology.

### § 2408. Security not required of United States

Security for damages or costs shall not be required of the United States, any department or agency thereof or any party acting under the direction of any such department or agency on the issuance of process or the institution or prosecution of any proceeding.

Costs taxable, under other Acts of Congress, against the United States or any such department, agency or party shall be paid out of the contingent fund of the department or agency which directed the proceedings to be instituted.

(June 25, 1948, ch. 646, 62 Stat. 972.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 870 (R.S. § 1001; Mar. 3, 1911, ch. 231, §§ 117, 289, 36 Stat. 1131, 1167; Jan. 31, 1928, ch. 14, § 1, 45 Stat. 54; June 19, 1934, ch. 653, § 7, 48 Stat. 1109).

Section 870 of title 28, U.S.C., 1940 ed., applied only to the Supreme Court and district courts. The revised section applies to all courts.

Words "process or the institution or prosecution of any proceeding" were substituted for "appeal, or other process in law, admiralty, or equity."

Word "agency" was substituted for "any corporation all the stock of which is beneficially owned by the United States, either directly or indirectly", in view of the creation of many independent governmental agencies since the enactment of the original law on which this section is based.

Changes were made in phraseology.

### § 2409. Partition actions involving United States

Any civil action by any tenant in common or joint tenant owning an undivided interest in lands, where the United States is one of such tenants in common or joint tenants, against the United States alone or against the United States and any other of such owners, shall proceed, and be determined, in the same manner as would a similar action between private persons.

Whenever in such action the court orders a sale of the property or any part thereof the Attorney General may bid for the same in behalf of the United States. If the United States is the purchaser, the amount of the purchase money shall be paid from the Treasury upon a warrant drawn by the Secretary of the Treasury on the requisition of the Attorney General.

(June 25, 1948, ch. 646, 62 Stat. 972.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 766 (May 17, 1898, ch. 339, §§ 1, 2, 30 Stat. 416).

Provisions relating to service or commencement of the action and duty of United States attorneys to appear, defend, and file answer were omitted as surplusage and covered by Rules 2, 3, and 4 of the Federal Rules of Civil Procedure and section 507 of this title.

Words "shall proceed, and be determined, in the same manner as would a similar action between private persons" were substituted for "shall proceed as other cases for partition by courts of equity, and in making such partition the court shall be governed by the same principles of equity that control courts of equity, in partition proceedings between private persons," in view of Rule 2 of the Federal Rules of Civil Procedure.

Changes were made in phraseology.

### § 2409a. Real property quiet title actions

(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1954, as amended (26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666).

(b) The United States shall not be disturbed in possession or control of any real property involved in any action under this section pending a final judgment or decree, the conclusion of any appeal therefrom, and sixty days; and if the final determination shall be adverse to the United States, the United States nevertheless may retain such possession or control of the real property or of any part thereof as it may elect, upon payment to the person determined to be entitled thereto of an amount which upon such election the district court in the same action shall determine to be just compensation for such possession or control.

(c) The complaint shall set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property, the circumstances under which it was acquired, and the right, title, or interest claimed by the United States.

(d) If the United States disclaims all interest in the real property or interest therein adverse to the plaintiff at any time prior to the actual commencement of the trial, which disclaimer is confirmed by order of the court, the jurisdiction of the district court shall cease unless it has jurisdiction of the civil action or suit on ground other than and independent of the authority conferred by section 1346(f) of this title.

(e) A civil action against the United States under this section shall be tried by the court without a jury.

(f) Any civil action under this section shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

(g) Nothing in this section shall be construed to permit suits against the United States based upon adverse possession.

(Added Pub. L. 92-562, § 3(a), Oct. 25, 1972, 86 Stat. 1176.)

#### References in Text

Section 208 of the Act July 10, 1952, referred to in subsec. (a), is section 208(a) to (d) of act July 10, 1952, ch. 651, 66 Stat. 560. Section 208(a) to (c) is classified to section 666 of Title 43, Public Lands. Section 208(d) was not classified to the Code.

#### Section Referred to in Other Sections

This section is referred to in sections 1346, 1402 of this title.

### § 2410. Actions affecting property on which United States has lien

(a) Under the conditions prescribed in this section and section 1444 of this title for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter—

(1) to quiet title to,

(2) to foreclose a mortgage or other lien upon,

(3) to partition,

(4) to condemn, or

(5) of interpleader or in the nature of interpleader with respect to,

real or personal property on which the United States has or claims a mortgage or other lien.

(b) The complaint or pleading shall set forth with particularity the nature of the interest or lien of the United States. In actions or suits involving liens arising under the internal revenue laws, the complaint or pleading shall include the name and address of the taxpayer whose liability created the lien and, if a notice of the tax lien was filed, the identity of the internal revenue office which filed the notice, and the date and place such notice of lien was filed. In actions in the State courts service upon the United States shall be made by serving the process of the court with a copy of the complaint upon the United States attorney for the district in which the action is brought or upon an assistant United States attorney or clerical employee designated by the United States attorney in writing filed with the clerk of the court in which the action is brought and by sending copies of the process and complaint, by registered mail, or by certified mail, to the Attorney General of the United States at Washington, District of Columbia. In such actions the United States may appear and answer, plead or demur within sixty days after such service or such further time as the court may allow.

(c) A judgment or decree in such action or suit shall have the same effect respecting the discharge of the property from the mortgage or other lien held by the United States as may be provided with respect to such matters by the local law of the place where the court is situated. However, an action to foreclose a mortgage or other lien, naming the United States as a party under this section, must seek judicial sale. A sale to satisfy a lien inferior to one of the United States shall be made subject to and without disturbing the lien of the United States, unless the United States consents that the property may be sold free of its lien and the proceeds divided as the parties may be entitled. Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem, except that with respect to a lien arising under the internal revenue laws the period shall be 120 days or the period allowable for redemption under State law, whichever is longer, and in any case in which, under the provisions of section 505 of the Housing Act of 1950, as amended (12 U.S.C. 1701k), and subsection (d) of section 1820 of title 38 of the United States Code, the right to redeem does not arise, there shall be no right of redemption. In any case where the debt owing the United States is due, the United States may ask, by way of affirmative relief, for the foreclosure of its own lien and where property is sold to satisfy a first lien held by the United States, the United States may bid at the sale such sum, not exceeding the amount of its claim with expenses of sale, as may be directed by the head (or his delegate) of the department or agency of the United States which has charge of the administration of the laws in respect to which the claim of the United States arises.

(d) In any case in which the United States redeems real property under this section or section 7425 of the Internal Revenue Code of 1954, the amount to be paid for such property shall be the sum of—

(1) the actual amount paid by the purchaser at such sale (which, in the case of a purchaser who is the holder of the lien being foreclosed, shall include the amount of the obligation secured by such lien to the extent satisfied by reason of such sale),

(2) interest on the amount paid (as determined under paragraph (1)) at 6 percent per annum from the date of such sale, and

(3) the amount (if any) equal to the excess of (A) the expenses necessarily incurred in connection with such property, over (B) the income from such property plus (to the extent such property is used by the purchaser) a reasonable rental value of such property.

(e) Whenever any person has a lien upon any real or personal property, duly recorded in the jurisdiction in which the property is located, and a junior lien, other than a tax lien, in favor of the United States attaches to such property, such person may make a written request to the officer charged with the administration of the laws in respect of which the lien of the United States arises, to have the same extinguished. If after appropriate investigation, it appears to such officer that the proceeds from the sale of the property would be insufficient to wholly or partly satisfy the lien of the United States, or that the claim of the United States has been satisfied or by lapse of time or otherwise has become unenforceable, such officer shall so report to the Comptroller General who may issue a certificate releasing the property from such lien.

(June 25, 1948, ch. 646, 62 Stat. 972; May 24, 1949, ch. 139, § 119, 63 Stat. 105; July 7, 1958, Pub. L. 85-508, § 12(h), 72 Stat. 348; June 11, 1960, Pub. L. 86-507, § 1(20), 74 Stat. 201; Nov. 2, 1966, Pub. L. 89-719, title II, § 201, 80 Stat. 1147.)

### HISTORICAL AND REVISION NOTES

### 1948 ACT

Based on title 28, U.S.C., 1940 ed., §§ 901, 902, 904, 905 (Mar. 4, 1931, ch. 515, §§ 1, 2, 4, 5, 46 Stat. 1528, 1529; May 17, 1932, ch. 190, 47 Stat. 158; June 25, 1936, ch. 804, 49 Stat. 1921; June 6, 1940, ch. 242, 54 Stat. 234; Dec. 2, 1942, ch. 656, §§ 1-3, 56 Stat. 1026).

Provisions including the districts of Hawaii and Puerto Rico, and the District Court of the United States for the District of Columbia, in section 901 of title 28, U.S.C., 1940 ed., were omitted as covered by "any district court." See section 451 of this title.

Provisions in section 902 of title 28, U.S.C., 1940 ed., relating to process, were omitted as covered by Rule 4 of the Federal Rules of Civil Procedure.

Changes were made in phraseology.

### 1949 ACT

This amendment conforms the language of section 2410(b) of title 28, U.S.C., with that of the prior law with respect to service of process and complaint upon the United States in suits brought in State courts. This is provided for by rule 4(d)(4) of the Federal Rules of Civil Procedure with respect to such suits in United States district courts.

### References in Text

The internal revenue laws, referred to in subsec. (b), are classified generally to Title 26, Internal Revenue Code.

Section 7425 of the Internal Revenue Code of 1954, referred to in subsec. (d), is classified to section 7425 of Title 26, Internal Revenue Code.

### Amendments

1966—Subsec. (a). Pub. L. 89-719 substituted "subject matter—

"(1) to quiet title to,

"(2) to foreclose a mortgage or other lien upon,

"(3) to partition,

"(4) to condemn, or

"(5) of interpleader or in the nature of interpleader with respect to,"

for "subject matter, to quiet title to or for the foreclosure of a mortgage or other lien upon".

Subsec. (b). Pub. L. 89-719 substituted "complaint or pleading shall set forth" for "complaint shall set forth", and inserted sentence requiring the complaint or pleading, in actions or suits involving liens arising under the internal revenue laws, to include the name and address of the taxpayer whose liability created the lien and, if a notice of the tax lien was filed, the identity of the internal revenue office which filed the notice, and the date and place such notice of lien was filed.

Subsec. (c). Pub. L. 89-719 substituted "judgment or decree in such action" for "judicial sale in such action", "discharge of the property from the mortgage or other lien" for "discharge of the property from liens and encumbrances", and "place where the court is situated" for "place where the property is situated", and inserted provisions requiring an action to foreclose a mortgage or other lien, in which the United States is named as a party under this section, to seek a judicial sale, providing that the period of redemption where a sale is made with respect to a lien arising under the internal revenue laws is 120 days or the period allowable for redemption under State law, whichever is longer, and prohibiting the right of redemption in any case which, under the provisions of section 1701k of Title 12 and section 1820(d) of Title 38, the right to redeem does not arise.

Subsec. (d). Pub. L. 89-719 added subsec. (d) and redesignated former subsec. (d) as (e).

Subsec. (e). Pub. L. 89-719 redesignated former subsec. (d) as (e).

1960—Subsec. (b). Pub. L. 86-507 inserted "or by certified mail," following "registered mail,".

1958—Pub. L. 85-508 eliminated provisions which extended this section to the District Court for the Territory of Alaska. See section 81A of this title which establishes a United States District Court for the State of Alaska.

1949—Subsec. (b). Act May 24, 1949, conformed the section with that of prior law with respect to service of process and complaint upon the United States in suits brought in State courts.

### Effective Date of 1966 Amendment

Amendment by Pub. L. 89-719 applicable after Nov. 2, 1966, see section 203 of Pub. L. 89-719, set out as an Effective Date of 1966 Amendment note under section 1346 of this title.

### Effective Date of 1958 Amendment

Amendment by Pub. L. 85-508 effective Jan. 3, 1959, upon admission of Alaska into the Union pursuant to Proc. No. 3269, Jan. 3, 1959, 24 F.R. 81, 73 Stat. c16, as required by sectional and 8(c) of Pub. L. 85-508, see notes set out under section 81A of this title and preceding section 21 of Title 48, Territories and Insular Possessions.

### Cross References

Right of redemption under subsec. (c), exclusion where subordinate lien of United States derives from insurance under National Housing Act or Servicemen's Readjustment Act of 1944, see section 1701k of Title 12, Banks and Banking.

### Section Referred to in Other Sections

This section is referred to in sections 1444, 2409a of this title; title 12 section 1017k; title 26 sections 6326, 7424, 7425, 7430, 7810; title 38 section 1820.

## § 2411. Interest

(a) In any judgment of any court rendered (whether against the United States, a collector or deputy collector of internal revenue, a former collector or deputy collector, or the personal representative in case of death) for any overpayment in respect of any internal-revenue tax, interest shall be allowed at an annual rate established under section 6621 of the Internal Revenue Code of 1954 upon the amount of the overpayment, from the date of the payment or collection thereof to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner of Internal Revenue. The Commissioner is authorized to tender by check payment of any such judgment, with interest as herein provided, at any time after such judgment becomes final, whether or not a claim for such payment has been duly filed, and such tender shall stop the running of interest, whether or not such refund check is accepted by the judgment creditor.

(b) Except as otherwise provided in subsection (a) of this section, on all final judgments rendered against the United States in actions instituted under section 1346 of this title, interest shall be computed at the rate of 4 per centum per annum from the date of the judgment up to, but not exceeding, thirty days after the date of approval of any appropriation Act providing for payment of the judgment.

(June 25, 1948, ch. 646, 62 Stat. 973; May 24, 1949, ch. 139, § 120, 63 Stat. 106; Jan. 3, 1975, Pub. L. 93-625, § 7(a)(2), 88 Stat. 2115.)

### Historical and Revision Notes

### 1948 Act

Based on title 28, U.S.C., 1940 ed., §§ 765, 931(a), 932, Mar. 3, 1837, ch. 359, § 10, 24 Stat. 507; Feb. 13, 1925, ch. 229, § 8, 43 Stat. 940; Jan. 31, 1928, ch. 14, § 1, 45 Stat. 54; Aug. 2, 1946, ch. 753, §§ 410(a), 411, 60 Stat. 843, 844).

Section consolidates section 765 with provisions of sections 931(a) and 932, all of title 28, U.S.C., 1940 ed., relating to interest on judgments, the latter two sections being applicable to judgments in tort claims cases. For other provisions of said sections 931(a) and 932, see Distribution Table. Said section 932 made the provisions of said section 765 applicable to such judgments, therefore the provisions of said section 931(a) that "the United States shall not be liable for interest prior to judgment" was omitted as covered by the language of said section 765 providing that interest shall be computed from the date of the judgment.

Provisions of section 765 of title 28, U.S.C., 1940 ed., that when the findings of fact and the law applicable thereto have been filed in any case as provided in "section 763" [764] of title 28, U.S.C., 1940 ed., and the judgment or decree is adverse to the Government, it shall be the duty of the district attorney to transmit to the Attorney General of the United States certified copies of all the papers filed in the cause, with a transcript of the testimony taken, the written findings of the court, and his written opinion as to the same, that, whereupon, the Attorney General shall determine and direct whether an appeal shall be taken or not, and that, when so directed, the district attorney shall cause an appeal to be perfected in accordance with the terms of the statutes and rules of practice governing the same were omitted as unnecessary and covered by section 507 of this title which provides for supervision of United States attorneys by the Attorney General.

Words of section 765 of title 28, U.S.C., 1940 ed., "Until the time when an appropriation is made for the payment of the judgment or decree" were omitted and words "up to, but not exceeding, thirty days after the date of approval of any appropriation act providing for payment of the judgment" were substituted. Substituted words clarify meaning and are in accord with congressional procedure in annual deficiency appropriation acts for payment of judgments against the United States. The substituted words will obviate necessity of repeating such provisions in appropriation acts.

Changes were made in phraseology.

### 1949 ACT

This section amends section 2411 of title 28, U.S.C., by restoring the provisions of section 177 of the former Judicial Code for the payment of interest on tax refunds.

### REFERENCES IN TEXT

Section 6621 of the Internal Revenue Code of 1954, referred to in subsec.(a), is classified to section 6621 of Title 26, Internal Revenue Code.

### AMENDMENTS

1975—Subsec. (a). Pub. L. 93-625 substituted "an annual rate established under section 6621 of the Internal Revenue Code of 1954" for "the rate of 6 per centum per annum".

1949—Act May 24, 1949, restored provisions relating to payment of interest on tax refunds.

### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 26 sections 6612, 6621; title 31 section 724a; title 42 section 418.

## § 2412. Costs

Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, in any court having jurisdiction of such action. A judgment for costs when taxed against the Government shall, in an amount established by statute or court rule or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by him in the litigation. Payment of a judgment for costs shall be as provided in section 2414 and section 2517 of this title for the payment of judgments against the United States.

(June 25, 1948, ch. 646, 62 Stat. 973; July 18, 1966, Pub. L. 89-507, § 1, 80 Stat. 308.)

### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§ 258, 931(a) (Mar. 3, 1911, ch. 231, § 152, 36 Stat. 1138; Aug. 2, 1946, ch. 753, § 410(a), 60 Stat. 843).

Section consolidates the last sentence of section 931(a) of title 28, U.S.C., 1940 ed., with section 258 of said title 28. For other provisions of said section 931(a), see Distribution Table.

Subsection (a) is new. It follows the well-known common-law rule that a sovereign is not liable for costs unless specific provision for such liability is made by law. This is a corollary to the rule that a sovereign cannot be sued without its consent.

Many enactments of Congress relating to fees and costs contain specific exceptions as to the liability of the United States. (See, for example, section 548 of title 28, U.S.C., 1940 ed.) A uniform rule, embodied in this section, will make such specific exceptions unnecessary.

Subsection (b) incorporates section 258 of title 28, U.S.C., 1940 ed.

Subsection (c) incorporates the costs provisions of section 931(a) of title 28, U.S.C., 1940 ed.

Words "and for summoning the same," after "witnesses," were omitted from subsection (b) as covered by "those actually incurred for witnesses."

Changes were made in phraseology.

### AMENDMENTS

1966—Pub. L. 89-507 empowered a court having jurisdiction to award judgment for costs, except as otherwise specifically provided by statute, to the prevailing party in any action brought by or against the United States or any agency or official of the United States acting in his official capacity, limited the judgment for costs when taxed against the Government to reimbursing in whole or in part the prevailing party for costs incurred by him in the litigation, required the payment of a judgment for costs to be as provided in section 2414 and section 2517 of this title for the payment of judgments against the United States and eliminated provisions which limited the liability of the United States for fees and costs to those cases in which liability was expressed provided for by Act of Congress, permitted the district court or the Court of Claims, in an action under section 1346(a) or 1491 of this title if the United States put in issue plaintiff's right to recover, to allow costs to the prevailing party from the time of joining such issue, and which authorized the allowance of costs to the successful claimant in an action under section 1346(b) of this title.

### EFFECTIVE DATE OF 1966 AMENDMENT

Section 3 of Pub. L. 89-507 provided that: "These amendments [to this section and section 2520 of this title] shall apply only to judgments entered in actions filed subsequent to the date of enactment of this Act [July 18, 1966]. These amendments [to this section and section 2520 of this title] shall not authorize the reopening or modification of judgments entered prior to the enactment of this Act [July 18, 1966]."

### FEDERAL RULES OF CIVIL PROCEDURE

Liability of United States for costs, see rule 54, Appendix to this title.

### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 15 sections 2059, 2060; title 26 section 7430

## § 2413. Executions in favor of United States

A writ of execution on a judgment obtained for the use of the United States in any court thereof shall be issued from and made returnable to the court which rendered the judgment, but may be executed in any other State, in any Territory, or in the District of Columbia.

(June 25, 1948, ch. 646, 62 Stat. 974.)

### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 839 (R.S. § 986).

Words "or in the District of Columbia" were added on the authority of 14 Op. Atty. Gen. 384, declaring that, under this section, a writ of execution in favor of the United States, obtained from a Federal court in any State, could be executed in the District of Columbia. (See, also, section 1963 of this title.)

Changes in phraseology were made.

### § 2414. Payment of judgments and compromise settlements

Payment of final judgments rendered by a district court against the United States shall be made on settlements by the General Accounting Office. Payment of final judgments rendered by a State or foreign court or tribunal against the United States, or against its agencies or officials upon obligations or liabilities of the United States, shall be made on settlements by the General Accounting Office after certification by the Attorney General that it is in the interest of the United States to pay the same.

Whenever the Attorney General determines that no appeal shall be taken from a judgment or that no further review will be sought from a decision affirming the same, he shall so certify and the judgment shall be deemed final.

Except as otherwise provided by law, compromise settlements of claims referred to the Attorney General for defense of imminent litigation or suits against the United States, or against its agencies or officials upon obligations or liabilities of the United States, made by the Attorney General or any person authorized by him, shall be settled and paid in a manner similar to judgments in like causes and appropriations or funds available for the payment of such judgments are hereby made available for the payment of such compromise settlements.

(June 25, 1948, ch. 646, 62 Stat. 974; Aug. 30, 1961, Pub. L. 87-187, § 1, 75 Stat. 415.)

#### HISTORICAL AND REVISION NOTES

Based on section 228 of title 31, U.S.C., 1940 ed., Money and Finance (Feb. 18, 1904, ch. 160, § 1, 33 Stat. 41; June 10, 1921, ch. 18, § 304, 42 Stat. 24).

Similar provisions of section 228 of title 31, U.S.C., 1940 ed., relating to judgments of the court of claims are incorporated in section 2517 of this title.

The second paragraph was added to make clear that the payment of judgments not appealed may be expedited by certificate to that effect.

Changes were made in phraseology.

#### AMENDMENTS

1961—Pub. L. 87-187 provided for payment of final judgments rendered by a State or foreign court against the United States, its agencies or officials and compromise settlements and substituted "and compromise settlements" for "against the United States" in the section catchline.

#### CROSS REFERENCES

Appropriations for payments of judgments against the United States, computation of interest time, see section 724a of Title 31, Money and Finance.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 2412 of this title; title 16 sections 79g, 460bb-2; title 31 section 724a; title 42 section 418.

### § 2415. Time for commencing actions brought by the United States

(a) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later: *Provided*, That in the event of later partial payment or written acknowledgment of debt, the right of action shall be deemed to accrue again at the time of each such payment or acknowledgment: *Provided further*, That an action for money damages brought by the United States for or on behalf of a recognized tribe, band or group of American Indians shall not be barred unless the complaint is filed more than six years and ninety days after the right of action accrued: *Provided further*, That an action for money damages which accrued on the date of enactment of this Act in accordance with subsection (g) brought by the United States for or on behalf of a recognized tribe, band, or group of American Indians, or on behalf of an individual Indian whose land is held in trust or restricted status, shall not be barred unless the complaint is filed more than eleven years after the right of action accrued or more than two years after a final decision has been rendered in applicable administrative proceedings required by contract or by law, whichever is later.

(b) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon a tort shall be barred unless the complaint is filed within three years after the right of action first accrues: *Provided*, That an action to recover damages resulting from a tresspass on lands of the United States; an action to recover damages resulting from fire to such lands; an action to recover for diversion of money paid under a grant program; and an action for conversion of property of the United States may be brought within six years after the right of action accrues, except that such actions for or on behalf of a recognized tribe, band or group of American Indians, including actions relating to allotted trust or restricted Indian lands, may be brought within six years and ninety days after the right of action accrues, except that such actions for or on behalf of a recognized tribe, band, or group of American Indians, including actions relating to allotted trust or restricted Indian lands, or on behalf of an individual Indian whose land is held in trust or restricted status which accrued on the date of enactment of this Act in accordance with subsection (g) may be brought within eleven years after the right of action accrues.

(c) Nothing herein shall be deemed to limit the time for bringing an action to establish the title to, or right of possession of, real or personal property.

(d) Subject to the provisions of section 2416 of this title and except as otherwise provided by Congress, every action for the recovery of money erroneously paid to or on behalf of any civilian employee of any agency of the United States or to or on behalf of any member or dependent of any member of the uniformed services of the United States, incident to the employment or services of such employee or member, shall be barred unless the complaint is filed within six years after the right of action accrues: *Provided*, That in the event of later partial payment or written acknowledgment of debt, the right of action shall be deemed to accrue again at the time of each such payment or acknowledgment.

(e) In the event that any action to which this section applies is timely brought and is thereafter dismissed without prejudice, the action may be recommenced within one year after such dismissal, regardless of whether the action would otherwise then be barred by this section. In any action so recommenced the defendant shall not be barred from interposing any claim which would not have been barred in the original action.

(f) The provisions of this section shall not prevent the assertion, in an action against the United States or an officer or agency thereof, of any claim of the United States or an officer or agency thereof against an opposing party, a co-party, or a third party that arises out of the transaction or occurrence that is the subject matter of the opposing party's claim. A claim of the United States or an officer or agency thereof that does not arise out of the transaction or occurrence that is the subject matter of the opposing party's claim may, if time-barred, be asserted only by way of offset and may be allowed in an amount not to exceed the amount of the opposing party's recovery.

(g) Any right of action subject to the provisions of this section which accrued prior to the date of enactment of this Act shall, for purposes of this section, be deemed to have accrued on the date of enactment of this Act.

(h) Nothing in this Act shall apply to actions brought under the Internal Revenue Code or incidental to the collection of taxes imposed by the United States.

(Added Pub. L. 89-505, § 1, July 18, 1966, 80 Stat. 304, and amended Pub. L. 92-353, July 18, 1972, 86 Stat. 499; Pub. L. 92-485, Oct. 13, 1972, 86 Stat. 803.)

#### REFERENCES IN TEXT

The date of enactment of this Act, referred to in subsecs. (a), (b), and (g), means the date of enactment of Pub. L. 89-505, which was approved on July 18, 1966.

This Act, referred to in subsec. (h), means Pub. L. 89-505, which enacted this section and section 2416 of this title. For complete classification of this Act to the Code, see Tables volume.

#### AMENDMENTS

1972—Subsec. (a). Pub. L. 92-485, § 1(a), added further proviso relating to actions for money damages brought by the United States for or on behalf of a recognized tribe, band, or group of American Indians, or on behalf of an individual Indian whose land is held in trust or restricted status.

Pub. L. 92-353, § 1(a), added proviso that an action for money damages brought by the United States on behalf of American Indians shall not be barred unless the complaint is filed more than six years and ninety days after the right of action accrued.

Subsec. (b). Pub. L. 92-485, § 1(b), added exception relating to actions for or on behalf of a recognized tribe, band, or group of American Indians, including actions relating to allotted trust or restricted Indian lands, or on behalf of an individual Indian whose land is held in trust or restricted status.

Pub. L. 92-353, § 1(b), increased the period of limitation to six years and ninety days for actions brought by the United States under the subsection for or on behalf of American Indians.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 2416 of this title.

### § 2416. Time for commencing actions brought by the United States—Exclusions

For the purpose of computing the limitations periods established in section 2415, there shall be excluded all periods during which—

(a) the defendant or the res is outside the United States, its territories and possessions, the District of Columbia, or the Commonwealth of Puerto Rico; or

(b) the defendant is exempt from legal process because of infancy, mental incompetence, diplomatic immunity, or for any other reason; or

(c) facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances; or

(d) the United States is in a state of war declared pursuant to article I, section 8, of the Constitution of the United States.

(Added Pub. L. 89-505, § 1, July 18, 1966, 80 Stat. 305.)

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 2415 of this title.

## CHAPTER 163—FINES, PENALTIES AND FORFEITURES

Sec.
2461. Mode of recovery.
2462. Time for commencing proceedings.
2463. Property taken under revenue law not repleviable.
2464. Security; special bond.
2465. Return of property to claimant; certificate of reasonable cause; liability for wrongful seizure.

### § 2461. Mode of recovery

(a) Whenever a civil fine, penalty or precuniary forfeiture is prescribed for the violation of an Act of Congress without specifying the mode of recovery or enforcement thereof, it may be recovered in a civil action.

(b) Unless otherwise provided by Act of Congress, whenever a forfeiture of property is prescribed as a penalty for violation of an Act of Congress and the seizure takes place on the high seas or on navigable waters within the admiralty and maritime jurisdiction of the United States, such forfeiture may be enforced by libel in admiralty but in cases of seizures on land the forfeiture may be enforced by a proceeding by libel which shall conform as near as may be to proceedings in admiralty.

(June 25, 1948, ch. 646, 62 Stat. 974.)

#### HISTORICAL AND REVISION NOTES

Subsection (a) was drafted to clarify a serious ambiguity in existing law and is based upon rulings of the Supreme Court. Numerous sections in the United States Code prescribe civil fines, penalties, and precuniary forfeitures for violation of certain sections without specifying the mode of recovery or enforcement thereof. See, for example, section 567 of title 12, U.S.C., 1940 ed., Banks and Banking, section 64 of title 14, U.S.C., 1940 ed., Coast Guard, and section 180 of title 25, U.S.C., 1940 ed., Indians. Compare section 1 (21) of title 49, U.S.C., 1940 ed., Transportation.

A civil fine, penalty, or precuniary forfeiture is recoverable in a civil action. *United States ex rel. Marcus* v. *Hess* et al., 1943, 63 S.Ct. 379, 317 U.S. 537, 87 L.Ed. 433, rehearing denied 63 S.Ct. 756, 318 U.S. 799, 87 L.Ed. 1163; *Hepner* v. *United States*, 1909, 29 S.Ct. 474, 213 U.S. 103, 53 L.Ed. 720, and cases cited therein.

Forfeiture of bail bonds in criminal cases are enforceable by procedure set out in Rule 46 of the Federal Rules of Criminal Procedure.

If the statute contemplates a criminal fine, it can only be recovered in a criminal proceeding under the Federal Rules of Criminal Procedure, after a conviction. The collection of civil fines and penalties, however, may not be had under the Federal Rules of Criminal Procedure, Rule 54(b)(5), but enforcement of a criminal fine imposed in a criminal case may be had by execution on the judgment rendered in such case, as in civil actions. (See section 569 of title 18, U.S.C., 1940 ed., Crimes and Criminal Procedure, incorporated in section 3565 of H.R. 1600, 80th Congress, for revision of the Criminal Code. See also Rule 69 of Federal Rules of Civil Procedure and Advisory Committee Note thereunder, as to execution in civil actions.)

Subsection (b) was drafted to cover the subject of forfeiture of property generally. Sections in the United States Code specifically providing a mode of enforcement of forfeiture of property for their violation and other procedural matters will, of course, govern and subsection (b) will not affect them. It will only cover cases where no mode of recovery is prescribed.

Words "Unless otherwise provided by enactment of Congress" were inserted at the beginning of subsection (b) to exclude from its application instances where a libel in admiralty is not required. For example, under sections 1607, 1609, and 1610 of title 19, U.S.C., 1940 ed., Customs Duties, the collector of customs may, by summary procedure, sell at public auction, without previous declaration of forfeiture or libel proceedings, any vessel, etc., under $1,000 in value in cases where no claim for the same is filed or bond given as required by customs laws.

Rule 81 of the Federal Rules of Civil Procedure makes such rules applicable to the appeals in cases of seizures on land. (See also *443 Cans of Frozen Egg Product* v. *United States*, 1912, 33 S.Ct. 50, 226 U.S. 172, 57 L.Ed. 174, and *Eureka Productions* v. *Mulligan*, C.C.A. 1940, 108 F.2d 760.) The proceeding, which resembles a suit in admiralty in that it is begun by a libel, is, strictly speaking, an "action at law" (The Sarah, 1823, 8 Wheat. 391, 21 U.S. 391, 5 L.Ed. 644; Morris's Cotton, 1869, 8 Wall. 507, 75 U.S. 507, 19 L.Ed. 481; Confiscation cases, 1873, 20 Wall. 92, 87 U.S. 92, 22 L.Ed. 320; *Eureka Productions* v. *Mulligan*, supra), even though the statute may direct that the proceedings conform to admiralty as near as may be. *In re Graham*, 1870, 10 Wall. 541, 19 L.Ed. 981, and *443 Cans of Frozen Egg Product* v. *United States*, supra.

Subsection (b) is in conformity with Rule 21 of the Supreme Court Admiralty Rules, which recognizes that a libel may be filed upon seizure for any breach of any enactment of Congress, whether on land or on the high seas or on navigable waters within the admiralty and maritime jurisdiction of the United States. Such rule also permits an information to be filed, but is rarely, if ever, used at present. Consequently, "information" has been omitted from the text and only "libel" is incorporated.

### § 2462. Time for commencing proceedings

Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

(June 25, 1948, ch. 646, 62 Stat. 974.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 791 (R.S. § 1047). Changes were made in phraseology.

#### Section Referred to in Other Sections

This section is referred to in title 26 section 6533.

### § 2463. Property taken under revenue law not repleviable

All property taken or detained under any revenue law of the United States shall not be repleviable, but shall be deemed to be in the custody of the law and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof.

(June 25, 1948, ch. 646, 62 Stat. 974.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 747 (R.S. § 934). Changes were made in phraseology.

#### Section Referred to in Other Sections

This section is referred to in title 26 section 7430.

### § 2464. Security; special bond

(a) Except in cases of seizures for forfeiture under any law of the United States, whenever a warrant of arrest or other process in rem is issued in any admiralty case, the United States marshal shall stay the execution of such process, or discharge the property arrested if the process has been levied, on receiving from the respondent or claimant of the property a bond or stipulation in double the amount claimed by the libellant, with sufficient surety, to be approved by the judge of the district court where the case is pending, or, in his absence, by the collector of the port, conditioned to answer the decree of the court in such case. Such bond or stipulation shall be returned to the court, and judgment or decree thereon, against both the principal and sureties, may be secured at the time of rendering the decree in the original case. The owner of any vessel may deliver to the marshal a bond or stipulation, with sufficient surety, to be approved by the judge of the district court, conditioned to answer the decree of such court in all or any cases that are brought thereafter in such court against the vessel. Thereupon the execution of all such process against such vessel shall be stayed so long as the amount secured by such bond or stipulation is at least double the aggregate amount claimed by libellants in such suits which are begun and pending against such vessel. Similar judgments or decrees and remedies may be had on such bond or stipulation as if a special bond or stipulation had been filed in each of such suits.

(b) The court may make necessary orders to carry this section into effect, particularly in giving proper notice of any such suit. Such bond or stipulation shall be indorsed by the clerk with a minute of the suits wherein process is so stayed. Further security may be required by the court at any time.

(c) If a special bond or stipulation in the particular case is given under this section, the liability as to said case on the general bond or stipulation shall cease. The parties may stipulate the amount of the bond or stipulation for the release of a vessel or other property to be not more than the amount claimed in the libel, with interest, plus an allowance for libellant's costs. In the event of the inability or refusal of the parties to so stipulate, the court shall fix the amount, but if not so fixed then a bond shall be required in the amount prescribed in this section.

(June 25, 1948, ch. 646, 62 Stat. 974.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 754 (R.S. § 941; Mar. 3, 1899, ch. 441, 30 Stat. 1354; Aug. 3, 1935, ch. 431, § 3, 49 Stat. 513).

Changes were made in phraseology.

### Transfer of Functions

All offices of collector of customs, comptroller of customs, surveyor of customs, and appraiser of merchandise of the Bureau of Customs of the Department of the Treasury to which appointments were required to be made by the President with the advice and consent of the Senate were ordered abolished, with such offices to be terminated not later than Dec. 31, 1966, by Reorg. Plan No. 1, of 1965, eff. May 25, 1965, 30 F.R. 7035, 79 Stat. 1317, set out in the Appendix to Title 5, Government Organization and Employees. All functions of the offices eliminated were already vested in the Secretary of the Treasury by Reorg. Plan No. 26 of 1950, eff. July 31, 1950, 15 F.R. 4935, 64 Stat. 1280, set out in the Appendix to title 5.

### Section Referred to in Other Sections

This section is referred to in title 16 sections 916g, 958, 959, 971f, 990, 1031, 1100a–1.

## § 2465. Return of property to claimant; certificate of reasonable cause; liability for wrongful seizure

Upon the entry of judgment for the claimant in any proceeding to condemn or forfeit property seized under any Act of Congress, such property shall be returned forthwith to the claimant or his agent; but if it appears that there was reasonable cause for the seizure, the court shall cause a proper certificate thereof to be entered and the claimant shall not, in such case, be entitled to costs, nor shall the person who made the seizure, nor the prosecutor, be liable to suit or judgment on account of such suit or prosecution.

(June 25, 1948, ch. 646, 62 Stat. 975.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., §§ 818, 827 (R.S. §§ 970, 979).

Section consolidates sections 818 and 827 of title 28, U.S.C., 1940 ed., with changes of phraseology necessary to effect the consolidation.

The words "in any proceeding to condemn or forfeit property" were inserted in conformity with the uniform course of judicial decisions. See *Hammel* v. *Little*, App.D.C. 1936, 87 F.2d 907, and cases there cited.

The qualifying language of section 827 of title 28, U.S.C., 1940 ed., requiring the claimant to pay his own costs before the return of his property was omitted as unnecessary and involving a matter more properly for regulation by rule of court. (See sections 1913, 1914, and 1925 of this title.)

(See also section 2006 of this title with respect to actions against internal revenue officers and their liability for acts in the performance of official duties.)

### Section Referred to in Other Sections

This section is referred to in title 26 section 7328.

## CHAPTER 165—COURT OF CLAIMS PROCEDURE

Sec.
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### Amendments

1954—Act Sept. 3, 1954, ch. 1263, §§ 46, 54(c), 55(d), 59(b), 68 Stat. 1243, 1247, 1248, substituted "Trial before judges" for "Place of taking evidence" in item 2505, and "Calls and discovery," for "Calls on departments for information" in item 2507, rephrased item 2510, and added item 2521.

## § 2501. Time for filing suit

Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

Every claim under section 1497 of this title shall be barred unless the petition thereon is filed within two years after the termination of the river and harbor improvements operations on which the claim is based.

A petition on the claim of a person under legal disability or beyond the seas at the time the claim accrues may be filed within three years after the disability ceases.

A suit for the fees of an officer of the United States shall not be filed until his account for such fees has been finally acted upon, unless the General Accounting Office fails to act within six months after receiving the account.

(June 25, 1948, ch. 646, 62 Stat. 976; Sept. 3, 1954, ch. 1263, § 52, 68 Stat. 1246.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., §§ 250(2), 250a, and 262 (Mar. 3, 1911, ch. 231, §§ 145, 156, 36 Stat. 1136, 1139; June 10, 1921, ch. 18, § 304, 42 Stat. 24; Aug. 30, 1935, ch. 831, § 13, 49 Stat. 1049; July 13, 1943, ch. 231, 57 Stat. 553).

Section consolidates limitation provisions of sections 250(2), 250a, and 262 of title 28, U.S.C., 1940 ed.

Words "a person under legal disability or beyond the seas at the time the claim accrues" were substituted for "married women first accrued during marriage, of persons under the age of twenty-one years first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued; entitled to the claim,". The revised language will cover all legal disabilities actually barring suit. For example, the particular reference to married women is archaic, and is eliminated by use of the general language substituted.

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[1] So in original. Does not conform to section catchline.

Words "nor shall any of the said disabilities operate cumulatively" were omitted, in view of the elimination of the reference to specific disabilities. Also, persons under legal disability could not sue, and their suits should not be barred until they become able to sue. Similar sections of the U.S. Code do not contain any such provision. (For example, see section 502 of title 28, U.S.C., 1940 ed., incorporated in section 544 of this title.)

The section was extended to include claims referred by the head of an executive department in conformity with section 2510 of this title.

#### Amendments

1954—Act Sept. 3, 1954, eliminated ", or the claim is referred by the Senate or House of Representatives, or by the head of an executive department" in the first par.

#### Cross References

Use or manufacture by United States of design relating to aircraft or aircraft component, time for filing action, see section 2273 of Title 10, Armed Forces.

### § 2502. Aliens' privilege to sue

(a) Citizens or subjects of any foreign government which accords to citizens of the United States the right to prosecute claims against their government in its courts may sue the United States in the Court of Claims if the subject matter of the suit is otherwise within such court's jurisdiction.

(b) See section 7422(f) of the Internal Revenue Code of 1954 for exception with respect to suits involving internal revenue taxes.

(June 25, 1948, ch. 646, 62 Stat. 976; Nov. 2, 1966, Pub. L. 89-713, § 3(b), 80 Stat. 1108.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 261 (Mar. 3, 1911, ch. 231, § 155, 36 Stat. 1139).

Changes were made in phraseology.

#### References in Text

Section 7422(f) of the Internal Revenue Code of 1954, referred to in subsec. (b), is classified to section 7422(f) of Title 26, Internal Revenue Code.

#### Amendments

1966—Pub. L. 89-713 designated existing provisions as subsec. (a) and added subsec. (b).

#### Effective Date of 1966 Amendment

Amendment by section 3(b) of Pub. L. 89-713, which added subsec. (b) to this section, applicable to suits brought against officers, employees, or personal representatives instituted 90 days or more after Nov. 2, 1966, see section 3(d) of Pub. L. 89-713, set out as an Effective Date of 1966 Amendment note under section 7422 of Title 26, Internal Revenue Code.

#### Section Referred to in Other Sections

This section is referred to in title 26 section 7422.

### § 2503. Proceedings before commissioners generally

(a) Parties to any suit in the Court of Claims may appear before a commissioner in person or by attorney, produce evidence and examine witnesses. In accordance with rules and orders of the court, commissioners shall fix times for trials, administer oaths or affirmations to and examine witnesses, receive evidence and report findings of fact and, when directed by the court, their recommendations for conclusions of law in cases assigned to them. Hearings shall, if convenient, be held in the counties where the witnesses reside.

(b) The rules of the court shall provide for the filing in court of the commissioner's report of facts and recommendations for conclusions of law, and for opportunity for the parties to file exceptions thereto, and a hearing thereon before the court within a reasonable time. This section shall not prevent the court from passing upon all questions and findings regardless of whether exceptions were taken before a commissioner.

(June 25, 1948, ch. 646, 62 Stat. 976; Sept. 3, 1954, ch. 1263, § 53, 68 Stat. 1246.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., §§ 269, 276, and 278 (Mar. 3, 1911, ch. 231, §§ 168, 170, 36 Stat. 1140; Feb. 24, 1925, ch. 301, § 1, 43 Stat. 964; June 23, 1930, ch. 573, § 2, 46 Stat. 799).

Section consolidates provisions relating to proceedings before commissioners and reporter-commissioners contained in sections 269, 276, and 278 of title 28, U.S.C., 1940 ed.

Provisions of section 269 of title 28, U.S.C., 1940 ed., relating to appointment and compensation of commissioners are incorporated in section 792 of this title.

Words "including reporter-commissioners" after "commissioners" were inserted to clarify meaning and conform to Rule 54(a) of the Court of Claims authorizing oaths before reporter-commissioners.

Changes were made in phraseology.

#### Senate Revision Amendment

The Senate amended this section by inserting "and when directed by the court his recommendations for conclusions of law" following "commissioner" in the second paragraph. This amendment authorizes the Court to direct its commissioners to report recommendations for conclusions of law as well as findings of fact in cases assigned to them. 80th Congress Senate Report No. 1559, Amendment No. 50.

#### Amendments

1954—Act Sept. 3, 1954, designated former first par. subsec. (a), and former second par. subsec. (b), and incorporated in one place provisions relating to function of Commissioners.

### § 2504. Plaintiff's testimony

The Court of Claims may, at the instance of the Attorney General, order any plaintiff to appear, upon reasonable notice, before any commissioner of the court and be examined on oath as to all matters pertaining to his claim. Such examination shall be reduced to writing by the commissioner, and shall be returned to and filed in the court, and may, at the discretion of the attorneys for the United States, be read and used as evidence on the trial. If any plaintiff, after such order is made and due and reasonable notice thereof is given to him, fails to appear, or refuses to testify or answer fully as to all material matters within his knowledge, the court may order that the case shall not be tried until he fully complies with such order.

(June 25, 1948, ch. 646, 62 Stat. 976.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 274 (Mar. 3, 1911, ch. 231, § 166, 36 Stat. 1140).

Words "Attorney General" were substituted for "attorney or solicitor appearing in behalf of the United

States," in view of section 309 of title 5, U.S.C., 1940 ed., Executive Departments and Government Officers and Employees.

Changes were made in phraseology.

### § 2505. Trial before judges

Any judge of the Court of Claims may sit at any place within the United States to take evidence and report findings.

(June 25, 1948, ch. 646, 62 Stat. 976; Sept. 3, 1954, ch. 1263, § 54(a), (b), 68 Stat. 1246.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§ 275 and 275a (Mar. 3, 1911, ch. 231, § 167, 36 Stat. 1140; Feb. 24, 1925, ch. 301, § 2, 43 Stat. 965; June 23, 1930, ch. 573, § 1, 46 Stat. 799; Oct. 16, 1941, ch. 443, 55 Stat. 741).

Changes were made in phraseology.

#### AMENDMENTS

1954—Act Sept. 3, 1954, replaced catchline reading "Place of taking evidence" with present one, and repealed second par. relating to taking of testimony.

### § 2506. Interest of witness

A witness in a suit in the Court of Claims shall not be exempt or disqualified because he is a party to or interested in such suit.

(June 25, 1948, ch. 646, 62 Stat. 977.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 274 (Mar. 3, 1911, ch. 231, § 186, 36 Stat. 1143; Feb. 5, 1912, ch. 28, 37 Stat. 61).

A provision that a witness should not be disqualified by color was omitted as obsolete and unnecessary, since no such disqualification could be invoked in absence of statutory authority.

A provision that the United States could examine any plaintiff or party interested is covered by the word "exempt" in the revised section, and by section 2504 of this title.

Changes were made in phraseology.

### § 2507. Calls and discovery

(a) The Court of Claims may call upon any department or agency of the United States or upon any party for any information or papers, not privileged, for purposes of discovery or for use as evidence. The head of any department or agency may refuse to comply with a call issued pursuant to this subsection when, in his opinion, compliance will be injurious to the public interest.

(b) Without limitation on account of anything contained in subsection (a) of this section, the court may, in accordance with its rules, provide additional means for the discovery of any relevant facts, books, papers, documents or tangible things, not privileged.

(c) The Court of Claims may use all recorded and printed reports made by the committees of the Senate or House of Representatives.

(June 25, 1948, ch. 646, 62 Stat. 977; Sept. 3, 1954, ch. 1263, § 55(a)-(c), 68 Stat. 1247.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 272 (Mar. 3, 1911, ch. 231, § 164, 36 Stat. 1140).

Words "or agency" were added. (See reviser's note under section 1345 of this title.)

Changes were made in phraseology.

#### AMENDMENTS

1954—Act Sept. 3, 1954, substituted "Calls and discovery" for "Calls on departments for information" in the catchline, designated as subsec. (a) the entire former section and added subsecs. (b) and (c).

### § 2508. Counterclaim or set-off; registration of judgment

Upon the trial of any suit in the Court of Claims in which any setoff, counterclaim, claim for damages, or other demand is set up on the part of the United States against any plaintiff making claim against the United States in said court, the court shall hear and determine such claim or demand both for and against the United States and plaintiff.

If upon the whole case it finds that the plaintiff is indebted to the United States it shall render judgment to that effect, and such judgment shall be final and reviewable.

The transcript of such judgment, filed in the clerk's office of any district court, shall be entered upon the records and shall be enforceable as other judgments.

(June 25, 1948, ch. 646, 62 Stat. 977; July 28, 1953, ch. 253, § 10, 67 Stat. 227; Sept. 3, 1954, ch. 1263, § 47(a), 68 Stat. 1243.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 252 (Mar. 3, 1911, ch. 231, § 146, 36 Stat. 1137).

Changes were made in phraseology.

#### AMENDMENTS

1954—Act Sept. 3, 1954, eliminated "United States" from name of Court of Claims in the first par.

1953—Act July 28, 1953, substituted "United States Court of Claims" for "Court of Claims" in first paragraph, and substituted "shall be enforceable as other judgments" for "be a judgment of such district court and enforceable as such" in third paragraph.

### § 2509. Congressional reference cases

(a) Whenever a bill, except a bill for a pension, is referred by either House of Congress to the chief commissioner of the Court of Claims pursuant to section 1492 of this title, the chief commissioner shall designate a trial commissioner for the case and a panel of three commissioners of the court to serve as a reviewing body. One member of the review panel shall be designated as presiding commissioner of the panel.

(b) Proceedings in a congressional reference case shall be under rules and regulations prescribed for the purpose by the chief commissioner who is hereby authorized and directed to require the application of the pertinent rules of practice of the Court of Claims insofar as feasible. Each trial commissioner and each review panel shall have authority to do and perform any acts which may be necessary or proper for the efficient performance of their duties, including the power of subpoena and the power to administer oaths and affirmations. None of the rules, rulings, findings, or conclusions authorized by this section shall be subject to judicial review.

(c) The trial commissioner to whom a congressional reference case is assigned by the chief commissioner shall proceed in accordance with the applicable rules to determine the facts, including facts relating to delay or laches, facts bearing upon the question whether the bar of any statute of limitation should be removed, or facts claimed to excuse the claimant for not having resorted to any established legal remedy. He shall append to his findings of fact conclusions sufficient to inform Congress whether the demand is a legal or equitable claim or a gratuity, and the amount, if any, legally or equitable due from the United States to the claimant.

(d) The findings and conclusions of the trial commissioner shall be submitted by him, together with the record in the case, to the review panel of commissioners for review by it pursuant to such rules as may be provided for the purpose, which shall include provision for submitted the report of the trial commissioner to the parties for consideration, exception, and argument before the panel. The panel, by majority vote, shall adopt or modify the findings or the conclusions of the trial commissioner.

(e) The panel shall submit its report to the chief commissioner for transmission to the appropriate House of Congress.

(f) Any act or failure to act or other conduct by a party, a witness, or an attorney which would call for the imposition of sanctions under the rules of practice of the Court of Claims shall be noted by the panel or the trial commissioner at the time of occurrence thereof and upon failure of the delinquent or offending party, witness, or attorney to make prompt compliance with the order of the panel or the trial commissioner a full statement of the circumstances shall be incorporated in the report of the panel.

(g) The Court of Claims is hereby authorized and directed, under such regulations as it may prescribe, to provide the facilities and services of the office of the clerk of the court for the filing, processing, hearing, and dispatch of congressional reference cases and to include within its annual appropriations the costs thereof and other costs of administration, including (but without limitation to the items herein listed) the salaries and traveling expenses of the commissioners serving as trial commissioners and panel members, mailing and service of process, necessary physical facilities, equipment, and supplies, and personnel (including secretaries and law clerks).

(June 25, 1948, ch. 646, 62 Stat. 977; Oct. 15, 1966, Pub. L. 89-681, § 2, 80 Stat. 958.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 257 (Mar. 3, 1911, ch. 231, § 151, 36 Stat. 1138).

Jurisdiction provisions of section 257 of title 28, U.S.C., 1940 ed., appear in section 1492 of this title.

A provision as to the court's power to render judgment on a referred claim and its duty to report thereon to Congress, was omitted from this section as covered by sections 791(c) and 1492 of this title.

Changes were made in phraseology.

### Amendments

1966—Pub. L. 89-681 substituted provisions for reference of bills to the chief commissioner of the Court of Claims pursuant to section 1492 of this title for provisions calling simply for reference to the Court of Claims, substituted provisions naming the trial commissioner to whom a reference case is assigned by the chief commissioner for provisions simply naming the Court of Claims as the agency by which findings and conclusions are made, and added provisions for the designation of a trial commissioner and reviewing body consisting of three other commissioners, the promulgation of rules and regulations for Congressional reference cases by the chief commissioner, the procedure to be followed, and the supplying of facilities and personnel for the dispatch of Congressional reference cases.

### Section Referred to in Other Sections

This section is referred to in section 1492 of this title.

## § 2510. Referral of cases by Comptroller General

The Comptroller General may transmit to the Court of Claims for trial and adjudication any claim or matter of which the Court of Claims might take jurisdiction on the voluntary action of the claimant, together with all vouchers, papers, documents, and proofs pertaining thereto.

The Court of Claims shall proceed with the claims or matters so referred as in other cases pending in such court and shall render judgment thereon.

(June 25, 1948, ch. 646, 62 Stat. 977; July 28, 1953, ch. 253, § 11, 67 Stat. 227; Sept. 3, 1954, ch. 1263, § 47(b), 68 Stat. 1243.)

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., §§ 254 and 255 (Mar. 3, 1911, ch. 231, §§ 148, 149, 36 Stat. 1137, 1138; June 10, 1921, ch. 18, § 304, 42 Stat. 24).

Section consolidates procedural provisions of sections 254 and 255 of title 28, U.S.C., 1940 ed., relating to departmental reference cases.

Jurisdiction provisions of such section 254 appear in section 1493 of this title.

Changes were made in phraseology.

### Amendments

1954—Act Sept. 3, 1954, replaced catchline reading "Departmental reference cases" with present catchline.

1953—Act July 28, 1953, eliminated the provisions relating to procedure in connection with departmental reference cases provided for by former section 1493 of this title; and, in connection with trial and adjudication of cases referred by the Comptroller General, inserted the provision for rendering judgment, and eliminated the requirement that such cases be transmitted through the Secretary of the Treasury.

## § 2511. Accounts of officers, agents or contractors

Notice of suit under section 1494 of this title shall be given to the Attorney General, to the Comptroller General, and to the head of the department requested to settle the account in question.

The judgment of the Court of Claims in such suit, or of the Supreme Court upon review, shall be conclusive upon the parties, and payment of the amount found due shall discharge the obligation.

The transcript of such judgment, filed in the clerk's office of any district court, shall be entered upon the records, and shall be enforceable as other judgments.

(June 25, 1948, ch. 646, 62 Stat. 977; July 28, 1953, ch. 253, § 12, 67 Stat. 227.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 287 (Mar. 3, 1911, ch. 231, § 180, 36 Stat. 1141; Feb. 13, 1925, ch. 229, § 3, 43 Stat. 939).

Words "The Attorney General shall represent the United States at the hearing of said cause" were omitted as covered by sections 309 and 310 of title 5, U.S.C., 1940 ed., Executive Departments and Government Officers and Employees.

Jurisdiction provisions of section 287 of title 28, U.S.C., 1940 ed., appear in section 1494 of this title.

A provision for continuances was omitted as unnecessary, in view of the inherent power of the court to grant continuances in any suit.

A provision in section 287 of title 28, U.S.C., 1940 ed., that section 274 of title 28, U.S.C., 1940 ed., should apply to cases under such section 287 was omitted as covered by section 2504 of this title.

Changes were made in phraseology.

#### Amendments

1953—Act July 28, 1953, inserted, "to the Comptroller General," in first paragraph; struck out former third paragraph which provided for accrual to the United States of a right of action upon the judgment, with a limitation period extending to three years after judgment, and inserted the provisions for filing and recording the transcript of such judgment in the clerk's office of any district court, and for enforcement thereof.

### § 2512. Disbursing officers; relief

Whenever the Court of Claims finds that any loss by a disbursing officer of the United States was without his fault or negligence, it shall render a judgment setting forth the amount thereof, and the General Accounting Office shall allow the officer such amount as a credit in the settlement of his accounts.

(June 25, 1948, ch. 646, 62 Stat. 978.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 253 (Mar. 3, 1911, ch. 231, § 147, 36 Stat. 1137; June 10, 1921, ch. 18, § 304, 42 Stat. 24).

Words "paymaster, quartermaster, commissary of subsistence, or other" were omitted as covered by words "disbursing officer of the United States". (See reviser's note under section 1496 of this title.)

Changes were made in phraseology.

### § 2513. Unjust conviction and imprisonment

(a) Any person suing under section 1495 of this title must allege and prove that:

(1) His conviction has been reversed or set aside on the ground that he is not guilty of the offense of which he was convicted, or on new trial or rehearing he was found not guilty of such offense, as appears from the record or certificate of the court setting aside or reversing such conviction, or that he has been pardoned upon the stated ground of innocence and unjust conviction and

(2) He did not commit any of the acts charged or his acts, deeds, or omissions in connection with such charge constituted no offense against the United States, or any State, Territory or the District of Columbia, and he did not by misconduct or neglect cause or bring about his own prosecution.

(b) Proof of the requisite facts shall be by a certificate of the court or pardon wherein such facts are alleged to appear, and other evidence thereof shall not be received.

(c) No pardon or certified copy of a pardon shall be considered by the Court of Claims unless it contains recitals that the pardon was granted after applicant had exhausted all recourse to the courts and that the time for any court to exercise its jurisdiction had expired.

(d) The Court may permit the plaintiff to prosecute such action in forma pauperis.

(e) The amount of damages awarded shall not exceed the sum of $5,000.

(June 25, 1948, ch. 646, 62 Stat. 978; Sept. 3, 1954, ch. 1263, § 56, 68 Stat. 1247.)

#### Historical and Revision Notes

Based on sections 729–732 of title 18, U.S.C., 1940 ed., Crimes and Criminal Procedure (May 24, 1938, ch. 266, §§ 1-4, 52 Stat. 438.)

Sections 729–732 of title 18, U.S.C., 1940 ed., were consolidated and completely rewritten in order to clarify ambiguities which made the statute unworkable as enacted originally. Jurisdictional provisions of section 729 of title 18, U.S.C., 1940 ed., are incorporated in section 1495 of this title.

Changes were made in phraseology.

#### Amendments

1954—Subsec. (c). Act Sept. 3, 1954, substituted "considered by" for "filed with".

### § 2514. Forfeiture of fraudulent claims

A claim against the United States shall be forfeited to the United States by any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance thereof.

In such cases the Court of Claims shall specifically find such fraud or attempt and render judgment of forfeiture.

(June 25, 1948, ch. 646, 62 Stat. 978.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., §§ 279 and 280 (Mar. 3, 1911, ch. 231, §§ 172, 173, 36 Stat. 1141).

A provision of section 279 of title 28, U.S.C., 1940 ed., that a judgment of forfeiture shall forever bar the prosecution of the claim was omitted as covered by section 2518 of this title.

A provision of section 280 of title 28, U.S.C., 1940 ed., barring allowance by accounting officers of fraudulent claims under Act June 16, 1874, 18 Stat. 75, was omitted as obsolete.

A provision of section 280 of title 28, U.S.C., 1940 ed., barring allowance of fraudulent claims by Congress was omitted as unnecessary and superfluous.

Changes were made in phraseology.

### § 2515. New trial; stay of judgment

(a) The Court of Claims may grant a plaintiff a new trial on any ground established by rules of common law or equity applicable as between private parties.

(b) Such court, at any time while any suit is pending before it, or after proceedings for review have been instituted, or within two years after the final disposition of the suit, may grant the United States a new trial and stay the payment of any judgment upon satisfactory evidence, cumulative or otherwise, that any fraud, wrong, or injustice has been done the United States.

(June 25, 1948, ch. 646, 62 Stat. 978.)

### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§ 281 and 282 (Mar. 3, 1911, ch. 231, §§ 174, 175, 36 Stat. 1141).

Words "but until an order is made staying the payment of a judgment, the same shall be payable and paid as on March 3, 1911, was provided by law," in section 282 of title 28, U.S.C., 1940 ed., were omitted as surplusage.

Changes were made in phraseology.

## § 2516. Interest on claims and judgments

(a) Interest on a claim against the United States shall be allowed in a judgment of the Court of Claims only under a contract or Act of Congress expressly providing for payment thereof.

(b) Interest on judgments against the United States affirmed by the Supreme Court after review on petition of the United States shall be paid at the rate of four percent per annum from the date of the filing of the transcript of the judgment in the Treasury Department to the date of the mandate of affirmance. Such interest shall not be allowed for any period after the term of the Supreme Court at which the judgment was affirmed.

(June 25, 1948, ch. 646, 62 Stat. 978; Sept. 3, 1954, ch. 1263, § 57, 68 Stat. 1248.)

### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 284 and section 226 of title 31, U.S.C., 1940 ed., Money and Finance (Sept. 30, 1890, ch. 1126, § 1, 26 Stat. 537; Mar. 3, 1911, ch. 231, § 177, 36 Stat. 1141; Nov. 23, 1921, ch. 136, § 1324(b), 42 Stat. 316; June 2, 1924, ch. 234, § 1020, 43 Stat. 346; Feb. 13, 1925, ch. 229, § 3(c), 43 Stat. 939; Feb. 26, 1926, ch. 27, §§ 1117, 1200, 44 Stat. 119, 125; May 29, 1928, ch. 852, § 615(a), 45 Stat. 877; June 22, 1936, ch. 690, § 808, 49 Stat. 1746).

Subdivision (b) of section 284 of title 28, U.S.C., 1940 ed., was omitted as covered by section 3771 of title 26, U.S.C., 1940 ed., Internal Revenue Code. Such omission required the exception in subdivision (a) of such section 284, reading: "except as provided in subdivision (b)", to be changed to read: "or Act of Congress expressly providing for payment thereof."

Subsection (b) of this section is based on the last sentence of section 226 of title 31, U.S.C., 1940 ed., Money and Finance.

Changes were made in phraseology.

### AMENDMENTS

1954—Subsec. (b). Act Sept. 3, 1954, inserted "for any period" in last sentence following "allowed".

### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 31 section 724a.

## § 2517. Payment of judgments

(a) Every final judgment rendered by the Court of Claims against the United States shall be paid out of any general appropriation therefor, on presentation to the General Accounting Office of a certification of the judgment by the clerk and chief judge of the court.

(b) Payment of any such judgment and of interest thereon shall be a full discharge to the United States of all claims and demands arising out of the matters involved in the case or controversy.

(June 25, 1948, ch. 646, 62 Stat. 979.)

### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 285, and sections 225, 228, of title 31, U.S.C., 1940 ed., Money and Finance, (R.S. §§ 236, 1089; Feb. 18, 1904, ch. 160, § 1, 33 Stat. 41; Mar. 3, 1911, ch. 231, § 178, 36 Stat. 1141; June 10, 1921, ch. 18, §§ 304, 305, 42 Stat. 24; Feb. 13, 1925, ch. 229, § 3(c), 43 Stat. 939).

Section consolidates section 285 of title 28, U.S.C., 1940 ed., and sections 225 and 228 of title 31, U.S.C., 1940 ed., Money and Finance.

Words "chief judge" were substituted for "the chief justice, or, in his absence, by the presiding judge of said court" in section 225 of title 31, U.S.C., 1940 ed., Money and Finance, in conformity with chapter 7 of this title.

Words "or, on review, by the Supreme Court, where the same are affirmed in favor of the claimant" in section 225 of title 31, U.S.C., 1940 ed., were omitted as unnecessary.

Provisions of section 228 of title 31, U.S.C., 1940 ed., for payment of district court judgments are incorporated in section 2414 of this title.

Changes were made in phraseology.

### CROSS REFERENCES

Appropriations for payments of judgments against the United States, computation of interest time, see section 724a of Title 31, Money and Finance.

### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 2412 of this title; title 16 sections 79g, 460bb-2; title 31 section 724a.

## § 2518. Certification of judgments for appropriation

The Secretary of the Treasury shall certify to Congress for appropriation only such judgments of the Court of Claims as are not to be reviewed or are entered upon mandate of the Supreme Court.

(June 25, 1948, ch. 646, 62 Stat. 979.)

### HISTORICAL AND REVISION NOTES

Based on section 226 of title 31, U.S.C. 1940 ed., Money and Finance (Sept. 30, 1890, ch. 1126, § 1, 26 Stat. 537; Feb. 13, 1925, ch. 229, § 3(c), 43 Stat. 939).

This section constitutes the first sentence of section 226 of title 31, U.S.C., 1940 ed.

Words "are entered upon mandate of the Supreme Court," were substituted for "or such cases as shall have been decided by the Supreme Court upon review as provided in section 288 of title 28, U.S.C., 1940 ed., to be due and payable" since only "judgments" and not "cases" would be certified for payment.

### SECTION REFERRED TO IN OTHER SECTION

This section is referred to in title 31 section 724a.

## § 2519. Conclusiveness of judgment

A final judgment of the Court of Claims against any plaintiff shall forever bar any further claim, suit, or demand against the United States arising out of the matters involved in the case or controversy.

(June 25, 1948, ch. 646, 62 Stat. 979.)

### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 286 (Mar. 3, 1911, ch. 231, § 179, 36 Stat. 1141).

Changes were made in phraseology.

## § 2520. Fees; cost of printing record

(a) The Court of Claims shall by rules impose a fee not exceeding $10, for the filing of any petition.

(b) The clerk shall collect a fee of 10 cents a folio for preparing and certifying a transcript of the record for the purpose of a writ of certiorari sought by the plaintiff, and for furnishing certified copies of judgments or other documents. Not less than $5 shall be charged for each certified copy of findings of fact and opinion of the court to be filed in the Supreme Court.

(c) The clerk shall also collect for each certified copy of the court's findings of fact and opinion a fee of 25 cents for five pages or less, 35 cents for those over five and not more than ten pages, 45 cents for those over ten and not more than twenty pages, and 50 cents for those of more than twenty pages.

(June 25, 1948, ch. 646, 62 Stat. 979; Sept. 3, 1954, ch. 1263, § 58, 68 Stat. 1248; July 18, 1966, Pub. L. 89-507, § 2, 80 Stat. 308.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§ 283 and 283a (Mar. 3, 1911, ch. 231, § 176, 36 Stat. 1141; Mar. 3, 1933, ch. 212, title II, § 19, 47 Stat. 1519).

This section consolidates section 283, with a part of section 283a, of title 28, U.S.C., 1940 ed.

The last subsection of section 283a of title 28, U.S.C., 1940 ed., appears in section 793 of this title.

Language in section 283a of title 28, U.S.C., 1940 ed., referring to cases instituted after March 3, 1933, was omitted as executed.

For liability of the United States for costs, both in actions in district courts and in suits in the Court of Claims, see section 2412 of this title.

Changes were made in phraseology.

#### AMENDMENTS

1966—Subsec. (d). Pub. L. 89-507 repealed subsec. (d) which required the cost of printing the record in every pending case to be taxed against the losing party except when the judgment is against the United States. See section 2412 of this title.

1954—Subsec. (a). Act Sept. 3, 1954, eliminated "and the hearing of any case before the court, a judge, or a commissioner" following "petition".

#### EFFECTIVE DATE OF 1966 AMENDMENT

Repeal of subsec. (d) applicable only to judgments in actions filed subsequent to July 18, 1966, and such repeal not to authorize the reopening or modification of judgments entered prior to July 18, 1966, see section 3 of Pub. L. 89-507, set out as an Effective Date of 1966 Amendment note under section 2412 of this title.

### § 2521. Subpoenas

Subpoenas requiring the attendance of parties or witnesses and subpoenas requiring the production of books, papers, documents or tangible things by any party or witness having custody or control thereof, may be issued for purposes of discovery or for use of the things produced as evidence in accordance with the rules and orders of the court. Such subpoenas shall be issued and served and compliance therewith shall be compelled as provided in the rules and orders of the court.

(Added Sept. 3, 1954, ch. 1263, § 59(a), 68 Stat. 1248.)

## CHAPTER 167—COURT OF CUSTOMS AND PATENT APPEALS PROCEDURE

Sec.
2601. Appeals from Customs Court decisions.
2602. Precedence of American manufacturer, producer, or wholesaler cases.

#### AMENDMENTS

1970—Pub. L. 91-271, title I, § 123(d), June 2, 1970, 84 Stat. 282, substituted "Appeals from Customs Court decisions" for "Customs Court decisions" in item 2601, and "Precedence of American manufacturer, producer, or wholesaler cases" for "Precedence of classification cases" in item 2602.

#### CROSS REFERENCES

Unfair practices and unfair methods of competition in import trade, procedure on appeal from findings of tariff commission, see section 1337 of Title 19, Customs Duties.

### § 2601. Appeals from Customs Court decisions

(a) A party may appeal to the Court of Customs and Patent Appeals from a final judgment or order of the Customs Court within sixty days after entry of the judgment or order.

(b) An appeal is made by filing in the office of the clerk of the Court of Customs and Patent Appeals a notice of appeal which shall include a concise statement of the errors complained of. A copy of the notice shall be served on the adverse parties. When the United States is an adverse party, service shall be made on the Attorney General and the Secretary of the Treasury or their designees. Thereupon, the Court of Customs and Patent Appeals shall order the Customs Court to transmit the record and evidence taken, together with either the findings of fact and conclusions of law or the opinion, as the case may be.

(c) The Court of Customs and Patent Appeals may affirm, modify, vacate, set aside, or reverse any judgment or order of the Customs Court lawfully brought before it for review, and may remand the cause and direct the entry of an appropriate judgment or order, or require such further proceedings as may be just under the circumstances. The judgment or order of the Court of Customs and Patent Appeals shall be final and conclusive unless modified, vacated, set aside, reversed, or remanded by the Supreme Court under section 2106 of this title.

(June 25, 1948, ch. 646, 62 Stat. 979; June 2, 1970, Pub. L. 91-271, title I, § 103, 84 Stat. 275).

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 310 (Mar. 3, 1911, ch. 231, § 198, 36 Stat. 1146; May 28, 1926, ch. 411, § 1, 44 Stat. 669; Mar. 2, 1929, ch. 488, § 1, 45 Stat. 1475).

Words "unless set aside or modified by the Supreme Court," were inserted in the last sentence of this section in view of section 1256 of this title, providing for review by the Supreme Court of decisions of the Court of Customs and Patent Appeals.

Whether the time for taking appeal should be shortened to 30 days, and, respecting appeals in cases arising in the Territories and Possessions, to 60 days, has been suggested for consideration. (See reviser's notes under sections 2101 and 2107 of this title.)

For appeals from the determination of the appraiser under the Anti-Dumping Law (sections 160-171 of title 19, U.S.C., 1940 ed., Customs Duties), see section 169 of such title 19 providing that the Court of Customs and Patent Appeals shall have the same jurisdiction as in appeals and protests relating to customs duties under existing law.

Review of decisions relating to reappraisement of merchandise is limited to questions of law only. See section 2637 of this title.

For appeals to the Court of Customs and Patent Appeals from findings of the United States Tariff Commission as to unfair practices in import trade, and the procedure therefor; see section 1337(c) of title 19, U.S.C., 1940 ed., Customs Duties. See, also, section 1543 of this title, for jurisdiction of such court to hear such appeals.

Appeals in patent and trade-mark cases, see section 89 of title 15, U.S.C., 1940 ed., Commerce and Trade, and sections 57-62 of Title 35, U.S.C., 1940 ed., Patents; also see Rules of the Court of Customs and Patent Appeals, Rules 25-30, set out in the appendix to such title 35.

Changes were made in phraseology.

#### AMENDMENTS

1970—Pub. L. 91-271 substituted in the section catchline "Appeals from Customs Court decisions" for "Customs Court decisions", reorganized existing provisions into lettered subsecs. (a) to (c), and struck out the special 90 day period for appeals in cases arising in the Territories and Possessions, provided for service of the notice of appeal on adverse parties or on the Attorney General, the Secretary of the Treasury, or their designees in place of the collector when the United States is the adverse party, struck out the provision that all evidence taken by and before the Customs Court be competent evidence before the Court of Customs and Patent Appeals, and set forth the powers of the court to affirm, modify, vacate, set aside, or reverse any judgment or order of the Customs Court and to remand the cause or direct further proceedings.

#### EFFECTIVE DATE OF 1970 AMENDMENT

Amendment by Pub. L. 91-271 effective on Oct. 1, 1970, see section 122 of Pub. L. 91-271, set out as an Effective Date of 1970 Amendment note under section 1541 of this title.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 2638 of this title.

### § 2602. Precedence of American manufacturer, producer, or wholesaler cases

(a) Every proceeding in the Court of Customs and Patent Appeals arising under section 516 of the Tariff Act of 1930, as amended, shall be given precedence over other cases on the docket of such court, except as provided for in paragraph (b) of this section, and shall be assigned for hearing at the earliest practicable date and expedited in every way.

(b) Appeals from findings by the Secretary of Commerce provided for in headnote 6 to schedule 8, part 4, of the Tariff Schedules of the United States (19 U.S.C. 1202) shall receive a preference over all other matters.

(June 25, 1948, ch. 646, 62 Stat. 980; Oct. 14, 1966, Pub. L. 89-651, § 8(c)(3), 80 Stat. 902; June 2, 1970, Pub. L. 91-271, title I, § 104, 84 Stat. 276.)

#### HISTORICAL AND REVISION NOTES

Based on section 1516(b) of title 19, U.S.C., 1940 ed., Customs Duties (June 17, 1930, ch. 497, title IV, § 516, 46 Stat. 735; June 25, 1938, ch. 679, § 17(a), 52 Stat. 1084).

Section is based on the last sentence of subsection (b) of section 1516 of title 19, U.S.C., 1940 ed. The same provision respecting the Customs Court is incorporated in section 2638 of this title.

Changes were made in phraseology.

#### REFERENCES IN TEXT

Section 516 of the Tariff Act of 1930, as amended, referred to in subsec. (a), is classified to section 1516 of Title 19, Customs Duties.

The Tariff Schedules of the United States, referred to in subsec. (b), are set out in section 1202 of Title 19.

#### AMENDMENTS

1970—Pub. L. 91-271 substituted in the section catchline "Precedence of American manufacturer, producer, or wholesaler cases" for "Precedence of classification cases", reorganized existing provisions into lettered subsecs. (a) and (b), and made changes in phraseology.

1966—Pub. L. 89-651 added requirement that appeals from findings by the Secretary of Commerce provided for in headnote 6 to schedule 8, part 4, of the Tariff Schedules of the United States be given the precedence provided for in such headnote.

#### EFFECTIVE DATE OF 1970 AMENDMENT

Amendment by Pub. L. 91-271 effective on Oct. 1, 1970, see section 122 of Pub. L. 91-271, set out as an Effective Date of 1970 Amendment note under section 1541 of this title.

#### EFFECTIVE DATE OF 1966 AMENDMENT

Amendment by Pub. L. 89-651 effective with respect to articles entered, or withdrawn from warehouse, for consumption on or after date proclaimed by the President, see section 2 of Pub. L. 89-651 set out as an Effective Date of Educational, Scientific, and Cultural Materials Importation Act of 1966 note preceding section 1202 of Title 19, Customs Duties.

## CHAPTER 169—CUSTOMS COURT PROCEDURE

Sec.

2631. Time for commencement of action.
2632. Customs Court procedures and fees.[1]
2633. Precedence of American manufacturer, producer, or wholesaler cases.
2634. Notice.
2635. Burden of proof; evidence of value.
2636. Analysis of imported merchandise.
2637. Witnesses; inspection of documents.
2638. Decisions; findings of fact and conclusions of law; effect of opinions.
2639. Retrial or rehearing.
[2640 to 2642. Repealed.]

#### HISTORICAL AND REVISION NOTES

#### 1949 ACT

This section amends the analysis of chapter 169 of title 28, U.S.C., by striking out item 2642 relating to disqualification of a Customs Court judge, as there is no separate section 2642 so relating (see, however, sec. 2636(c) of such title), and by inserting a new item 2642 to conform with a new section 2642 inserted in such title by another section of this bill.

#### AMENDMENTS

1970—Pub. L. 91-271, title I, § 123(e), June 2, 1970, 84 Stat. 282, substituted "Time for commencement of action" for "Appeal for reappraisement; assignment to single judge; hearing" in item 2631, "Customs Court procedures and fees' for "Notice" in item 2632, "Precedence of American manufacturer, producer, or wholesaler cases" for "Evidence of value, upon reappraisement; burden of proof" in item 2633, "Notice" for "Witnesses; inspection of documents" in item 2634, "Burden of proof; evidence of value" for "Decision of single judge in reappraisement appeal" in item 2635, "Analysis of imported merchandise" for "Review of single judge's decision; disqualification of judges;

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[1] So in original. Does not conform to section catchline.

remand; presumption" in item 2636, "Witnesses; inspection of documents" for "Review of decisions of divisions" in item 2637, "Decisions; findings of fact and conclusions of law; effect of opinions" for "Precedence of classification cases" in item 2638, and "Retrial or rehearing" for "Analysis of imported merchandise" in item 2639, and struck out item 2640 "Rehearing or retrial", item 2641 "Frivolous protest or appeal", and item 2642 "Amendment of protests, appeals, and pleadings".

1949—Act May 24, 1949, ch. 139, § 121, 63 Stat. 106, struck out "2642. Disqualification of judge." and inserted in lieu thereof "2642. Amendment of protests, appeals, and pleadings."

### § 2631. Time for commencement of action

(a) An action over which the court has jurisdiction under section 1582(a) of this title is barred unless commenced within one hundred and eighty days after:

(1) the date of mailing of notice of denial, in whole or in part, of a protest pursuant to the provisions of section 515(a) of the Tariff Act of 1930, as amended; or

(2) the date of denial of a protest by operation of law pursuant to the provisions of section 515(b) of the Tariff Act of 1930, as amended.

(b) An action over which the court has jurisdiction under section 1582(b) of this title is barred unless commenced within thirty days after the date of mailing of a notice sent pursuant to section 516(c) of the Tariff Act of 1930, as amended, or, in the case of an action under section 516(d) of such Act, after the date of publication of a notice under such section.

(June 25, 1948, ch. 646, 62 Stat. 980; May 24, 1949, ch. 139, § 122, 63 Stat. 106; June 2, 1970, Pub. L. 91-271, title I, § 112, 84 Stat. 278; Jan. 3, 1975, Pub. L. 93-618, title III, § 321(f)(2), 88 Stat. 2048.)

#### HISTORICAL AND REVISION NOTES

#### 1948 ACT

Based on section 1501(a) of title 19, U.S.C., 1940 ed., Customs Duties (June 17, 1930, ch. 497, title IV, § 501, 46 Stat. 730; June 25, 1938, ch. 679, § 16(b), 52 Stat. 1084).

Section constitutes last clause of the fourth sentence of section 1501(a) of title 19, U.S.C., 1940 ed.

The provisions of section 1501(a) of title 19, U.S.C., 1940 ed., following the fourth sentence, are incorporated in sections 2632, 2633, and 2634 of this title, and other provisions of such section 1501(a) relating to finality of the appraiser's decisions, duties of the collector of customs on the filing of an appeal, etc., are to remain in such title 19, with proper amendment to exclude those provisions incorporated in this revision. Jurisdictional provisions of said section 1501(a) are incorporated in section 1582 of this title.

For appeals from the determination of the appraiser under the Anti-Dumping Law (section 160-171 of title 19, U.S.C., 1940 ed.), see section 169 of title 19, U.S.C., 1940 ed., providing that the Customs Court shall have the same jurisdiction as in appeals and protests relating to customs duties under existing law.

Changes were made in phraseology.

#### 1949 ACT

This amendment restores to section 2631 of title 28, U.S.C., language of the original law.

#### REFERENCES IN TEXT

Sections 515 and 516 of the Tariff Act of 1930, as amended, referred to in subsecs. (a) and (b), respectively, are classified to sections 1515 and 1516, respectively, of Title 19, Customs Duties.

#### AMENDMENTS

1975—Subsec. (b). Pub. L. 93-618 inserted ", or, in the case of an action under section 516(d) of such Act, after the date of publication of a notice under such section" following "Tariff Act of 1930, as amended".

1970—Pub. L. 91-271 substituted in the section catchline "Time for commencement of action" for "Appeal for reappraisement; assignment to single judge; hearing", and substituted provisions establishing the time for commencing an action in the Customs Court for provisions setting forth the procedures for appeal to the Customs Court in reappraisement disputes.

1949—Act May 24, 1949, substituted "or that the original appraisement for any reason may be held invalid or void" in lieu of "and without regard to any invalidity of the original appraisement" in the second par.

#### EFFECTIVE DATE OF 1975 AMENDMENT

Amendment by Pub. L. 93-618 applicable with respect to determinations under section 160 of Title 19, Customs Duties, resulting from questions of dumping raised or presented on or after Jan. 3, 1975, see section 321(g)(3) of Pub. L. 93-618, set out as an Effective Date of 1975 Amendment note under section 1516 of Title 19.

#### EFFECTIVE DATE OF 1970 AMENDMENT

Amendment by Pub. L. 91-271 effective on Oct. 1, 1970, see section 122 of Pub. L. 91-271, set out as an Effective Date of 1970 Amendment note under section 1541 of this title.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 19 section 1514.

### § 2632. Customs Court procedure and fees

(a) A party may contest (1) denial of a protest under section 515 of the Tariff Act of 1930, as amended; (2) a decision of the Secretary of the Treasury made under section 516 of the Tariff Act of 1930, as amended; or (3) a determination by the Secretary of the Treasury under section 201 of the Antidumping Act, 1921, as amended, that a class or kind of merchandise is not being, nor likely to be, sold in the United States at less than its fair value, or under section 303 of the Tariff Act of 1930 that a bounty or grant is not being paid or bestowed; by bringing a civil action in the Customs Court. A civil action shall be commenced by filing a summons in the form, manner, and style and with the content prescribed in rules adopted by the court.

(b) There shall be a filing fee payable upon commencing an action. The amount of the fee shall be fixed by the Customs Court but shall be not less than $5 nor more than the filing fee for commencing a civil action in a United States district court. The Customs Court may fix all other fees to be charged by the clerk of the court.

(c) The Customs Court shall provide by rule for pleadings and other papers, for their amendment, service, and filing, for consolidations, severances, and suspensions of cases, and for other procedural matters.

(d) The Customs Court, by rule, may consider any new ground in support of a civil action if the new ground (1) applies to the same merchandise that was the subject of the protest; and (2) is related to the same administrative decision or decisions listed in section 514 of the Tariff Act of 1930, as amended, that were contested in the protest.

(e) All pleadings and other papers filed in the Customs Court shall be served on all the adverse parties in accordance with the rules of the court. When the United States is an adverse party, service of the summons shall be made on the Attorney General and the Secretary of the Treasury or their designees.

(f) Upon service of the summons on the Secretary of the Treasury or his designee in any action brought under subsection (a)(1) or (a)(2), the appropriate customs officer shall forthwith transmit the following items, if they exist, to the United States Customs Court as part of the official record of the civil action: (1) consumption or other entry; (2) commercial invoice; (3) special Customs invoice; (4) copy of protest; (5) copy of denial of protest in whole or in part; (6) importer's exhibits; (7) official samples; (8) any official laboratory reports; and (9) the summary sheet. If any of the aforesaid items do not exist in the particular case, an affirmative statement to that effect shall be transmitted as part of the official record.

(g) Upon service of the summons on the Secretary of the Treasury or his designee in an action contesting the Secretary's determination under section 201 of the Antidumping Act, 1921, as amended, that a class or kind of foreign merchandise is not being, nor likely to be, sold in the United States at less than its fair value, the Secretary or his designee shall forthwith transmit to the United States Customs Court, as the official record of the civil action, a certified copy of the transcript of any hearing held by the Secretary in the particular antidumping proceeding pursuant to section 201(d)(1) of the Antidumping Act, 1921, as amended, and certified copies of all notices, determinations, or other matters which the Secretary has caused to be published in the Federal Register in connection with the particular antidumping proceeding. Upon service of the summons on the Secretary of the Treasury or his designee in an action contesting the Secretary's determination under section 303 of the Tariff Act of 1930 that a bounty or grant is not being paid or bestowed, the Secretary or his designee shall forthwith transmit to the United States Customs Court, as the official record of the civil action, a certified copy of the transcript of all hearings held by the Secretary in the proceeding which resulted in such determination and certified copies of all notices, determinations, or other matters which the Secretary has caused to be published in the Federal Register in connection with such proceeding.

(June 25, 1948, ch. 646, 62 Stat. 980; June 2, 1970, Pub. L. 91-271, title I, § 113, 84 Stat. 279; Jan. 3, 1975, Pub. L. 93-618, title III, § 321(f)(3), 88 Stat. 2048.)

### REVISION AND HISTORICAL NOTES

#### 1948 ACT

Based on section 1501(a) of title 19, U.S.C., 1940 ed., Customs Duties (June 17, 1930, ch. 497, title IV, § 501, 46 Stat. 730; June 25, 1938, ch. 679, § 16(b), 52 Stat. 1084).

Section is based on the first clause of the fifth sentence of section 1501(a) of title 19, U.S.C., 1940 ed., which related only to notice in reappraisement proceedings. The revised section has been broadened so as to provide for notice in all proceedings before the Customs Court, in conformity with Rules 8 and 14 of such court.

Certain other provisions of section 1501(a) of title 19, U.S.C., 1940 ed., are incorporated in sections 1582, 2631, 2633, and 2634 of this title. Those relating to duties of the collector of customs on filing of an appeal, finality of the appraiser's decision, etc., are to remain in such title 19 with proper amendment to exclude the provisions incorporated in this revision.

#### REFERENCES IN TEXT

Sections 303, 514, 515, and 516 of the Tariff Act of 1930, as amended, referred to in subsecs. (a), (d), and (g), are classified to sections 1303, 1514, 1515, and 1516, respectively, of Title 19, Customs Duties.

Section 201 of the Antidumping Act of 1921, as amended, referred to in subsecs. (a) and (g), is classified to section 160 of Title 19.

#### AMENDMENTS

1975—Subsec. (a). Pub. L. 93-618, § 321(f)(3)(A), inserted references to determinations by the Secretary of the Treasury under section 201 of the Antidumping Act, 1921, as amended, that a class or kind of merchandise is not being, nor likely to be, sold in the United States at less than its fair value, and determinations under section 303 of the Tariff Act of 1930 that a bounty or grant is not being paid or bestowed.

Subsec. (f). Pub. L. 93-618, § 321(f)(3)(B), inserted "in any action brought under subsection (a)(1) or (a)(2)" after "designee".

Subsec. (g). Pub. L. 93-618, § 321(f)(3)(C), added subsec. (g).

1970—Pub. L. 91-271 substituted in the section catchline "Customs Court procedure and fees" for "Notice," and substituted provisions setting forth the procedure and fees in the Customs Court for provisions requiring that notice of the time and place of hearing before a judge or division of the Customs Court be given to all parties, under rules prescribed by such court, which are now covered by section 2634 of this title.

#### EFFECTIVE DATE OF 1975 AMENDMENT

Amendment by Pub. L. 93-618 applicable with respect to determinations under section 160 of Title 19, Customs Duties, resulting from questions of dumping raised or presented on or after Jan. 3, 1975, see section 321(g)(3) of Pub. L. 93-618, set out as an Effective Date of 1975 Amendment note under section 1516 of Title 19.

#### EFFECTIVE DATE OF 1970 AMENDMENT

Amendment by Pub. L. 91-271 effective on Oct. 1, 1970, and provisions deeming summonses timely and properly filed for purposes of the amendments made by Pub. L. 91-271, see section 122 of Pub. L. 91-271, set out as an Effective Date of 1970 Amendment note under section 1541 of this title.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 19 sections 1514, 1516.

### § 2633. Precedence of American manufacturer, producer, or wholesaler cases

Every proceeding in the Customs Court arising under section 516 of the Tariff Act of 1930, as amended, shall be given precedence over other cases on the docket of the court, and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

(June 25, 1948, ch. 646, 62 Stat. 980; June 2, 1970, Pub. L. 91-271, title I, § 114, 84 Stat. 279.)

### HISTORICAL AND REVISION NOTES

### 1948 ACT

Based on section 1501(a) of title 19, U.S.C., 1940 ed., Customs Duties (June 17, 1930, ch. 497, title IV, § 501, 46 Stat. 730; June 25, 1938, ch. 679, § 16(b), 52 Stat. 1084).

Section is based on the last three sentences of section 1501(a) of title 19, U.S.C., 1940 ed. Certain other provisions of such section 1501(a) are incorporated in sections 1582, 2631, 2632, and 2634 of this title. Those relating to finality of the appraiser's decision, duties of the collector of customs on the filing of an appeal, etc., are to remain in such title 19, with proper amendment to exclude those provisions incorporated in this revision.

Changes were made in phraseology.

### REFERENCES IN TEXT

Section 516 of the Tariff Act of 1930, as amended, referred to in text, is classified to section 1516 of Title 19, Customs Duties.

### AMENDMENTS

1970—Pub. L. 91-271 substituted in the section catchline "Precedence of American manufacturer, producer, or wholesaler cases" for "Evidence of value, upon reappraisement; burden of proof", and substituted provisions that every proceeding in the Customs Court arising under section 516 of the Tariff Act of 1930 be given precedence over other cases on the docket for provisions that in reappraisement proceedings, affidavits, depositions, price lists, etc., were admissible in evidence to prove the value of merchandise, which are now covered by section 2635 of this title.

### EFFECTIVE DATE OF 1970 AMENDMENT

Amendment by Pub. L. 91-271 effective on Oct. 1, 1970, see section 122 of Pub. L. 91-271, set out as an Effective Date of 1970 Amendment note under section 1541 of this title.

## § 2634. Notice

Reasonable notice of the time and place of trial before a judge of the Customs Court shall be given to all parties to any proceeding, under rules prescribed by the court.

(June 25, 1948, ch. 646, 62 Stat. 981; June 2, 1970, Pub. L. 91-271, title I, § 115, 84 Stat. 280.)

### HISTORICAL AND REVISION NOTES

### 1948 ACT

Based on section 1501(a) and 1516(d) of title 19, U.S.C., 1940 ed., Customs Duties (June 17, 1930, ch. 497, title IV, §§ 501, 516, 46 Stat. 730, 735; June 25, 1938, ch. 679, §§ 16(b), 17(a), 52 Stat. 1084).

Section consolidates the second clause of the fifth sentence of section 1501(a), with section 1516(d) both of title 19, U.S.C., 1940 ed., with changes in phraseology and arrangement necessary to effect the consolidation.

Subsection (a) of the revised section was derived from second clause of the fifth sentence of section 1501(a) of title 19, U.S.C., 1940 ed., which related to reappraisement proceedings before a single judge of the Customs Court. As revised, it embraces the introduction of evidence, the hearing and examination of witnesses, inspection of samples and papers, etc., in any de novo proceeding in such court, including classification cases. This is in accordance with current practice.

Subsection (b) of the revised section is derived from section 1516(d) of title 19, U.S.C., 1940 ed., relating to reappraisement proceedings and classification proceedings instituted as the result of a complaint made by an American manufacturer, producer, or wholesaler.

Certain other provisions of section 1501(a) of title 19, U.S.C., 1940 ed., are incorporated in sections 1582, 2631, 2632, and 2633 of this title. Those relating to finality of the appraiser's decision, duties of the collector of customs on the filing of an appeal, etc., are to remain in said title 19, with proper amendment to exclude the provisions incorporated in this revision.

### AMENDMENTS

1970—Pub. L. 91-271 substituted in the section catchline "Notice" for "Witnesses; inspection of documents", and substituted provisions requiring that notice of the time and place of trial be given to all parties in any proceeding for provisions authorizing the examination of witnesses and the inspection of documents in proceedings in the Customs Court, which are now covered by section 2637 of this title.

### EFFECTIVE DATE OF 1970 AMENDMENT

Amendment by Pub. L. 91-271 effective on Oct. 1, 1970, see section 122 of Pub. L. 91-271, set out as an Effective Date of 1970 Amendment note under section 1541 of this title.

## § 2635. Burden of proof; evidence of value

In any matter in the Customs Court:

(a) The decision of the Secretary of the Treasury, or his delegate, is presumed to be correct. The burden to prove otherwise shall rest upon the party challenging a decision.

(b) Where the value of merchandise is in issue:

(1) Reports or depositions of consuls, customs officers, and other officers of the United States and depositions and affidavits of other persons whose attendance cannot reasonably be had, may be admitted in evidence when served upon the opposing party in accordance with the rules of the court.

(2) Price lists and catalogs may be admitted in evidence when duly authenticated, relevant, and material.

(c) The value of merchandise shall be determined from the evidence in the record and that adduced at the trial whether or not the merchandise or samples thereof are available for examination.

(June 25, 1948, ch. 646, 62 Stat. 981; June 2, 1970, Pub. L. 91-271, title I, § 116, 84 Stat. 280.)

### HISTORICAL AND REVISION NOTES

### 1948 ACT

Based on section 1501(b) of title 19, U.S.C., 1940 ed., Customs Duties (June 17, 1930, ch. 497, title IV, § 501, 46 Stat. 730; June 25, 1938, ch. 679, § 16(b), 52 Stat. 1084).

Section is based on first sentence of section 1501(b) of title 19, U.S.C., 1940 ed. Other provisions of such section are incorporated in sections 2636 and 2637 of this title.

Changes were made in phraseology.

### AMENDMENTS

1970—Pub. L. 91-271 substituted in the section catchline "Burden of proof; evidence of value" for "Decision of single judge in reappraisement appeal", and substituted provisions establishing the burden of proof and authorizing the admission of evidence of value of merchandise for provisions setting forth the requirements for the decision of the judge in an appeal for the reappraisement of merchandise, which are now covered by section 2638 of this title.

EFFECTIVE DATE OF 1970 AMENDMENT

Amendment by Pub. L. 91-271 effective on Oct. 1, 1970, see section 122 of Pub. L. 91-271, set out as an Effective Date of 1970 Amendment note under section 1541 of this title

### § 2636. Analysis of imported merchandise

A judge of the Customs Court may order an analysis of imported merchandise and reports thereon by laboratories or agencies of the United States.

(June 25, 1948, ch. 646, 62 Stat. 981; June 2, 1970, Pub. L. 91-271, title I, § 117, 84 Stat. 280.)

HISTORICAL AND REVISION NOTES

1948 ACT

Based on title 28, U.S.C., 1940 ed., § 297, and section 1501(b), (c) of title 19, U.S.C., 1940 ed., Customs Duties (June 10, 1890, ch. 407, § 12, 26 Stat. 136; Aug. 5, 1909, ch. 6, § 28, 36 Stat. 98; May 28, 1926, ch. 411, § 1, 44 Stat. 669; June 17, 1930, ch. 497, title IV, § 501, 46 Stat. 730; June 25, 1938, ch. 679, § 16(b), 52 Stat. 1084).

Section consolidates section 297 of title 28, U.S.C., 1940 ed., with the second and third sentences of section 1501(b) of title 19, U.S.C., 1940 ed., and section 1501(c) of title 19, U.S.C., 1940 ed., with changes in phraseology and arrangement necessary to effect the consolidation.

Other provisions of section 1501(b) of title 19, U.S.C., 1940 ed., are incorporated in sections 2635 and 2637 of this title.

AMENDMENTS

1970—Pub. L. 91-271 substituted in the section catchline "Analysis of imported merchandise" for "Review of single judge's decision; disqualification of judges; remand; presumption", and substituted provisions authorizing a judge of the Customs Court to order an analysis of imported merchandise for provisions setting forth the review procedures for a decision of a single judge, which are now covered by section 2638 of this title.

EFFECTIVE DATE OF 1970 AMENDMENT

Amendment by Pub. L. 91-271 effective on Oct. 1, 1970, see section 122 of Pub. L. 91-271, set out as an Effective Date of 1970 Amendment note under section 1541 of this title.

### § 2637. Witnesses; inspection of documents

(a) In any proceeding in the Customs Court, under rules prescribed by the court, the parties and their attorneys shall have an opportunity to introduce evidence, to hear and cross-examine the witnesses of the other party, and to inspect all samples and all papers admitted or offered as evidence, except as provided in subsection (b) of this section.

(b) In an action instituted by an American manufacturer, producer, or wholesaler, the plaintiff may not inspect any documents or papers of a consignee or importer disclosing any information which the Customs Court deems unnecessary or improper to be disclosed.

(June 25, 1948, ch. 646, 62 Stat. 982; June 2, 1970, Pub. L. 91-271, title I, § 118, 84 Stat. 280.)

HISTORICAL AND REVISION NOTES

1948 ACT

Based on sections 1501(b), 1515, and 1516(c) of title 19, U.S.C., 1940 ed., Customs Duties (June 17, 1930, ch. 497, title IV, §§ 501, 515, 516, 46 Stat. 730, 734, 735; June 25, 1938, ch. 679, §§ 16(b), 17(a), 52 Stat. 1084).

Section consolidates provisions of sections 1501(b), 1515, and 1516(c) of title 19, U.S.C., 1940 ed., relating to finality of decisions of the Customs Court. See sections 1582 and 1583 of this title.

In the revised section, the provision that the decision of a division of the Customs Court shall be the decision of such court, is new. It was added to clarify an apparent statutory omission respecting decisions of the court.

Jurisdictional provisions of section 1515 of title 19, U.S.C., 1940 ed., are incorporated in section 1583 of this title, and other provisions of section 1501(b) of title 19, U.S.C., 1940 ed., are incorporated in sections 2635 and 2636 of this title.

Changes were made in phraseology.

AMENDMENTS

1970—Pub. L. 91-271 substituted in the section catchline "Witnesses; inspection of documents" for "Review of decisions of divisions", and substituted provisions authorizing the examination of witnesses and the inspection of documents in Customs Court proceedings for provisions setting forth the review procedures for a decision of a division of the Customs Court, which are now covered by section 2638 of this title.

EFFECTIVE DATE OF 1970 AMENDMENT

Amendment by Pub. L. 91-271 effective on Oct. 1, 1970, see section 122 of Pub. L. 91-271, set out as an Effective Date of 1970 Amendment note under section 1541 of this title.

### § 2638. Decisions; findings of fact and conclusions of law; effect of opinions

(a) A decision of the judge in a contested case shall be supported by either (1) a statement of findings of fact and conclusions of law, or (2) an opinion stating the reasons and facts upon which the decision is based.

(b) The decision of the judge is final and conclusive, unless a retrial or rehearing is granted pursuant to section 2639 of this title or an appeal is made to the Court of Customs and Patent Appeals within the time and in the manner provided in section 2601 of this title.

(June 25, 1948, ch. 646, 62 Stat. 982; June 2, 1970, Pub. L. 91-271, title I, § 119, 84 Stat. 281.)

HISTORICAL AND REVISION NOTES

1948 ACT

Based on section 1516(b) of title 19, U.S.C., 1940 ed., Customs Duties (June 17, 1930, ch. 497, title IV, § 516, 46 Stat. 735; June 25, 1938, ch. 679, § 17(a), 52 Stat. 1084).

Section is based on the last sentence of subsection (b) of section 1516 of title 19, U.S.C., 1940 ed. The same provision, in such sentence, respecting the Court of Customs and Patent Appeals is incorporated in section 2603 of this title.

Other provisions of section 1516(b) of title 19, U.S.C., 1940 ed., remain in title 19. Changes were made in phraseology.

AMENDMENTS

1970—Pub. L. 91-271 substituted in the section catchline "Decisions; findings of fact and conclusions of law; effect of opinions" for "Precedence of classification cases", and substituted provisions setting forth the requirements for decisions and the effect of opinions for provisions requiring precedence to be given on the docket of the Customs Court to classification cases, which are now covered by section 2633 of this title.

#### EFFECTIVE DATE OF 1970 AMENDMENT

Amendment by Pub. L. 91-271 effective on Oct. 1, 1970, see section 122 of Pub. L. 91-271, set out as an Effective Date of 1970 Amendment note under section 1541 of this title.

### § 2639. Retrial or rehearing

The judge who has rendered a judgment or order may, upon motion of a party or upon his own motion grant a retrial or a rehearing, as the case may be. A party's motion must be made or the judge's action on his own motion must be taken, not later than thirty days after entry of the judgment or order.

(June 25, 1948, ch. 646, 62 Stat. 982; June 2, 1970, Pub. L. 91-271, title I, § 120, 84 Stat. 281.)

#### REVISION AND HISTORICAL NOTES

#### 1948 ACT

Based on title 28, U.S.C., 1940 ed., § 296 (Mar. 3, 1911, ch. 231, § 187(a), as added Oct. 10, 1940, ch. 843, § 1, 54 Stat. 1101).

This section contains a part of section 296 of title 28, U.S.C., 1940 ed. Other provisions of such section are incorporated in sections 251, 252, 253, 456, 1581, 2071, and 2640 of this title.

Changes were made in phraseology.

#### AMENDMENTS

1970—Pub. L. 91-271 substituted in the section catchline "Retrial or rehearing" for "Analysis of imported merchandise", and substituted provisions authorizing the judge who rendered a judgment or order to grant a retrial or rehearing upon his own motion or motion of a party for provisions authorizing a division or a single judge to order an analysis of imported merchandise, which are now covered by section 2633 of this title.

#### EFFECTIVE DATE OF 1970 AMENDMENT

Amendment by Pub. L. 91-271 effective on Oct. 1, 1970, see section 122 of Pub. L. 91-271, set out as an Effective Date of 1970 Amendment note under section 1541 of this title.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 2638 of this title.

### [§§ 2640 to 2642. Repealed. Pub. L. 91-271, title I, § 121, June 2, 1970, 84 Stat. 281]

Section 2640, act June 25, 1948, ch. 646, 62 Stat. 982, authorized the division which has decided a case or the single judge who has decided an appeal for a reappraisement to grant a rehearing or retrial. See, now, section 2639 of this title.

Section 2641, act June 25, 1948, ch. 646, 62 Stat. 982, authorized the Customs Court to assess a penalty of not less than $5 nor more than $250 against any person filing a frivolous protest or appeal.

Section 2642, act May 24, 1949, ch. 139, § 126, 63 Stat. 106, authorized the Customs Court under its rules and in its discretion to permit the amendment of protests, appeals and pleadings. See, now, section 2632 of this title.

#### EFFECTIVE DATE OF REPEAL

Repeal by Pub. L. 91-271 effective on Oct. 1, 1970, see section 122 of Pub. L. 91-271, set out as an Effective Date of 1970 Amendment note under section 1541 of this title.

## CHAPTER 171—TORT CLAIMS PROCEDURE

Sec.
2671. Definitions.
2672. Administrative adjustment of claims.
2673. Reports to Congress.
2674. Liability of United States.
2675. Disposition by federal agency as prerequisite; evidence.
2676. Judgment as bar.
2677. Compromise.
2678. Attorney fees; penalty.
2679. Exclusiveness of remedy.
2680. Exceptions.

#### SENATE REVISION AMENDMENT

As printed in this report, this chapter should have read "173" and not "171". It was properly numbered "173" in the bill. However, the chapter was renumbered "171", without change in its section numbers, by Senate amendment. See 80th Congress Senate Report No. 1559.

#### AMENDMENTS

1966—Pub. L. 89-506, § 9(b), July 18, 1966, 80 Stat. 308, substituted "claims" for "claims of $2,500 or less" in item 2672.

1959—Pub. L. 86-238, § 1(2), Sept. 8, 1959, 73 Stat. 472, substituted "$2,500" for "$1,000" in item 2672.

#### CROSS REFERENCES

Costs in tort claims cases, see section 2412 of this title.

Interest on judgments against the United States, computation, see section 2411 of this title.

Jurisdiction of district courts in tort claims cases, see section 1346 of this title.

Jury trial denied in action against the United States, see section 2402 of this title.

Review of tort claims cases, see sections 1291 and 1504 of this title.

Time for commencing tort action against the United States, see section 2401 of this title.

Venue in tort claims actions, see section 1402 of this title.

#### CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in section 1346 of this title; title 2 section 190g; title 5 sections 3373, 3374, 5564; title 16 sections 565a-2, 1703; title 20 section 1105; title 22 section 2504; title 29 section 926; title 37 section 554; title 39 section 409; title 42 sections 247b, 5032, 5055; title 46 section 740.

### § 2671. Definitions

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States, means acting in line of duty.

(June 25, 1948, ch. 646, 62 Stat. 982; May 24, 1949, ch. 139, § 124, 63 Stat. 106; July 18, 1966, Pub. L. 89-506, § 8, 80 Stat. 307.)

### HISTORICAL AND REVISION NOTES

### 1948 ACT

Based on title 28, U.S.C., 1940 ed., § 941 (Aug. 2, 1946, ch. 753, § 402, 60 Stat. 842).

Changes were made in phraseology.

### 1949 ACT

This section corrects a typographical error in section 2671 of title 28, U.S.C.

### AMENDMENTS

1966—Pub. L. 89-506 expanded the definition of "Federal agency" to include military departments.

1949—Act May 24, 1949, corrected spelling of "office".

### EFFECTIVE DATE OF 1966 AMENDMENT

Amendment by Pub. L. 89-506 applicable to claims accruing six months or more after July 18, 1966, see section 10 of Pub. L. 89-506, set out as an Effective Date of 1966 Amendment note under section 2672 of this title.

### AIR FORCE

For transfer of certain functions relating to claims and litigation, insofar as they pertain to the Air Force, from the Secretary of the Army to the Secretary of the Air Force, see Secretary of Defense Transfer Order No. 34 [§ 1a(2)(4)], eff. July 1, 1949.

### CROSS REFERENCE

Peace Corps volunteers deemed employees of the United States for purposes of this chapter, see section 2504 of Title 22, Foreign Relations and Intercourse.

### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 42 section 247b.

## § 2672. Administrative adjustment of claims

The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred: *Provided*, That any award, compromise, or settlement in excess of $25,000 shall be effected only with the prior written approval of the Attorney General or his designee.

Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award, compromise, settlement, or determination shall be final and conclusive on all offices of the Government, except when procured by means of fraud.

Any award, compromise, or settlement in an amount of $2,500 or less made pursuant to this section shall be paid by the head of the Federal agency concerned out of appropriations available to that agency. Payment of any award, compromise, or settlement in an amount in excess of $2,500 made pursuant to this section or made by the Attorney General in any amount pursuant to section 2677 of this title shall be paid in a manner similar to judgments and compromises in like causes and appropriations or funds available for the payment of such judgments and compromises are hereby made available for the payment of awards, compromises, or settlements under this chapter.

The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.

(June 25, 1948, ch. 646, 62 Stat. 983; Apr. 25, 1949, ch. 92, § 2(b), 63 Stat. 62; May 24, 1949, ch. 139, § 125, 63 Stat. 106; Sept. 23, 1950, ch. 1010, § 9, 64 Stat. 987; Sept. 8, 1959, Pub. L. 86-238, § 1(1), 73 Stat. 471; July 18, 1966, Pub. L. 89-506, §§ 1, 9(a), 80 Stat. 306, 308.)

### HISTORICAL AND REVISION NOTES

### 1948 ACT

Based on title 28, U.S.C., 1940 ed., § 921 (Aug. 2, 1946, ch. 753, § 403, 60 Stat. 843).

The phrase "accruing on and after January 1, 1945" was omitted because executed as of the date of the enactment of this revised title.

Changes were made in phraseology.

### 1949 ACT

This section corrects a typographical error in section 2672 of title 28, U.S.C.

### AMENDMENTS

1966—Pub. L. 89-506 substituted "claims" for "claims of $2,500 or less" in the section catchline, authorized administrative settlement of tort claims, in accordance with regulations prescribed by the Attorney General, of up to $25,000 and, with the prior written approval of the Attorney General or his designee, in excess of $25,000, added "compromise" and "settlement" to the list of administrative acts that would be final and conclusive on all officers of the government, authorized the payment of administrative settlements in excess of $2,500 in the manner similar to judgments and compromises in like causes, and made appropriations and funds which were available for the payment of such judgments and compromises available for the payment of awards, compromises, or settlements under this chapter.

1959—Pub. L. 86-238 substituted "$2,500" for "$1,000" in the catchline and the text.

1950—Act Sept. 23, 1950, eliminated the requirement for specific authorization for payment of tort claims in appropriation acts.

1949—Act Apr. 25, 1949, inserted "accruing on or after January 1, 1945" following "United States" in first par.

Act May 24, 1949, substituted "2677" for "2678" in third par.

### EFFECTIVE DATE OF 1966 AMENDMENT

Section 10 of Pub. L. 89-506 provided that: "This Act [amending sections 2401(b), 2671, 2672, 2675, 2677, 2678, and 2679(b) of this title, section 724a of Title 31 and section 4116(a) of Title 38] shall apply to claims accruing six months or more after the date of its enactment [July 18, 1966]."

### LAWS UNAFFECTED

Section 424(b) of act Aug. 2, 1946, ch. 753, title IV, 60 Stat. 856, provided that: "Nothing contained herein shall be deemed to repeal any provision of law authorizing any Federal agency to consider, ascertain, adjust, settle, determine, or pay any claim on account of damage to or loss of property or on account of personal injury or death, in cases in which such damage, loss, injury, or death was not caused by any negligent or wrongful act or omission of an employee of the Government while acting within the scope of his office or employment, or any other claim not cognizable under part 2 of this title."

#### CROSS REFERENCES

Allowance of claims for property loss, personal injury, or death incident to noncombat activities of Army, Navy, or Air Force, see section 2733 of Title 10, Armed Forces.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 2678, 2679 of this title; title 10 sections 1089, 2733; title 15 section 2081; title 22 sections 817, 1474, 2669; title 29 section 926; title 31 section 724a; title 32 section 715; title 38 sections 236, 351, 4116; title 39 section 2603; title 42 sections 233, 2458a.

### § 2673. Reports to Congress

The head of each federal agency shall report annually to Congress all claims paid by it under section 2672 of this title, stating the name of each claimant, the amount claimed, the amount awarded, and a brief description of the claim.

(June 25, 1948, ch. 646, 62 Stat. 983.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 922 (Aug. 2, 1946, ch. 753, § 404, 60 Stat. 843).

Changes were made in phraseology.

#### REPEAL

*Section 1(1) of Pub. L. 89-348, Nov. 8, 1965, 79 Stat. 1310, repealed the requirement that an annual report to Congress be made of the administrative adjustment of tort claims of $2,500 or less, stating the name of each claimant, the amount claimed, the amount awarded, and a brief description of the claim.*

### § 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

(June 25, 1948, ch. 646, 62 Stat. 983.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 931(a) (Aug. 2, 1946, ch. 753, § 410(a), 60 Stat. 843).

Section constitutes the liability provisions in the second sentence of section 931(a) of title 28, U.S.C., 1940 ed.

Other provisions of section 931(a) of title 28, U.S.C., 1940 ed., are incorporated in sections 1346(b), 1402, 2402, 2411, and 2412 of this title, but the provision of such section 931(a) that the United States shall not be liable for interest prior to judgment was omitted as unnecessary in view of section 2411 of this title, which provides that interest on judgments against the United States shall be computed from the date of judgment. Such section 2411 is made applicable to tort-claim actions by section 932 of title 28, U.S.C., 1940 ed.

Changes were made in phraseology.

#### SENATE REVISION AMENDMENT

For Senate amendment to this section, see 80th Congress Senate Report No. 1559, amendment No. 60.

#### CROSS REFERENCES

Interest on judgments, computation, see section 2411 of this title.

### § 2675. Disposition by federal agency as prerequisite; evidence

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time or presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

(June 25, 1948, ch. 646, 62 Stat. 983; May 24, 1949, ch. 139, § 126, 63 Stat. 107; July 18, 1966, Pub. L. 89-506, § 2, 80 Stat. 306.)

#### HISTORICAL AND REVISION NOTES

#### 1948 ACT

Based on title 28, U.S.C., 1940 ed., § 931(b) (Aug. 2, 1946, ch. 753, § 410(b), 60 Stat. 844).

Section constitutes all of section 931(b), except the first sentence, of title 28, U.S.C., 1940 ed. The remainder of such section 931(b) is incorporated in section 2677 of this title.

Changes were made in phraseology.

#### 1949 ACT

This section corrects a typographical error in section 2675(b) of title 28, U.S.C.

#### REFERENCES IN TEXT

The Federal Rules of Civil Procedure, referred to in subsec. (a), are set out in the Appendix to this title.

#### AMENDMENTS

1966—Subsec. (a). Pub. L. 89-506, § 2(a), required that all administrative claims be filed with the agency or department and finally denied by the agency and sent by certified or registered mail prior to the filing of a court action against the United States, provided that the claimant be given the option of considering the claim to have been denied if the agency fails to make final disposition of the claim within six months of presentation of the claim to the agency, and provided that the requirements of the subsection would not apply to claims asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

Subsec. (b). Pub. L. 89-506, § 2(b), deleted provisions under which a claimant could, upon 15 days written notice, withdraw a claim from the agency and institute an action thereon.

1949—Subsec. (b). Act May 24, 1949, substituted "section" in lieu of "subsection".

#### EFFECTIVE DATE OF 1966 AMENDMENT

Amendment by Pub. L. 89-506 applicable to claims accruing six months or more after July 18, 1966, see section 10 of Pub. L. 89-506, set out as an Effective Date of 1966 Amendment note under section 2672 of this title.

#### CROSS REFERENCES

District courts, jurisdiction of tort claims cases, see section 1346 of this title.

Jury trial denied in actions against the United States, see section 2402 of this title.

Time for commencing tort action against the United States, see section 2401 of this title.

Venue in tort claims actions, see section 1402 of this title.

### § 2676. Judgment as bar

The judgment in an action under section 1346 (b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

(June 25, 1948, ch. 646, 62 Stat. 984.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 931(b) (Aug. 2, 1946, ch. 753, § 410(b), 60 Stat. 844).

Section constitutes the first sentence of section 931(b) of title 28, U.S.C., 1940 ed. Other provisions of such section 931(b) are incorporated in section 2675 of this title.

Changes were made in phraseology.

#### SENATE REVISION AMENDMENT

This section was eliminated by Senate amendment. See 80th Congress Senate Report No. 1559.

### § 2677. Compromise

The Attorney General or his designee may arbitrate, compromise, or settle any claim cognizable under section 1346(b) of this title, after the commencement of an action thereon.

(June 25, 1948, ch. 646, 62 Stat. 984; July 18, 1966, Pub. L. 89-506, § 3, 80 Stat. 307.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 934 (Aug. 2, 1946, ch. 753, § 413, 60 Stat. 845).

Changes were made in phraseology.

#### SENATE REVISION AMENDMENT

This section was renumbered "2676" by Senate amendment. See 80th Congress Senate Report No. 1559.

#### AMENDMENTS

1966—Pub. L. 89-506 deleted provision requiring that the approval of the court be obtained before the Attorney General could arbitrate, compromise, or settle a claim after commencement of an action thereon.

#### EFFECTIVE DATE OF 1966 AMENDMENT

Amendment by Pub. L. 89-506 applicable to claims accruing six months or more after July 18, 1966, see section 10 of Pub. L. 89-506, set out as an Effective Date of 1966 Amendment note under section 2672 of this title.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 2672, 2678 of this title; title 10 section 1089; title 22 section 817; title 31 section 724a; title 38 sections 351, 4116; title 42 section 2458a.

### § 2678. Attorney fees; penalty

No attorney shall charge, demand, receive, or collect for services rendered, fees in excess of 25 per centum of any judgment rendered pursuant to section 1346(b) of this title or any settlement made pursuant to section 2677 of this title, or in excess of 20 per centum of any award, compromise, or settlement made pursuant to section 2672 of this title.

Any attorney who charges, demands, receives, or collects for services rendered in connection with such claim any amount in excess of that allowed under this section, if recovery be had, shall be fined not more than $2,000 or imprisoned not more than one year, or both.

(June 25, 1948, ch. 646, 62 Stat. 984; July 18, 1966, Pub. L. 89-506, § 4, 80 Stat. 307.)

#### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 944 (Aug. 2, 1946, ch. 753, § 422, 60 Stat. 846).

Words "shall be guilty of a misdemeanor" and "shall, upon conviction thereof", in the second sentence, were omitted in conformity with revised title 18, U.S.C., Crimes and Criminal Procedure (H.R. 1600, 80th Cong.). See sections 1 and 2 of said revised title 18.

Changes were made in phraseology.

#### SENATE REVISION AMENDMENT

This section was renumbered "2677" by Senate amendment. See 80th Congress Senate Report No. 1559.

#### AMENDMENTS

1966—Pub. L. 89-506 raised the limitations on allowable attorneys fees from 10 to 20 percent for administrative settlements and from 20 to 25 percent for fees in cases after suit is filed and removed the requirement of agency or court allowance of the amount of attorneys fees.

#### EFFECTIVE DATE OF 1966 AMENDMENT

Amendment by Pub. L. 89-506 applicable to claims accruing six months or more after July 18, 1966, see section 10 of Pub. L. 89-506, set out as an Effective Date of 1966 Amendment note under section 2672 of this title.

### § 2679. Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property or personal injury or death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d) Upon a certification by the Attorney General that the defendant employee was acting within the scope of his employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending and the proceedings deemed a tort action brought against the United States under the provisions of this title and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (b) of this section is not available against the United States, the case shall be remanded to the State court.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

(June 25, 1948, ch. 646, 62 Stat. 984; Sept. 21, 1961, Pub. L. 87-258, § 1, 75 Stat. 539; July 18, 1966, Pub. L. 89-506, § 5(a), 80 Stat. 307.)

#### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 945 (Aug. 2, 1946, ch. 753, § 423, 60 Stat. 846).

Changes were made in phraseology.

#### Senate Revision Amendment

The catchline and text of this section were changed and the section was renumbered "2678" by Senate amendment. See 80th Congress Senate Report No. 1559.

#### Amendments

1966—Subsec. (b). Pub. L. 89-506 inserted reference to section 2672 of this title and substituted reference simply to "remedy" for reference to "remedy by suit".

1961—Pub. L. 87-258 designated existing provisions as subsec. (a) and added subsecs. (b) to (e).

#### Effective Date of 1966 Amendment

Amendment by Pub. L. 89-506 applicable to claims accruing six months or more after July 18, 1966, see section 10 of Pub. L. 89-506, set out as an Effective Date of 1966 Amendment note under section 2672 of this title.

#### Effective Date of 1961 Amendment

Section 2 of Pub. L. 87-258 provided that: "The amendments made by this Act [adding subsecs. (b) to (e)] shall be deemed to be in effect six months after the enactment hereof [Sept. 21, 1961] but any rights or liabilities then existing shall not be affected."

#### Cross References

Court of Claims, appellate jurisdiction in tort claims cases, see section 1504 of this title.

Courts of appeals, review of final decisions of district courts, see section 1291 of this title.

#### Section Referred to in Other Sections

This section is referred to in title 7 section 943; title 19 sections 1920, 2350; title 20 sections 1082, 1132c-2; title 42 sections 2458a, 3211.

### § 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

[(g) Repealed. Sept. 26, 1950, ch. 1049, § 13 (5), 64 Stat. 1043.]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(*l*) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

(June 25, 1948, ch. 646, 62 Stat. 984; July 16, 1949, ch. 340, 63 Stat. 444; Sept. 26, 1950, ch. 1049, §§ 2(a)(2), 13(5), 64 Stat. 1038, 1043; Aug. 18, 1959, Pub. L. 86-168, title II, § 202(b), 73 Stat. 389; Mar. 16, 1974, Pub. L. 93-253, § 2, 88 Stat. 50.)

### Termination of Subsec. (j)

*Joint Res. July 3, 1952, ch. 570, § 1(a)(32), 66 Stat. 333, as amended by Joint Res. Mar. 31, 1953, ch. 13, § 1, 67 Stat. 18, and Joint Res. June 30, 1953, ch. 172, 67 Stat. 132, provided that subsec. (j) of this section should continue in force until six months after the termination of the national emergency proclaimed by the President on Dec. 16, 1950, by 1950 Proc. No. 2914, 15 F.R. 9029, set out as a note preceding section 1 of Appendix to Title 50, War and National Defense, or such earlier date or dates as may be provided for by Congress, but in no event beyond Aug. 1, 1953. Section 7 of Joint Res. July 3, 1952, provided that it should become effective June 16, 1952.*

### Historical and Revision Notes

Based on title 28, U.S.C., 1940 ed., § 943 (Aug. 2, 1946, ch. 753, § 421, 60 Stat. 845).

Changes were made in phraseology.

Section 946 of title 28, U.S.C., 1940 ed., which was derived from section 424(b) of the Federal Tort Claims Act, was omitted from this revised title. It preserved the existing authority of federal agencies to settle tort claims not cognizable under section 2672 of this title. Certain enumerated laws granting such authority were specifically repealed by section 424(a) of the Federal Tort Claims Act, which section was also omitted from this revised title. These provisions were not included in this revised title as they are not properly a part of a code of general and permanent law.

### Senate Revision Amendment

Sections 2680 and 2681 were renumbered "2679" and "2680", respectively, by Senate amendment. See 80th Congress Senate Report No. 1559.

### References in Text

Section 743a of Title 46, referred to in subsec. (d), was omitted from the Code as obsolete. See, now, section 745 of Title 46, Shipping.

Section 15 of Title 50, Appendix, referred to in subsec. (e), was omitted from the Code as executed.

Date of the enactment of this proviso, referred to in subsec. (h), means Mar. 16, 1974, the date on which Pub. L. 93-253 enacting the proviso was approved.

### Amendments

1974—Subsec. (h). Pub. L. 93-253 added proviso.

1959—Subsec. (n). Pub. L. 86-168 added subsec. (n).

1950—Subsec. (g). Act Sept. 26, 1950, § 13(5) repealed subsec. (g).

Subsec. (m). Act Sept. 26, 1950, § 2, substituted Panama Canal Company for Panama Railroad Company.

1949—Subsec. (m). Act July 16, 1949, added subsec. (m).

### Effective Date of 1959 Amendment

Amendment by Pub. L. 86-168 effective Jan. 1, 1960, see section 203(c) of Pub. L. 86-168.

### Effective Date of 1950 Amendment

Section 14 of act Sept. 26, 1950, provided that the repeal of subpar. (g) and amendment of subpar. (m) of this section by that act should take effect upon the effective date of the transfer to the Panama Canal Company, pursuant to the provisions of section 256 of the Canal Zone Code, as added by section 10 of that act, of the Panama Canal together with the facilities and appurtenances related thereto.

### Transfer of Functions

For transfer of certain functions relating to claims and litigation, insofar as they pertain to the Air Force, from the Secretary of the Army to the Secretary of the Air Force, see Secretary of Defense Transfer Order No. 34 [§ 1a(2)(4)], eff. July 1, 1949.

### Exception as to Transfer of Functions

Functions of the Coast Guard, and of the Commandant thereof, when the Coast Guard is operating as a part of the Navy under section 3 of Title 14, Coast Guard, were excepted from the transfer of functions of officers, agencies, and employees of the Department of the Treasury to the Secretary of the Treasury, made by Reorg. Plan No. 26, of 1950, § 1, eff. July 31, 1950, 15 F.R. 4935, 64 Stat. 1280, set out in the Appendix to Title 5, Government Organization and Employees.

### Repeal of Prior Acts Continuing Subsec. (j)

Joint Res. July 3, 1952, ch. 570, § 6, 66 Stat. 334, repealed Joint Res. Apr. 14, 1952, ch. 204, 66 Stat. 54 as amended by Joint Res. May 28, 1952, ch. 339, 66 Stat. 96; Joint Res. June 14, 1952, ch. 437, 66 Stat. 137; Joint Res. June 30, 1952, ch. 526, 66 Stat. 296, which continued provisions of subsec. (j) of this section until July 3, 1952. This repeal was made effective June 16, 1952, by section 7 of Joint Res. July 3, 1952.

### Section Referred to in Other Sections

This section is referred to in title 10 section 1089; title 15 section 2053; title 22 section 1474; title 42 sections 233, 247b, 2458a.

## CHAPTER 173—ATTACHMENT IN POSTAL SUITS

Sec.
2710. Right of attachment.
2711. Application for warrant.
2712. Issue of warrant.
2713. Trial of ownership of property.
2714. Investment of proceeds of attached property.
2715. Publication.
2716. Personal notice.

Sec.
2717. Discharge.
2718. Interest on balances due department.

### Effective Date

Section 11 of Pub. L. 86-682, Sept. 2, 1960, 74 Stat. 708, provided that this chapter shall be effective on Sept. 1, 1960.

### § 2710. Right of attachment

(a) Where debts are due from a defaulting or delinquent postmaster, contractor, or other officer, agent or employee of the Post Office Department, a warrant of attachment may issue against all property and legal and equitable rights belonging to him, and his sureties, or either of them, where he—

(1) is a nonresident of the district where he was appointed, or has departed from that district for the purpose of permanently residing outside thereof, or of avoiding the service of civil process; and

(2) has conveyed away, or is about to convey away any of his property, or has removed or is about to remove the same from the district wherein it is situated, with intent to defraud the United States.

(b) When the property has been removed, the marshal of the district into which it has been removed, upon receipt of certified copies of the warrant, may seize the property and convey it to a convenient place within the jurisdiction of the court which issued the warrant. Alias warrants may be issued upon due application. The warrant first issued remains valid until the return day thereof.

(Added Pub. L. 86-682, § 9, Sept. 2, 1960, 74 Stat. 706.)

### Change of Name

References to the Post Office Department, the Postal Service, the Postal Field Service, the Field Postal Service, or the Departmental Service or the Departmental Headquarters of the Post Office Department to be considered references to the United States Postal Service pursuant to Pub. L. 91-375, § 6(o), Aug. 12, 1970, 84 Stat. 733, set out as a Cross Reference note preceding section 101 of Title 39, Postal Service.

### Section Referred to in Other Sections

This section is referred to in section 2711 of this title.

### § 2711. Application for warrant

A United States attorney or assistant United States attorney or a person authorized by the Attorney General—

(1) upon his own affidavit or that of another credible person, stating the existence of either of the grounds of attachments enumerated in section 2710 of this title and

(2) upon production of legal evidence of the debt

may apply for a warrant of attachment to a judge, or, in his absence, to the clerk of any court of the United States having original jurisdiction of the cause of action.

(Added Pub. L. 86-682, § 9, Sept. 2, 1960, 74 Stat. 707.)

### § 2712. Issue of warrant

Upon an order of a judge of a court, or, in his absence and upon the clerk's own initiative, the clerk shall issue a warrant for the attachment of the property belonging to the person specified in the affidavit. The marshal shall execute the warrant forthwith and take the property attached, if personal, in his custody, subject to the interlocutory or final orders of the court.

(Added Pub. L. 86-682, § 9, Sept. 2, 1960, 74 Stat. 707.)

### Section Referred to in Other Sections

This section is referred to in section 2713 of this title.

### § 2713. Trial of ownership of property

Not later than twenty days before the return day of a warrant issued under section 2712 of this title, the party whose property is attached, on notice to the United States Attorney, may file a plea in abatement, denying the allegations of the affidavit, or denying ownership in the defendant of the property attached. The court, upon application of either party, shall order a trial by jury of the issues. Where the parties, by consent, waive a trial by jury, the court shall decide the issues. A party claiming ownership of the property attached and seeking its return is limited to the remedy afforded by this section, but his right to an action of trespass, or other action for damages, is not impaired.

(Added Pub. L. 86-682, § 9, Sept. 2, 1960, 74 Stat. 707.)

### § 2714. Investment of proceeds of attached property

When the property attached is sold on an interlocutory order or is producing revenue, the money arising from the sale or revenue shall be invested, under the order of the court, in securities of the United States. The accretions therefrom are subject to the order of the court.

(Added Pub. L. 86-682, § 9, Sept. 2, 1960, 74 Stat. 707.)

### § 2715. Publication

The marshal shall cause publication of an executed warrant of attachment—

(1) for two months in case of an absconding debtor, and

(2) for four months in case of a nonresident debtor

in a newspaper published in the district where the property is situated pursuant to the details of the order under which the warrant is issued.

(Added Pub. L. 86-682, § 9, Sept. 2, 1960, 74 Stat. 707.)

### § 2716. Personal notice

After the first publication of the notice of attachment, a person indebted to, or having possession of property of a defendant and having knowledge of the notice, shall answer for the amount of his debt or the value of the property. Any disposal or attempted disposal of the property, to the injury of the United States, is unlawful. When the person indebted to, or having possession of the property of a defendant, is known to the United States attorney or marshal, the officer shall cause a personal notice of the attachment to be served upon him, but the lack of the notice does not invalidate the attachment.

(Added Pub. L. 86-682, § 9, Sept. 2, 1960, 74 Stat. 707.)

### § 2717. Discharge

The court, or a judge thereof, upon—

(1) application of the party when property has been attached and

(2) execution to the United States of a penal bond, approved by a judge, in double the value of the property attached and conditioned upon the return of the property or the payment of any judgment rendered by the court

may discharge the warrant of attachment as to the property of the applicant.

(Added Pub. L. 86-682, § 9, Sept. 2, 1960, 74 Stat. 708.)

### § 2718. Interest on balances due department

In suits for balances due the Post Office Department may recover interest at the rate of 6 per centum per year from the time of default.

(Added Pub. L. 86-682, § 9, Sept. 2, 1960, 74 Stat. 708.)

#### CHANGE OF NAME

References to the Post Office Department, the Postal Service, the Postal Field Service, the Field Postal Service, or the Departmental Service or the Departmental Headquarters of the Post Office Department to be considered references to the United States Postal Service pursuant to Pub. L. 91-375, § 6(*o*), Aug. 12, 1970, 84 Stat. 733, set out as a Cross References note preceding section 101 of Title 39, Postal Service.

## CHAPTER 175—CIVIL COMMITMENT AND REHABILITATION OF NARCOTIC ADDICTS

Sec.
2901. Definitions.
2902. Discretionary authority of court; examination, report, and determination by court; termination of civil commitment.
2903. Authority and responsibilities of the Surgeon General; institutional custody; aftercare; maximum period of civil commitment; credit toward sentence.
2904. Civil commitment not a conviction; use of test results.
2905. Delegation of functions by Surgeon General; use of Federal, State, and private facilities.
2906. Absence of offer by the court to a defendant of an election under section 2902(a) or any determination as to civil commitment, not reviewable on appeal or otherwise.

#### CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in title 18 section 4251; title 42 section 257.

### § 2901. Definitions

As used in this chapter—

(a) "Addict" means any individual who habitually uses any narcotic drug as defined by section 102(16) of the Controlled Substances Act so as to endanger the public morals, health, safety, or welfare, or who is so far addicted to the use of such narcotic drugs as to have lost the power of self-control with reference to his addiction.

(b) "Surgeon General" means the Surgeon General of the Public Health Service.

(c) "Crime of violence" includes voluntary manslaughter, murder, rape, mayhem, kidnaping, robbery, burglary or housebreaking in the nighttime, extortion accompanied by threats of violence, assault with a dangerous weapon or assault with intent to commit any offense punishable by imprisonment for more than one year, arson punishable as a felony, or an attempt or conspiracy to commit any of the foregoing offenses.

(d) "Treatment" includes confinement and treatment in an institution and under supervised aftercare in the community and includes, but not limited to, medical, educational, social, psychological, and vocational services, corrective and preventive guidance and training, and other rehabilitative services designed to protect the public and benefit the addict by eliminating his dependence on addicting drugs, or by controlling his dependence, and his susceptibility to addiction.

(e) "Felony" includes any offense in violation of a law of the United States classified as a felony under section 1 of title 18 of the United States Code, and further includes any offense in violation of a law of any State, any possession or territory of the United States, the District of Columbia, the Canal Zone, or the Commonwealth of Puerto Rico, which at the time of the offense was classified as a felony by the law of the place where that offense was committed.

(f) "Conviction" and "convicted" mean the final judgment on a verdict or finding of guilty, a plea of guilty, or a plea of nolo contendere, but do not include a final judgment which has been expunged by pardon, reversed, set aside or otherwise rendered nugatory.

(g) "Eligible individual" means any individual who is charged with an offense against the United States, but does not include—

(1) an individual charged with a crime of violence.

(2) an individual charged with unlawfully importing, selling, or conspiring to import or sell, a narcotic drug.

(3) an individual against whom there is pending a prior charge of a felony which has not been finally determined or who is on probation or whose sentence following conviction on such a charge, including any time on parole or mandatory release, has not been fully served: *Provided*, That an individual on probation, parole, or mandatory release shall be included if the authority authorized to require his return to custody consents to his commitment.

(4) an individual who has been convicted of a felony on two or more occasions.

(5) an individual who has been civilly committed under this Act, under the District of Columbia Code, or any State preceeding because of narcotic addiction on three or more occasions.

(Added Pub. L. 89-793, title I, § 101, Nov. 8, 1966, 80 Stat. 1438, and amended Pub. L. 91-513, title III, § 1102(*l*), Oct. 27, 1970, 84 Stat.

1293; Pub. L. 92-420, § 2, Sept. 16, 1972, 86 Stat. 677.)

### References in Text

Section 102(16) of the Controlled Substances Act, referred to in subsec. (a), is classified to section 802(16) of Title 21, Food and Drugs.

This Act, referred to in subsec. (g)(5), is Pub. L. 89-793, which enacted this chapter, section 4251 et seq. of Title 18, Crimes and Criminal Procedure, sections 3402 and 3411 et seq. of Title 42, The Public Health and Welfare, amended section 7237 of Title 26, Internal Revenue Code, and section 257 of Title 42, and enacted provisions set out as notes under sections 4202 of Title 18 and 3401 of Title 42. For complete classification of this Act to the Code, see Short Title note set out under section 3401 of Title 42 and Tables volume.

### Amendments

1972—Subsec. (d). Pub. L. 92-420 substituted "by eliminating his dependence on addicting drugs, or by controlling his dependence," for "by correcting his antisocial tendencies and ending his dependence on addicting drugs".

1970—Subsec. (a). Pub. L. 91-513 substituted "as defined by section 102(16) of the Controlled Substances Act" for "as defined by section 4731 of the Internal Revenue Code of 1954, as amended," following "narcotic drug".

### Effective Date of 1972 Amendment

Section 5 of Pub. L. 92-420 provided that: "This Act [amending subsec. (d) of this section, section 4251(c) of Title 18, Crimes and Criminal Procedure, and section 3411(b) of Title 42, The Public Health and Welfare, and enacting provisions set out as a note under this section] shall take effect immediately upon enactment [Sept. 16, 1972]. Sections 2 and 3 [amending section 4251(c) of Title 18 and section 3411(b) of Title 42, respectively] shall apply to any case pending in a district court of the United States in which an appearance has not been made prior to the effective date [Sept. 16, 1972]."

### Effective Date of 1970 Amendment

Amendment by Pub. L. 91-513 effective on the first day of the seventh calendar month that begins after Oct. 26, 1970, see section 1105(a) of Pub. L. 91-513, set out as an Effective Date note under section 951 of Title 21, Food and Drugs.

### Effective Date

Chapter effective three months after Nov. 8, 1966, and applicable to any case pending in a district court of the United States in which an appearance has not been made prior to such effective date, see section 605 of Pub. L. 89-793, title VI, Nov. 8, 1966, 80 Stat. 1450, set out as an Effective Date note under section 3401 of Title 42, The Public Health and Welfare.

### Savings Provisions

Prosecutions for any violation of law occurring, and civil seizures or forfeitures and injunctive proceedings commenced, prior to the effective date of amendment of this section by section 1102 of Pub. L. 91-513 not to be affected or abated by reason thereof, see section 1103 of Pub. L. 91-513, set out as a Savings Provision note under section 171 of Title 21, Food and Drugs.

## § 2902. Discretionary authority of court; examination, report, and determination by court; termination of civil commitment

(a) If the United States district court believes that an eligible individual is an addict, the court may advise him at his first appearance or thereafter at the sole discretion of the court that the prosecution of the criminal charge will be held in abeyance if he elects to submit to an immediate examination to determine whether he is an addict and is likely to be rehabilitated through treatment. In offering an individual an election, the court shall advise him that if he elects to be examined, he will be confined during the examination for a period not to exceed sixty days; that if he is determined to be an addict who is likely to be rehabilitated, he will be civilly committed to the Surgeon General for treatment; that he may not voluntarily withdraw from the examination or any treatment which may follow; that the treatment may last for thirty-six months; that during treatment, he will be confined in an institution and, at the discretion of the Surgeon General, he may be conditionally released for supervised aftercare treatment in the community; and that if he successfully completes treatment the charge will be dismissed, but if he does not, prosecution on the charge will be resumed. An individual upon being advised that he may elect to submit to an examination shall be permitted a maximum of five days within which to make his election. Except on a showing that a timely election could not have been made, an individual shall be barred from an election after the prescribed period. An individual who elects civil commitment shall be placed in the custody of the Attorney General or the Surgeon General, as the court directs, for an examination by the Surgeon General during a period not to exceed thirty days. This period may, upon notice to the court and the appropriate United States attorney, be extended by the Surgeon General for an additional thirty days.

(b) The Surgeon General shall report to the court the results of the examination and recommend whether the individual should be civilly committed. A copy of the report shall be made available to the individual and the United States attorney. If the court, acting on the report and other information coming to its attention, determines that the individual is not an addict or is an addict not likely to be rehabilitated through treatment, the individual shall be held to answer the abeyant charge. If the court determines that the individual is an addict and is likely to be rehabilitated through treatment, the court shall commit him to the custody of the Surgeon General for treatment, except that no individual shall be committed under this chapter if the Surgeon General certifies that adequate facilities or personnel for treatment are unavailable.

(c) Whenever an individual is committed to the custody of the Surgeon General for treatment under this chapter the criminal charge against him shall be continued without final disposition and shall be dismissed if the Surgeon General certifies to the court that the individual has successfully completed the treatment program. On receipt of such certification, the court shall discharge the individual from custody and dismiss the charge against him. If prior to such certification the Surgeon General determines that the individual cannot be further treated as a medical problem, he shall advise the court. The court shall thereupon terminate the commitment, and the pending criminal proceeding shall be resumed.

(d) An individual committed for examination or treatment shall not be released on bail or on his own recognizance.

(e) Whoever escapes or attempts to escape while committed to institutional custody for examination or treatment, or whoever rescues or attempts to rescue or instigates, aids, or assists the escape or attempt to escape of such a person, shall be subject to the penalties provided in sections 751 and 752 of title 18, United States Code.

(Added Pub. L. 89-793, title I, § 101, Nov. 8, 1966, 80 Stat. 1439.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 2906 of this title; title 18 section 3161.

### § 2903. Authority and responsibilities of the Surgeon General; institutional custody; aftercare; maximum period of civil commitment; credit toward sentence

(a) An individual who is committed to the custody of the Surgeon General for treatment under this chapter shall not be conditionally released from institutional custody until the Surgeon General determines that he has made sufficient progress to warrant release to a supervisory aftercare authority. If the Surgeon General is unable to make such a determination at the expiration of twenty-four months after the commencement of institutional custody, he shall advise the court and the appropriate United States attorney whether treatment should be continued. The court may affirm the commitment or terminate it and resume the pending criminal proceeding.

(b) An individual who is conditionally released from institutional custody shall, while on release, remain in the legal custody of the Surgeon General and shall report for such supervised aftercare treatment as the Surgeon General directs. He shall be subject to home visits and to such physical examination and reasonable regulation of his conduct as the supervisory aftercare authority establishes, subject to the approval of the Surgeon General. The Surgeon General may, at any time, order a conditionally released individual to return for institutional treatment. The Surgeon General's order shall be a sufficient warrant for the supervisory aftercare authority, a probation officer, or any Federal officer authorized to serve criminal process within the United States to apprehend and return the individual to institutional custody as directed. If it is determined that an individual has returned to the use of narcotics, the Surgeon General shall inform the court of the conditions under which the return occurred and make a recommendation as to whether treatment should be continued. The court may affirm the commitment or terminate it and resume the pending criminal proceeding.

(c) The total period of treatment for any individual committed to the custody of the Surgeon General shall not exceed thirty-six months. If, at the expiration of such maximum period, the Surgeon General is unable to certify that the individual has successfully completed his treatment program the pending criminal proceeding shall be resumed.

(d) Whenever a pending criminal proceeding against an individual is resumed under this chapter, he shall receive full credit toward the service of any sentence which may be imposed for any time spent in the institutional custody of the Surgeon General or the Attorney General or any other time spent in institutional custody in connection with the matter for which sentence is imposed.

(Added Pub. L. 89-793, title I, § 101, Nov. 8, 1966, 80 Stat. 1440.)

### § 2904. Civil commitment not a conviction; use of test results

The determination of narcotic addiction and the subsequent civil commitment under this chapter shall not be deemed a criminal conviction. The results of any tests or procedures conducted by the Surgeon General or the supervisory aftercare authority to determine narcotic addiction may only be used in a further proceeding under this chapter. They shall not be used against the examined individual in any criminal proceeding except that the fact that he is a narcotic addict may be elicited on his cross-examination as bearing on his credibility as a witness.

(Added Pub. L. 89-793, title I, § 101, Nov. 8, 1966, 80 Stat. 1441.)

### § 2905. Delegation of functions by Surgeon General; use of Federal, State, and private facilities

(a) The Surgeon General may from time to time make such provision as he deems appropriate authorizing the performance of any of his functions under this chapter by any other officer or employee of the Public Health Service, or with the consent of the head of the Department or Agency concerned, by any Federal or other public or private agency or officer or employee thereof.

(b) The Surgeon General is authorized to enter into arrangements with any public or private agency or any person under which appropriate facilities or services of such agency or person, will be made available, on a reimbursable basis or otherwise, for the examination or treatment of individuals who elect civil commitment under this chapter.

(Added Pub. L. 89-793, title I, § 101, Nov. 8, 1966, 80 Stat. 1441.)

### § 2906. Absence of offer by the court to a defendant of an election under section 2902(a) or any determination as to civil commitment, not reviewable on appeal or otherwise.

The failure of a court to offer a defendant an election under section 2902(a) of this chapter, or a determination relative to civil commitment under this chapter shall not be reviewable on appeal or otherwise.

(Added Pub. L. 89-793, title I, § 101, Nov. 8, 1966, 80 Stat. 1441.)

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# RULES OF THE SUPREME COURT OF THE UNITED STATES

*Adopted June 15, 1970, as amended to January 1, 1977*

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| — | — | 5 | 9 | 9 | 9 |
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| 9 | 10 | 10 | 12 | 12 | 12 |
| 10 | 11 | 11 | 13, 14 | 13, 14 | 13, 14 |
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| 11 | 13 | 13 | 17, 26, 36 | 17, 26, 36 | 17, 26, 36 |
| 12 | 14 | 14 | 37 | 37 | 37 |
| 13 | 15 | 15 | — | — | — |
| 14 | 16 | 16 | — | — | — |
| 15 | 17 | 17 | 32 | 32 | 32 |
| 16 | 18 | 18 | 38 | 38 | 38 |
| 17 | 19 | 19 | 48 | 48 | 48 |
| 18 | 20 | 20 | 35, 43 | 35, 43 | 35, 43 |
| 19 | 21 | 21 | — | — | — |
| 20 | 22 | 22 | — | — | — |
| 21 | 23 | 23 | — | — | — |
| 22 | 24 | 24 | — | — | — |
| 23 | 25 | 25 | 45 | 45 | 45 |
| 24 | 26 | 26 | 39 | 39 | 39 |
| 25 | 27 | 27 | 40 to 42 | 40 to 42 | 40 to 42 |
| 26 | 28 | 28 | 44 | 44 | 44 |
| 27 | 29 | 29 | 55 | 55 | 55 |
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| 39 | 42 | 42 | 19 | 19 | 19 |
| 40 | 43 | 43 | 25 | 25 | 25 |
| 41 | 44 | 44 | — | — | — |
| 42 | 45 | 45 | 49 | 49 | 49 |
| — | 46 | 46 | — | — | — |
| — | 46½ | 47 | — | — | — |
| — | — | 48 | 46 | 46 | 46 |
| 43 | 47 | 49 | 4 | 4 | 4 |
| 44 | 48 | 50 | 3 | 3 | 3 |
| 45 | 49 | 51 | 61 | 62 | 62 |
| — | — | — | 62 | 61 | 61 |

## Part I—The Court

### Rule 1. Clerk

1. The clerk of this court shall reside and keep the office at the seat of the National Government, and he shall not practice as attorney or counsellor in any court, while he continues in office.

2. The clerk shall not permit any original or certified record or paper to be taken from the office, except temporarily for purposes of printing, and except, on proper application from counsel or from the clerk or the presiding judge of a court below whose judgment is sought to be reviewed, for return to such court, after the conclusion of the proceedings in this court. Original or file copies of pleadings, papers, or briefs may not be withdrawn by litigants.

3. The clerk's office will be open from 9:00 A.M. to 5:00 P.M. Mondays through Fridays, and from 9:00 A.M. to noon on Saturdays, legal holidays excepted.

#### Cross References

Clerks to justices not to practice, see rule 7.

Seat of Government, see section 71 et seq. of Title 4, Flag and Seal, Seat of Government, and the States.

### Rule 2. Library

1. The library for the bar shall be open to members of the bar of this court, to members of Congress, and to law officers of the executive or other departments of the Government.

2. The library shall be open during such times as the reasonable needs of the bar require and shall be governed by the regulations made by the librarian with the approval of the chief justice.

3. Books may not be removed from the building.

#### Cross References

Law Library of Congress—

- Purchase of books under direction of Chief Justice, see section 135 of Title 2, The Congress.
- Use and regulation by Supreme Court Justices, see section 137 of Title 2.

### Rule 3. Term

1. The court will hold an annual term commencing on the first Monday in October of each year and may hold such adjourned or special terms as may be necessary.

2. The court will at every term announce the date after which no case will be called for argument, or be submitted for decision at that term, unless otherwise ordered for special cause shown.

3. At the end of each term, all cases on the docket shall be continued to the next term.

#### Cross References

Terms of court, see section 2 of this title.

### Rule 4. Sessions, quorum, and adjournments

1. Open sessions of the court will be held at ten a.m. on the first Monday in October of each year, and thereafter as announced by the court. Unless otherwise ordered, the court sits to hear arguments from ten until noon, recesses until one, and adjourns for the day at three.

2. Unless otherwise ordered the court will not schedule arguments on Fridays or Saturdays.

3. In the absence of a quorum, on any day appointed for holding a session of the court, the

justices attending (or, if no justice is present, the clerk or a deputy clerk) may adjourn the court until there is a quorum.

4. The court may, in appropriate instances, direct the clerk or the marshal to announce recesses and adjournments.

CROSS REFERENCES

Quorum, see section 1 of this title.

## PART II—ATTORNEYS AND COUNSELLORS

CROSS REFERENCES

Clerk of court not to practice, see rule 1.

Number of counsel to be heard for each party, see rule 44.

### Rule 5. Admission to the bar

1. It shall be requisite to the admission of attorneys or counsellors to practice in this court, that they shall have been such for three years past in the highest court of a State, Territory, District, Commonwealth, or Possession, and that their private and professional characters shall appear to be good.

2. Each applicant shall file with the clerk (1) a certificate from the presiding judge or clerk of the proper court evidencing his admission to practice there and that he is presently in good standing, and (2) his personal statement, on the form approved by the court and furnished by the clerk, which shall be endorsed by two members of the bar of this court who are not related to the applicant.

3. If the documents submitted by the applicant demonstrate that he possesses the necessary qualifications, the clerk shall so notify the applicant and he may be admitted without appearing in court. Upon the applicant's signing the oath or affirmation and paying the fee required under Rule 52(d), the clerk shall issue a certificate of admission to the applicant. However, if the applicant so elects he may be admitted on oral motion by a member of the bar in open court, provided the applicant has satisfied the requirements for admission.

4. Each applicant shall take or subscribe the following oath or affirmation, viz.:

I, ———— ————, do solemnly swear (or affirm) that as an attorney and as a counsellor of this court I will conduct myself uprightly, and according to law, and that I will support the Constitution of the United States.

(As amended Oct. 12, 1970.)

### Rule 6. Admission of foreign counsel

An attorney, barrister, or advocate who is qualified to practice in the courts of any foreign state may be specially admitted to the bar of this court for purposes limited to a particular case. He shall not, however, be authorized to act as attorney of record. In the case of such applicants, the oath shall not be required and there shall be no fee. Such admissions shall be only on motion of a member of the bar of this court, notice of which signed by such member and reciting all relevant facts shall be filed with the clerk at least three days prior to the motion.

### Rule 7. Clerks to justices not to practice

No one serving as a law clerk or secretary to a justice of this court shall practice as an attorney or counsellor in any court or before any agency of government while continuing in that position; nor shall he after separating from that position practice as an attorney or counsellor in this court until two years have elapsed after such separation; nor shall he ever participate, by way of any form of professional consultation and assistance, in any case that was pending in this court during the period that he held such position.

CROSS REFERENCES

Appointment and compensation of law clerks and secretaries, see section 675 of this title.

Clerk of court not to practice, see rule 1.

### Rule 8. Disbarment

Where it is shown to the court that any member of its bar has been disbarred from practice in any State, Territory, District, Commonwealth, or Possession, or has been guilty of conduct unbecoming a member of the bar of this court, he will be forthwith suspended from practice before this court. He will thereupon be afforded the opportunity to show good cause, within forty days, why he should not be disbarred. Upon his response to the rule to show cause, or upon the expiration of the forty days if no response is made, the court will enter an appropriate order; but no order of disbarment will be entered except with the concurrence of a majority of the justices participating.

## PART III—ORIGINAL JURISDICTION

### Rule 9. Procedure in original actions

1. This rule applies only to actions within the original jurisdiction of the court under the Constitution. Original applications for writs in aid of the court's appellate jurisdiction are governed by Part VII of these rules.

2. The form of pleadings and motions in original actions shall be governed, so far as may be, by the Federal Rules of Civil Procedure, and in other respects those rules, where their application is appropriate, may be taken as a guide to procedure in original actions in this court.

3. The initial pleading in any original action shall be prefaced by a motion for leave to file such pleading, and both shall be printed in conformity with Rule 39. A brief in support of the motion for leave to file, which shall comply with Rule 39, may be filed with the motion and pleading. Sixty copies of each document, with proof of service as prescribed by Rule 33, are required, except that, where the adverse party is a State, service shall be made on the governor and attorney general of such State.

4. The case will be placed upon the original docket when the motion for leave to file is filed with the clerk. The docket fee must be paid at that time, and the appearance of counsel for the plaintiff entered.

5. The adverse party or parties may, within sixty days after receipt of the motion for leave to file and allied documents, file sixty printed

copies of a brief or briefs in opposition to such motion, which shall conform to Rule 39. When such brief or briefs in opposition have been filed, or the time within which they may be filed has expired, the motion, pleading and briefs shall be distributed to the court by the clerk. The court may thereafter grant or deny the motion or set it down for argument.

6. Additional pleadings may be filed, and subsequent proceedings had, as the court shall direct.

7. Any process against a State issued from the court in an original action shall be served on the governor and attorney general of such State.

8. A summons issuing out of this court in any original action shall be served on the defendant sixty days before the return day set out therein; and if the defendant, on such service of the summons, shall not respond by the return day, the plaintiff shall be at liberty to proceed *ex parte.*

#### CROSS REFERENCES

Fees, see rule 52.

Jurisdiction of Courts, see U.S. Const., Art. 3, § 2, Cl. 2.

Marshal to serve and execute process, see section 672 of this title.

Original jurisdiction, see section 1251 of this title.

Seal and teste of process, see section 1691 of this title.

Taxation of cost of serving process, see section 1911 of this title.

## PART IV—JURISDICTION ON APPEAL

### Rule 10. Appeal—how taken—parties

1. An appeal permitted by law to this court shall be taken by filing a notice of appeal, in the form and at the place prescribed by this rule, and shall be perfected by docketing the case in this court as provided in Rule 13.

2. The notice of appeal shall specify the parties taking the appeal, shall designate the judgment or part thereof appealed from, giving the time of its entry, and shall specify the statute or statutes under which the appeal to this court is taken. A copy of the notice of appeal shall be served on all parties to the proceeding in the court where the judgment appealed from was issued, in the manner prescribed by Rule 33, and proof of such service shall be filed with the notice of appeal.

3. If the appeal is taken from a federal court, the notice of appeal shall be filed with the clerk of such court. If the appeal is taken from a state court, the notice of appeal shall be filed with the clerk of the court possessed of the record.

4. All parties to the proceeding in the court from whose judgment the appeal is being taken shall be deemed parties in this court, unless the appellant shall notify the clerk of this court in writing of his belief that one or more of the parties below have no interest in the outcome of the appeal. A copy of such notice shall be served on all parties to the proceeding below and a party noted as no longer interested may remain a party here by notifying the clerk, with service on the other parties, that he has an interest in the appeal. All parties other than the appellant shall be appellees, but appellees who support the position of the appellant shall meet the time schedule for filing papers which is provided for the appellant, except that any response by such appellees to a jurisdictional statement shall be filed as promptly as possible after receipt of the jurisdictional statement.

### Rule 11. Appeal—time for taking and docketing

1. An appeal to review the judgment of a state court of last resort in a criminal case shall be deemed in time when the notice of appeal prescribed by Rule 10 is filed with the clerk of the court possessed of the record within ninety days after the entry of such judgment and the case is docketed within the time provided in Rule 13.

2. An appeal permitted by law from a district court to this court in a criminal case shall be in time when the notice of appeal prescribed by Rule 10 is filed with the clerk of the district court within thirty days after entry of the judgment or order appealed from and the case is docketed within the time provided in Rule 13.

3. An appeal in all other cases shall be in time when the notice of appeal prescribed by Rule 10 is filed with the clerk of the appropriate court within the time allowed by law for taking such appeal and the case is docketed within the time provided in Rule 13.

### Rule 12. Certification of record

1. A party intending to appeal may, prior to filing the notice of appeal or at any time thereafter prior to action by this court on the appeal, request the clerk of the court possessed of the record to certify it, or any part of it, and to provide for its transmission to this court, but the filing of the record in this court is not required for docketing an appeal. If the appellant has not done so, the appellee may request such clerk to certify and transmit the record or any part of it. Thereafter, the clerk of this court or any party to the appeal may request that additional parts of the record be certified and transmitted to this court. A copy of all requests for certification and transmission shall be sent to all parties to the proceeding.

2. When requested to certify and transmit the record, or any part of it, the clerk of the court possessed of the record shall number the documents to be certified comprising the record and shall transmit with them a numbered list of the documents, identifying each with reasonable definiteness.

3. Whenever it shall be necessary or proper, in the opinion of the presiding judge of the court from which the appeal is taken, that original papers of any kind should be inspected in this court in lieu of copies, such presiding judge may make such rule or order for the safekeeping, transporting, and return of such original papers as to him may seem proper. If the record has been printed for the use of the court below, such printed record plus the proceedings in the court below may be certified as the record unless one of the parties or the clerk of this court otherwise requests.

4. When more than one appeal is taken to this court from the same judgment, it shall be sufficient to prepare a single record containing all the matter designated or agreed upon by the parties, without duplication.

### Rule 13. Docketing cases

1. Not more than ninety days after the entry of the judgment appealed from it shall be the duty of the appellant to docket the case in the manner set forth in paragraph 2 of this rule, except that in the case of appeals pursuant to Section 1252, 1253, or 2282 of Title 28 of the United States Code the time limit for docketing shall be sixty days from the filing of the notice of appeal. For good cause shown, a justice of this court may extend the time for docketing a case for a period not exceeding sixty days. Where application under this rule is made, paragraph 2 of Rule 34 governs timeliness. Such applications are not favored.

2. Counsel for the appellant shall enter his appearance, pay the docket fee, and file, with proof of service as prescribed by Rule 33, forty copies of a printed statement as to jurisdiction, which shall comply in all respects with Rule 15. The case will then be placed on the docket.

3. It shall be the duty of the appellant to notify all appellees on a form supplied by the clerk of the date of docketing and of the docket number of the case.

#### References in Text

Section 2282 of Title 28, referred to in text, was repealed by Pub. L. 94-381, § 2, Aug. 12, 1976, 90 Stat. 1119.

#### Cross References

Call and order of the calendar, see rule 43.

Direct appeal to Supreme Court, docketing, see section 2101 of this title.

Original docket, rules governing, see rule 9.

Priority on docket of criminal cases from State court, see section 2102 of this title.

### Rule 14. Dismissing appeals for non-prosecution

1. After a notice of appeal has been filed, but before the case has been docketed in this court, the parties may at any time dismiss the appeal by stipulation filed in the court possessed of the record, or that court may dismiss the appeal upon motion and notice by the appellant. For dismissal after the case has been docketed, see Rule 60.

2. If a notice of appeal has been filed but the case has not been docketed in this court within the time for docketing, plus any enlargement thereof duly granted, the court possessed of the record may dismiss the appeal upon motion of the appellee and notice to the appellant, and may make such orders thereon with respect to costs as may be just.

3. If a notice of appeal has been filed but the case has not been docketed in this court within the time for docketing, plus any enlargement thereof duly granted, and the court possessed of the record has for any reason denied an appellee's motion, made as provided in the foregoing paragraph, to dismiss the appeal, the appellee may have the cause docketed and the appeal dismissed in this court, by producing a certificate, whether in term or vacation, from the clerk of the court possessed of the record, establishing the foregoing facts, and by filing a motion to dismiss, which shall conform to Rule 35 and be accompanied by proof of service as prescribed by Rule 33. The clerk's certificate shall be attached to the motion, but it shall not be necessary for the appellee to file the record. In the event that the appeal is thereafter dismissed, the court will give judgment against the appellant and in favor of appellee for costs. In no case shall the appellant be entitled to docket the cause after the appeal shall have been dismissed under this paragraph, unless by special leave of court.

### Rule 15. Jurisdictional statement

1. The jurisdictional statement required by paragraph 2 of Rule 13 shall contain in the order here indicated—

(a) A reference to the official and unofficial reports of the opinions delivered in the courts below, if any, and if reported. Any such opinions shall be appended as provided in subparagraph (h) hereof.

(b) A concise statement of the grounds on which the jurisdiction of this court is involved, showing:

(i) The nature of the proceeding and the statute pursuant to which it is brought;

(ii) The date of the judgment or decree sought to be reviewed and the time of its entry, the date of any order respecting a rehearing, the date the notice of appeal was filed, and the court in which it was filed;

(iii) The statutory provision believed to confer on this court jurisdiction of the appeal;

(iv) Cases believed to sustain the jurisdiction;

(v) If the validity of the statute of a state, or statute or treaty of the United States is involved, its text shall be set out verbatim, citing the volume and page where it may be found in the official edition. If the statutory or treaty provisions that are involved are lengthy, the citation alone will suffice at this point, and their pertinent text shall be set forth in an appendix.

A copy of the judgment or decree, of any order on rehearing, and of the notice of appeal shall be appended as provided in subparagraphs (i) and (j) hereof.

(c) The questions presented by the appeal, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of the questions should be short and concise and should not be repetitious. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. Only the questions set forth in the jurisdictional statement or fairly comprised therein will be considered by the court.

(d) A concise statement of the case containing the facts material to the consideration of the questions presented. If the appeal is from a state court, the statement of the case shall also specify the stage in the proceedings in the court of first instance, and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the court's charge and exception thereto, assignment of error) as will support the assertion that the rulings of the court were of a nature to bring the case within the statutory provision believed to confer jurisdiction on this court.

(e) If the appeal is from a state court, there shall be included a presentation of the grounds upon which it is contended that the federal questions are substantial (*Zucht* v. *King*, 260 U.S. 174, 176, 177), which shall show that the nature of the case and of the rulings of the court was such as to bring the case within the jurisdictional provisions relied on and the cases cited to sustain the jurisdiction (subparagraph (b)(iv) hereof), and shall include the reasons why the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

(f) If the appeal is from a federal court, there shall similarly be included a statement of the reasons why the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

(g) If the appeal is from a decree of a district court granting or denying an interlocutory injunction, the statement must also include a showing of the matters in which it is contended that the court has abused its discretion by such action. See *United States* v. *Corrick*, 298 U.S. 435; *Mayo* v. *Lakeland Highlands Canning Co.*, 309 U.S. 310.

(h) There shall be appended to the statement a copy of any opinions delivered upon the rendering of the judgment or decree sought to be reviewed, including, if not reported, earlier opinions in the same case, or opinions in companion cases, reference to which may be necessary to ascertain the grounds of the judgment or decree; and, if the appeal is from a federal court, there shall similarly be appended the court's findings of fact and conclusions of law, if any were separately made.

(i) There shall be appended to the statement a copy of the judgment or decree and of any order on rehearing, including in each the caption showing the name of the court issuing it, the title and number of the case, and the date of entry of the judgment or decree, and of any order on rehearing.

(j) There shall be appended to the statement a copy of the notice of appeal showing the date it was filed and the name of the court where it was filed.

2. The jurisdictional statement shall be printed in conformity with Rule 39.

3. Where several cases are appealed from the same court that involve identical or closely related questions, it shall suffice to file a single jurisdictional statement covering all the cases.

CROSS REFERENCES

Briefs—
  Generally, see rule 40.
  Amicus curiae, see rule 42.
  Time for filing briefs on merits, see rule 41.

### Rule 16. Motion to dismiss or affirm

1. Within thirty days after receipt of the jurisdictional statement, unless the time is enlarged by the court or a justice thereof, or by the clerk under the provisions of paragraph 5 of Rule 34, the appellee may file a printed motion to dismiss, or motion to affirm. In cases where the United States or any agency, officer or employee thereof is the appellee, the appellee shall have an additional twenty days to file said motions. Where appropriate, a motion to affirm may be united in the alternative with a motion to dismiss.

(a) The court will receive a motion to dismiss any appeal on the ground that the appeal is not within the jurisdiction of this court, because not taken in conformity to statute or to these rules.

(b) The court will receive a motion to dismiss an appeal from a state court on the ground that it does not present a substantial federal question; or that the federal question sought to be reviewed was not timely or properly raised, or expressly passed on; or that the judgment rests on an adequate non-federal basis.

(c) The court will receive a motion to affirm the judgment sought to be reviewed on appeal from a federal court on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

(d) The court will receive a motion to dismiss or affirm on any other grounds which the appellee wishes to present as reasons why the court should not set the case for argument.

2. The motion to dismiss or affirm shall be printed in conformity with Rules 35 and 39, and forty copies, with proof of service as prescribed by Rule 33, shall be filed with the clerk.

3. Upon the filing of such motion, or the expiration of the time allowed therefor, or express waiver of the right to file, the jurisdictional statement and the motion, if any, shall be distributed by the clerk to the court for its consideration.

4. Briefs opposing motions to dismiss or affirm may be filed, but distribution of the jurisdictional statement and consideration thereof by this court will not be delayed pending the filing of such briefs. Forty copies of such briefs prepared in accordance with Rule 39 and served as prescribed by Rule 33 shall be filed.

5. Any party may file a supplemental brief at any time while a jurisdictional statement is pending calling attention to new cases or legislation or other intervening matter not available at the time of his last filing.

6. After consideration of the papers distributed pursuant to this rule, the court will enter an appropriate order. If such order notes probable jurisdiction, or postpones consideration of the question of jurisdiction to the hearing of the case on the merits, the case shall stand for argument. If the record has not previously been filed, the clerk of this court shall request the clerk of the court possessed of the record to certify it and transmit it to this court. If consideration of the question of jurisdiction is postponed, counsel should address themselves, at the outset of their briefs and oral argument, to the question of jurisdiction.

(As amended Nov. 22, 1971.)

CROSS REFERENCES

Advancement or postponement of cases by motion, see rule 43.

### Rule 17. Use of single appendix

After the court has noted or postponed jurisdiction any portion of the record to which the parties wish to direct the court's particular attention shall be printed in a single appendix prepared by the appellant under the procedures provided in Rule 36, but the fact that any part of the record has not been printed shall not prevent the parties or the court from relying on it.

#### CROSS REFERENCES

Clerk of Supreme Court, permission to remove records, see rule 1.

#### FEDERAL RULES OF APPELLATE PROCEDURE

Record on appeal, see rule 10, this Appendix.

### Rule 18. Supersedeas on appeal

1. Whenever an appellant entitled thereto desires a stay on appeal, he may present for approval to a judge of the court whose decision is sought to be reviewed, or to such court when action by that court is required by law, or, subject to paragraph 2 hereof, to a justice of this court, a motion to stay the enforcement of the judgment appealed from, with which, if the stay is to act as a supersedeas, shall be tendered a supersedeas bond which shall have such surety or sureties as said judge, court, or justice may require. The bond shall be conditioned for the satisfaction of the judgment in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest, and damages as this court may adjudge and award. When the judgment is for the recovery of money not otherwise secured, the amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on the appeal, interest, and damages for delay, unless the judge, court, or justice after notice and hearing and for good cause shown fixes a different amount or orders security other than the bond. When the judgment determines the disposition of the property in controversy as in real actions, replevin, and actions to foreclose mortgages or when such property is in the custody of the marshall or when the proceeds of such property or a bond for its value is in the custody or control of any court wherein were had the proceedings appealed from, the amount of the supersedeas bond shall be fixed at such sum only as will secure the amount recovered for the use and detention of the property, the costs of the action, costs on appeal, interest, and damages for delay.

2. Application hereunder to a justice of this court will normally not be entertained unless application therefor has first been made to a judge of the court rendering the decision appealed from, or to such court, or unless the security offered below has been disapproved by such judge or court. All such applications are governed by Rules 50 and 51.

## PART V—JURISDICTION ON WRIT OF CERTIORARI

### Rule 19. Considerations governing review on certiorari

1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, or of any other court whose determinations are by law reviewable on writ of certiorari.

#### CROSS REFERENCES

Court of Claims cases, review of, see section 1255 of this title.

Court of Customs and Patent Appeals, review of, see section 1256 of this title.

### Rule 20. Certiorari to a court of appeals before judgment

A writ of certiorari to review a case pending in a court of appeals, before judgment is given in such court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court. See *United States* v. *Bankers Trust Co.*, 294 U.S. 240; *Railroad Retirement Board* v. *Alton R. Co.*, 295 U.S. 330; *Rickert Rice Mills* v. *Fontenot*, 297 U.S. 110; *Carter* v. *Carter Coal Co.*, 298 U.S. 238; *Ex parte Quirin*, 317 U.S. 1; *United States* v. *United Mine Workers*, 330 U.S. 258; *Youngstown Co.* v. *Sawyer*, 343 U.S. 579.

### Rule 21. Review on certiorari—how sought—parties

1. A party intending to file a petition for certiorari may, prior to filing the case in this court or at any time thereafter prior to action by this court on the petition, request the clerk of the court possessed of the record to certify it, or any part of it, and to provide for its transmission to this court, but the filing of the record in this court is not a requisite for docketing the petition. If the petitioner has not done so, the respondent may request such clerk to certify

and transmit the record or any part of it. Thereafter, the clerk of this court or any party to the case may request that additional parts of the record be certified and transmitted to this court. A copy of all requests for certification and transmission shall be sent to all parties to the proceeding.

2. When requested to certify and transmit the record, or any part of it, the clerk of the court possessed of the record shall number the documents to be certified and shall transmit with the record a numbered list of the documents, identifying each with reasonable definiteness. If the record has been printed for the use of the court below, such printed record plus the proceedings in the court below may be certified as the record unless one of the parties or the clerk of this court otherwise requests. The provisions of Rule 12(3) with respect to original papers shall apply to all cases sought to be reviewed on writ of certiorari.

3. Counsel for the petitioner shall file with the clerk of this court, with proof of service as provided by Rule 33, forty copies of a petition which shall comply in all respects with Rule 23 and shall enter his appearance and pay the docket fee. The case will then be placed on the docket. It shall be the duty of counsel for the petitioner to notify all respondents, on a form supplied by the clerk, of the date of filing and of the docket number of the case. Such notice shall be served as required by Rule 33.

4. All parties to the proceeding in the court whose judgment is sought to be reviewed shall be deemed parties in this court, unless the petitioner shall notify the clerk of this court in writing of his belief that one or more of the parties below have no interest in the outcome of the petition. A copy of such notice shall be served on all parties to the proceeding below and a party noted as no longer interested may remain a party here by notifying the clerk, with service on the other parties, that he has an interest in the petition. All parties other than the petitioner shall be respondents, but respondents who support the position of the petitioner shall meet the time schedule for filing papers which is provided for the petitioner, except that any response by such respondents to the petition shall be filed as promptly as possible after receipt of the petition.

### Rule 22. Review on certiorari—time for petitioning

1. A petition for writ of certiorari to review the judgment of a state court of last resort in a criminal case shall be deemed in time when it is filed with the clerk within ninety days after the entry of such judgment. A justice of this court, for good cause shown, may extend the time for applying for a writ of certiorari in such cases for a period not exceeding sixty days.

2. A petition for writ of certiorari to review the judgment of a court of appeals in a criminal case shall be deemed in time when it is filed with the clerk within thirty days after the entry of such judgment. A justice of this court, for good cause shown, may extend the time for applying for a writ of certiorari in such cases for a period not exceeding thirty days. If the original judgment in such a case was entered in a district court in Alaska, Guam, Hawaii, Puerto Rico, the Virgin Islands, or the Canal Zone, the petition shall be deemed filed in time if mailed by airmail under a postmark dated within the thirty-day period or due extension thereof.

3. A petition for writ of certiorari in all other cases shall be deemed in time when it is filed with the clerk within the time prescribed by law.

4. An application for extension of time within which to file a petition for writ of certiorari must set out, as in a petition for certiorari (see Rule 23(1), subparagraphs (b) and (f)), the grounds on which the jurisdiction of this court is invoked, must identify the judgment sought to be reviewed and have appended thereto a copy of the opinion, and must set forth with specificity the reasons why the granting of an extension of time is deemed justified. For the time and manner of presenting an application for extension of time within which to file a petition for writ of certiorari, see Rules 34, 35(2), and 50. Such applications are not favored.

### Rule 23. The petition for certiorari

1. The petition for writ of certiorari shall contain in the order here indicated—

(a) A reference to the official and unofficial reports of the opinions delivered in the courts below, if any, and if reported. Any such opinions shall be appended as provided in subparagraph (i) hereof.

(b) A concise statement of the grounds on which the jurisdiction of this court is invoked, showing:

(i) The date of the judgment or decree sought to be reviewed, and the time of its entry;

(ii) The date of any order respecting a rehearing, and the date and terms of any order granting an extension of time within which to petition for certiorari; and

(iii) The statutory provision believed to confer on this court jurisdiction to review the judgment or decree in question by writ of certiorari.

(c) The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. Only the questions set forth in the petition or fairly comprised therein will be considered by the court.

(d) The constitutional provisions, treaties, statutes, ordinances, or regulations which the case involves, setting them out verbatim, and citing the volume and page where they may be found in the official edition. If the provisions involved are lengthy, their citation alone will suffice at this point, and their pertinent text shall be set forth in an appendix.

(e) A concise statement of the case containing the facts material to the consideration of the questions presented.

(f) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari.

Where the portions of the record relied upon under this subparagraph are voluminous, then they shall be included in an appendix to the petition, which may, if more convenient, be separately presented.

(g) If review of the judgment of a federal court is sought, the statement of the case shall also show the basis for federal jurisdiction in the court of first instance.

(h) A direct and concise argument amplifying the reasons relied on for the allowance of the writ. See Rule 19.

(i) There shall be appended to the petition a copy of any opinions delivered upon the rendering of the judgment or decree sought to be reviewed, including all opinions of courts or administrative agencies in the case, and, if reference thereto is necessary to ascertain the grounds of the judgment or decree, opinions in companion cases. The opinions shall include the caption showing the name of the court or agency issuing the same and the title and numbers of the case and the date of their entry. If whatever is required by this paragraph to be appended to the petition is voluminous, it may, if more convenient, be separately presented.

(j) If review of the judgment or decree of a state court is sought, there shall also be appended to the petition a copy of the judgment or decree in question and any order on rehearing; and, if review of the ment or decree of a federal court is sought, there shall similarly be appended a copy of such judgment or decree and any order on rehearing, which may however be limited to the portions thereof sought to be reviewed. The judgments, decrees, or orders on rehearing shall include the caption showing the name of the court issuing the same, the title and number of the case, and the date of entry of such judgment, decree and order.

2. The petition for writ of certiorari shall be printed in conformity with Rule 39.

3. All contentions in support of a petition for writ of certiorari shall be set forth in the body of the petition, as provided in subparagraph (h) of paragraph 1 of this rule. No separate brief in support of a petition for writ of certiorari will be received, and the clerk will refuse to file any petition for writ of certiorari to which is annexed or appended any supporting brief.

4. The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition.

5. Where several cases are sought to be reviewed on certiorari to the same court that involve identical or closely related questions, it shall suffice to file a single petition for writ of certiorari covering all the cases.

### Rule 24. Brief in opposition—reply—supplemental briefs

1. Counsel for the respondent shall have thirty days (unless enlarged by the court or a justice thereof, or by the clerk under the provisions of paragraph 5 of Rule 34), after receipt of a petition, within which to file forty printed copies of an opposing brief disclosing any matter or ground why the cause should not be reviewed by this court. See Rule 19. Such brief in opposition shall comply with Rule 39 and with the requirements of Rule 40 governing a respondent's brief, and shall be served as prescribed by Rule 33. In cases where the United States or any agency, officer or employee thereof is the respondent, the respondent shall have an additional twenty days to file the said opposing brief.

2. No motion by a respondent to dismiss a petition for writ of certiorari will be received. Objections to the jurisdiction of the court to grant writs of certiorari may be included in briefs in opposition to petitions therefor.

3. Upon the expiration of the period for filing the respondent's brief, or upon an express waiver of the right to file, or upon the actual filing of such brief in a shorter time, the petition and brief, if any, shall be distributed by the clerk to the court for its consideration.

4. Reply briefs addressed to arguments first raised in the briefs in opposition may be filed, but distribution under paragraph 3 hereof will not be delayed pending the filing of such briefs.

5. Any party may file a supplemental brief at any time while a petition for a writ of certiorari is pending calling attention to new cases or legislation or other intervening matter not available at the time of his last filing.

(As amended Nov. 22, 1971.)

### Rule 25. Order granting or denying certiorari

1. Whenever a petition for writ of certiorari to review a decision of any court is granted, the clerk shall enter an order to that effect, and shall forthwith notify the court below and counsel of record of the granting of the petition. If the record has not previously been filed, the clerk of this court shall request the clerk of the court possessed of the record to certify it and transmit it to this court. A formal writ shall not issue unless specially directed.

2. Whenever application for a writ of certiorari to review a decision of any court is denied, the clerk shall enter an order to that effect, and shall forthwith notify the court below and counsel of record. The order of denial will not be suspended pending disposition of a petition for rehearing except by order of the court or of a justice thereof.

#### CROSS REFERENCES

Determination by Supreme Court, remand, see section 2106 of this title.

### Rule 26. Use of single appendix

After certiorari has been granted any portion of the record to which the parties wish to direct the court's particular attention shall be printed in a single appendix prepared by the petitioner under the procedures provided in Rule 36, but the fact that any part of the record has not been printed shall not prevent the parties or the court from relying on it.

#### CROSS REFERENCES

Clerk of Supreme Court, permission to remove records, see rule 1.

Printing and binding for Supreme Court, pamphlets, see section 676 of this title.

Supreme Court reports and digests, printing, binding and distribution, see section 411 of this title.

### Rule 27. Stay pending review on certiorari

Applications pursuant to 28 U.S.C. § 2101(f) to a justice of this court will normally not be entertained unless application for a stay has first been made to a judge of the court rendering the decision sought to be reviewed, or to such court, or unless the security offered below has been disapproved by such judge or court. All such applications are governed by Rules 50 and 51.

## PART VI—JURISDICTION OF CERTIFIED QUESTIONS

### Rule 28. Questions certified by a court of appeals or by the Court of Claims

1. Where a court of appeals or the Court of Claims shall certify to this court a question or proposition of law, concerning which it desires instruction for the proper decision of a cause, the certificate shall contain a statement of the nature of the cause and of the facts on which such question or proposition of law arises. Questions of fact cannot be certified. Only questions or propositions of law may be certified, and they must be distinct and definite.

2. If in a cause certified by a court of appeals it appears that there is special reason therefor, this court may on application, or on its own motion, require that the entire record be sent up, so that it may consider and decide the entire matter in controversy.

#### CROSS REFERENCES

Certified questions from—
  Court of Appeals, see section 1254 of this title.
  Court of Claims, see section 1255 of this title.

### Rule 29. Procedure in certified cases

1. When a case is certified, the certificate itself constitutes the record. The clerk will upon receipt thereof from the court below notify the appellant in the court of appeals, or the plaintiff in the Court of Claims, who shall thereupon pay the docket fee, after which the case will be placed on the docket. If the appellant or plaintiff fails to pay the fee, the appellee or defendant may do so. The appearance of counsel for the party paying the fee shall be entered at the time of payment.

2. After docketing, the certificate shall be submitted to the court for a preliminary examination to determine whether the case shall be set for argument or whether the certificate will be dismissed.

3. Any portion of the record to which the parties wish to direct the court's particular attention shall be printed in a single appendix prepared by the appellant or plaintiff in the court below under the procedures provided in Rule 36, but the fact that any part of the record has not been printed shall not prevent the parties or the court from relying on it.

4. Briefs on the merits in cases on certificates shall comply with Rules 39, 40, and 41, except that the brief of the party who was appellant or plaintiff below shall be filed within forty-five days of the order setting the case down for argument.

## PART VII—JURISDICTION TO ISSUE EXTRAORDINARY WRITS

### Rule 30. Considerations governing issuance of extraordinary writs

The issuance by the court of any writ authorized by 28 U.S.C. § 1651(a) is not a matter of right but of sound discretion sparingly exercised. See the following cases, which are cited by way of illustration only: *Ex parte Bollman and Swartwout*, 4 Cranch 75; *Ex parte Peru*, 318 U.S. 578; *Ex parte Albernathy*, 320 U.S. 219, *Ex parte Hawk*, 321 U.S. 114; *House* v. *Mayo*, 324 U.S. 42; *U.S. Alkali Export Assn.* v. *United States*, 325 U.S. 196; *DeBeers Consol. Mines* v. *United States*, 325 U.S. 212; *Ex parte Betz*, 329 U.S. 672; *Ex parte Fahey*, 332 U.S. 258.

### Rule 31. Procedure on applications for extraordinary writs

1. The petition in any proceeding seeking the issuance of a writ by this court authorized by 28 U.S.C. § 1651(a) or 28 U.S.C. § 2241 shall be prefaced by a motion for leave to file such petition, and both shall be printed. All contentions in support of the petition shall be included in the petition. The case will be placed upon the docket when forty copies of the printed papers, with proof of service as prescribed by Rule 33 (subject to paragraph 5 of this rule), are filed with the clerk and the docket fee is paid. The appearance of counsel for the petitioner must be entered at this time.

2. If the petition seeks issuance of a common law writ of certiorari under 28 U.S.C. § 1651(a), there may also be filed, at the time of docketing, a certified copy of the record, including all proceedings in the court to which the writ is sought to be directed. However, the filing of such record is not required. The petition shall, except for the addition of the motion for leave to file, follow as far as may be the form for a petition for certiorari prescribed by Rule 23, and shall set forth with particularity why the relief sought is not available in any other court, or cannot be had through other appellate processes. The respondent may, within thirty days after receipt of the motion and petition, file forty printed copies of a brief in opposition, as provided in Rule 24.

3. If the petition seeks issuance of a writ of prohibition, a writ of mandamus, or both in the alternative, it shall set forth with particularity why the relief sought is not available in any other court, and there shall be appended to such petition a copy of the judgment or order in respect of which the writ is sought, including a copy of any opinion rendered in that connection, and such other papers as may be essential to an understanding of the petition. The petition shall follow, insofar as applicable, the form for the petition for writ of certiorari prescribed by Rule 23. The motion and petition shall be served on the judge or judges to whom the writ is sought to be directed, and shall also be served

on every other party to the proceeding in respect of which relief is desired. The judge or judges, and the other parties, may, within thirty days after receipt of the motion and petition, file forty printed copies of a brief or briefs in opposition thereto, with proof of service. If the judge or judges concerned do not desire to contest the motion and petition, they may so advise the clerk and all parties by letter. All parties, other than the judge or judges, who are served pursuant to this paragraph, shall also be deemed to be respondents for all purposes in in the proceeding in this court.

4. When briefs in opposition under paragraphs 2 and 3 of this rule have been filed, or when the time within which they may be filed has expired, or upon an express waiver of the right to file, the motion, petition, and briefs shall be distributed to the court by the clerk.

5. If the petition seeks issuance of an original writ of habeas corpus, it shall comply with the requirements of 28 U.S.C. § 2242, and in particular with the last paragraph thereof; and, if the relief sought is from the judgment of a state court, shall specifically set forth how and wherein the petitioner has exhausted his remedies in the state courts. See *Ex parte Abernathy*, 320 U.S. 219; *Ex parte Hawk*, 321 U.S. 114. Proceedings under this paragraph will be *ex parte*, unless the court requires the respondent to show cause why leave to file the petition for a writ of habeas corpus should not be granted. Neither refusal of leave to file, without more, nor an order of transfer under authority of 28 U.S.C. § 2241(b), is an adjudication on the merits, and the former action is to be taken as without prejudice to a further application to any other court for the relief sought.

6. If the court orders the cause set down for argument, the clerk will notify the parties whether additional briefs are required, when they must be filed, how much time has been allotted for oral argument, and, if the case involves a petition for common law certiorari, that the parties shall proceed to print an appendix pursuant to Rule 36.

### Rule 32. Certiorari to correct diminution of record abolished

The writ of certiorari to correct diminution of the record is abolished.

## PART VIII—PRACTICE

### Rule 33. Service and special rule where constitutionality of Act of Congress in issue

1. Whenever any pleading, motion, notice, brief or other document is required by these rules to be served, such service may be made personally or by mail on each adverse party. If the document to be served is printed, three copies shall be served on each other party separately represented in the proceeding. If the document is not printed, service of a single copy on each other party separately represented shall suffice. If personal, service shall consist of delivery, at the office of counsel of record, to counsel or a clerk therein. If by mail, it shall consist of depositing the same in a United States post office or mail box, with first class postage prepaid, addressed to counsel of record at his post office address. Where the person on whom service is to be made resides 500 miles or more from the person effecting service, such mailing must be made with air mail postage prepaid.

2. (a) If the United States or an officer or agency thereof is a party, service of all briefs, pleadings, notices and papers shall, notwithstanding the foregoing paragraph, be made upon the Solicitor General, Department of Justice, Washington, D.C. 20530. Where an agency of the United States authorized by law to appear in its own behalf is a party in addition to the United States, such agency shall also be served, in addition to the Solicitor General, in every case.

(b) In any proceeding in whatever court arising wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question and the United States or any agency, officer or employee thereof is not a party, all initial pleadings, motions or papers in this court shall recite that 28 U.S.C. § 2403 may be applicable and shall be served upon the Solicitor General, Department of Justice, Washington, D.C. 20530. In proceedings from any court of the United States as defined by 28 U.S.C. § 451, such initial pleading, motion or paper shall state whether or not any such court has, pursuant to 28 U.S.C. § 2403, certified to the Attorney General the fact that the constitutionality of such Act of Congress was drawn in question.

3. Whenever proof of service is required by these rules, it must be stated that all parties required to be served have been served and such service may be shown, either by indorsement on the document served or by separate instrument, by any one of the methods set forth below; and it is not necessary that service on each party required to be served be effected in the same manner or evidenced by the same proof:

(a) By an acknowledgment of service of the document in question, signed by counsel of record for the party served.

(b) By a certificate of service of the document in question, reciting the fact and circumstances of service in compliance with the appropriate paragraph of this rule, such certificate to be signed by a member of the bar of this court representing the party in behalf of whom such service has been effected. If counsel certifying to such service has not up to that time entered his appearance in this court in respect of the cause in which such service is made, his appearance shall accompany the certificate of service if the same is to be filed in this court.

(c) By an affidavit of service of the document in question, reciting the fact and circumstances of service in compliance with the appropriate paragraph of this rule, whenever such service is effected by any person not a member of the bar of this court.

4. Whenever proof of service is required by these rules, it must accompany or be indorsed upon the document in question at the time such document is presented to the clerk for filing. Any document filed with the clerk by or on behalf of counsel of record whose appearance has not previously been entered must be accompanied by an entry of appearance.

### Cross References

Seal and teste of process, see section 1691 of this title.

## Rule 34. Computation and enlargement of time

1. In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither a Sunday nor a holiday. A half holiday shall be considered as other days and not as a holiday.

2. Whenever any justice of this court or the clerk is empowered by law or under any provision of these rules to extend the time within which a party may petition for a writ of certiorari or docket an appeal or file any brief or paper, an application seeking such extension must be presented to the clerk within the period sought to be extended. Applications for extension of time to file petitions for certiorari or to docket appeals shall be submitted at least ten days before the expiration of the period sought to be extended and will not be granted except in the most extraordinary circumstances if filed during the last ten days of such period.

3. All applications seeking an extension of time within which a party may petition for a writ of certiorari or docket an appeal or file any brief or paper must be presented and served upon all other parties as provided in Rule 50, but such applications for extension of time, if once denied, may not be renewed before another justice after expiration of the period sought to be extended.

4. Whenever a justice or the clerk has granted an extension of time within which a party may petition for a writ of certiorari or docket an appeal or file any brief or paper it shall be the duty of the party to whom such extension is granted to give all other parties to the proceeding prompt notice thereof.

5. All applications for extensions of time to file briefs, motions, appendices or other papers, to designate parts of records for printing in appendices, or otherwise to comply with time limits provided by these rules, except applications for extensions of time to file petitions for certiorari, to docket appeals, to petition for rehearings or to issue mandates shall in the first instance be acted upon by the clerk, whether addressed to him, to the court or to a justice. Any party aggrieved by the clerk's action on such application may request that it be submitted to a justice or to the court.

### Federal Rules of Civil Procedure

Time, see rule 6, this Appendix.

### Federal Rules of Criminal Procedure

Time, see rule 45, Title 18, Appendix, Crimes and Criminal Procedure.

## Rule 35. Motions

1. Every motion to the court shall state clearly its object and the facts on which it is based. A brief in support of the motion (other than motions under Rule 31) may be filed therewith.

2. Motions and applications addressed to a single justice need not be printed, and only a typewritten original need be filed. Motions in actions within the court's original jurisdiction shall be printed, and sixty copies shall be filed. Motions to dismiss or affirm made under Rule 16, motions to bring up the entire record under Rule 28(2), motions for permission to file a brief *amicus curiae*, any motions the granting of which would be dispositive of the entire case or would affect the final judgment to be entered (other than a motion to docket or dismiss under Rule 14, or a motion for voluntary dismissal under Rule 60), and any motions to the court accompanied by a supporting brief, shall likewise be printed, and forty copies of the motion and of the brief, if any, shall be filed. All other motions to the court need not be printed, and it shall be sufficient to file a typewritten original and nine legible typewritten copies; but the court may by subsequent order require any such motion to be printed by the moving party.

3. Motions to the court shall be filed with the clerk, with proof of service unless *ex parte* in nature. For applications and motions addressed to a single justice, see Rule 50. No motion shall be presented in open court, other than a motion for admission to the bar, except when the proceeding to which it refers is being argued. Oral argument will not be heard on any motion unless the court specially assigns it therefor.

4. Action by the court or a justice on contested motions will ordinarily, but not always, be withheld to permit responses by opposing parties, but such responses shall be made as promptly as possible considering the nature of the relief asked and any asserted need for emergency action, and, in any event, shall be made within ten days unless otherwise ordered by the court or a justice, or by the clerk under the provisions of paragraph 5 of Rule 34. Responses to printed motions shall be printed if time permits.

5. Printed motions must comply with Rule 39 with respect to format, signatures, and index. Typewritten motions must similarly comply with Rule 47.

### Cross References

Advancement or postponement of cases on motion, see rule 43.

Motion to dismiss or affirm, see rule 16.

## Rule 36. Printing of appendices

1. In the absence of a stipulation pursuant to paragraph 4 below, the appellant or petitioner shall, within forty-five days after the order noting or postponing jurisdiction or of the order granting the writ of certiorari; prepare and file forty copies of an appendix to the briefs which shall contain: (1) the relevant docket entries in the proceeding below; (2) any relevant pleading, charge finding or opinion; (3) the judgment, order or decision in question; and (4) any other parts of the record to which the parties wish to direct the court's particular attention. At the same time or promptly thereafter the appellant or petitioner shall file with the clerk a statement of the costs of preparing the appendix. The appellant or petitioner shall

serve at least three copies of the appendix and a copy of the statement of costs on each of the other parties to the proceeding.

2. The parties are encouraged to agree as to the contents of the appendix. In the absence of agreement, not later than ten days after the order noting or postponing jurisdiction or of the order granting the writ of certiorari, the appellant or petitioner shall serve on the appellee or respondent a designation of the parts of the record which he intends to include in the appendix and a statement of the issues which he intends to present for review. If in the judgment of the appellee or respondent the parts of the record designated by the appellant or petitioner are not sufficient, the appellee or respondent shall, within ten days after receipt of the designation, serve upon the appellant or petitioner a designation of additional parts to be included in the appendix. The appellant or petitioner shall include the parts thus designated in the appendix. In designating parts of the record for inclusion in the appendix, the parties shall have regard for the fact that the record on file with the clerk is always available to the court for reference and examination and shall not engage in unnecessary designation.

3. Unless the parties otherwise agree, the cost of producing the appendix shall initially be paid by the appellant or petitioner, but if the appellant or petitioner considers that parts of the record designated by the appellee or respondent for inclusion are unnecessary for the determination of the issues presented he may so advise the appellee or respondent and the appellee or respondent shall advance the cost of including such parts unless the court or a justice by appropriate order fixes the initial allocation of the expense of printing the appendix. The cost of producing the appendix shall be taxed as costs in the case, but if either party shall cause matter to be included in the appendix unnecessarily the court may impose the cost of producing such parts on the party.

4. If the parties shall so stipulate, or the court shall so order, preparation of the appendix may be deferred until after the briefs have been filed, and the appendix may be filed fourteen days after service of the brief of the appellee or respondent, or at least twenty days before the case is set for argument, whichever is later. If the preparation and filing of the appendix are thus deferred, the provisions of paragraphs 1, 2, and 3 of this rule shall apply, except that the designations referred to therein shall be made by each party at the time his brief is served, and a statement of the issues presented shall be unnecessary.

5. If the deferred appendix authorized by paragraph 4 of this rule is employed, references in the briefs to the record may be to the pages of the parts of the record involved, in which event the original paging of each part of the record shall be indicated in the appendix by placing in brackets the number of each page at the place in the appendix where that page begins. Or if a party desires to refer in his brief directly to pages of the appendix, he may serve and file typewritten or page proof copies of his brief within the time required by Rule 41, with appropriate references to the pages of the parts of the record involved. In that event, within ten days after the appendix is filed he shall serve and file copies of the brief in the form prescribed by Rule 39 containing references to the pages of the appendix in place of or in addition to the initial references to the pages of the parts of the record involved. No other changes may be made in the brief as initially served and filed, except that typographical errors may be corrected.

6. At the beginning of the appendix there shall be inserted a list of the parts of the record which it contains in the order in which the parts are set out therein, with references to the pages of the appendix at which each part begins. The relevant docket entries shall be set out following the list of contents. Thereafter, other parts of the record shall be set out in chronological order. When matter contained in the reporter's transcript of proceedings is set out in the appendix, the page of the transcript at which such matter may be found shall be indicated in brackets immediately before the matter which is set out. Omissions in the text of papers or of the transcript must be indicated by asterisks. Immaterial formal matters (captions, subscriptions, acknowledgments, etc.) shall be omitted. A question and its answer may be contained in a single paragraph.

7. Exhibits designated for inclusion in the appendix may be contained in a separate volume, or volumes, suitably indexed. The transcript of a proceeding before an administrative agency, board, commission or officer used in an action in the district court shall be regarded as an exhibit for the purpose of this paragraph.

8. The court may by order dispense with the requirement of an appendix and may permit cases to be heard on the original record, with such copies of the record, or relevant parts thereof, as the court may require.

9. For good cause shown the time limits specified in this rule may be shortened or enlarged by the court, by a justice thereof, or by the clerk under the provisions of paragraph 5 of Rule 34.

### CROSS REFERENCES

Clerk of Supreme Court, permission to remove records, see rule 1.

Printing and binding for Supreme Court, pamphlets, see section 676 of this title.

Supreme Court reports and digests, printing, binding and distribution, see section 411 of this title.

### Rule 37. Translations

Whenever any record transmitted to this court shall contain any document, paper, testimony, or other proceedings in a foreign language, without a translation of such document, paper, testimony, or other proceedings, made under the authority of the lower court, or admitted to be correct, the case shall be reported by the clerk, to the end that this court may order that a translation be supplied and, if necessary, printed as a part of the appendix.

### Rule 38. Models, diagrams, and exhibits of material

1. Models, diagrams, and exhibits of material forming part of the evidence taken in a case, and brought up to this court for its inspection, shall be placed in the custody of the clerk at

least one week before the case is heard or submitted.

2. All such models, diagrams, and exhibits of material placed in the custody of the clerk must be taken away by the parties within forty days after the case is decided. When this is not done, it shall be the duty of the clerk to notify counsel to remove the articles forthwith; and if they are not removed within a reasonable time after such notice, the clerk shall destroy them, or make such other disposition of them as to him may seem best.

### Rule 39. Form of appendices, petitions, briefs, etc.

1. All appendices, petitions, motions, and briefs, printed for the use of the court must be in such form and size that they can be conveniently bound together, so as to make an ordinary octavo volume, having pages 6⅛ by 9¼ inches and type matter 4⅛ by 7⅛ inches, except that appendices in patent cases may be printed in such size as is necessary to utilize copies of patent documents. They and all quotations contained therein, and the matter appearing on the covers, must be printed in clear type (never smaller than 11-point type) adequately leaded; and the paper must be opaque and unglazed. If footnotes are included, they may not be printed in type smaller than 9-point.

2. All printed documents presented to the court, other than appendices, must bear on the cover the name and post office address of the member of the bar of this court who is counsel of record for the party concerned, and upon whom service is to be made. The individual names of other counsel and, if desired, their post office addresses, may be added. The body of the document shall at its close bear the printed names of counsel of record and of such other individual counsel as may be desired. One copy of every printed motion filed with the clerk (other than a motion to dismiss or affirm under Rule 16) must in addition bear, at the appropriate place in the body thereof, the manuscript signature of counsel of record.

3. All printed documents presented to the court other than appendices, which in this respect are governed by Rule 36, shall, unless they are less than ten pages in length, be preceded by a subject index of the matter contained therein, with page references, and a table of the cases (alphabetically arranged), text books and statutes cited, with references to the pages where they are cited.

4. Printing, as the term is used in these rules, shall include any process capable of producing a clear black image on white paper but shall not include ordinary carbon copies. If papers are filed in a form which is not clearly legible, the clerk will require that new copies be substituted, but the filing shall not thereby be deemed untimely.

### Rule 40. Briefs—in general

1. Briefs of an appellant or petitioner on the merits shall be printed as prescribed in Rule 39, and shall contain in the order here indicated—

(a) A reference to the official and unofficial reports of the opinions delivered in the courts below, if there were such and they have been reported.

(b) A concise statement of the grounds on which the jurisdiction of this court is invoked, with citation to the statutory provision and to the time factors upon which such jurisdiction rests.

(c) The constitutional provisions, treaties, statutes, ordinances and regulations which the case involves, setting them out verbatim, and citing the volume and page where they may be found in the official edition. If the provisions involved are lengthy, their citation alone will suffice at this point, and their pertinent text shall be set forth in an appendix.

(d)(1) The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein.

(2) The phrasing of the questions presented need not be identical with that set forth in the jurisdictional statement or the petition for certiorari, but the brief may not raise additional questions or change the substance of the questions already presented in those documents. Questions not presented according to this paragraph will be disregarded, save as the court, at its option, may notice a plain error not presented.

(e) A concise statement of the case containing all that is material to the consideration of the questions presented, with appropriate references to the appendix, e.g., (A. 12) or to the record, e.g., (R. 12).

(f) In briefs on the merits, or in any briefs wherein the argument portion extends beyond twenty printed pages, a summary of argument, suitably paragraphed, which should be a succinct, but accurate and clear, condensation of the argument actually made in the body of the brief. It should not be a mere repetition of the headings under which the argument is arranged.

(g) The argument, exhibiting clearly the points of fact and of law being presented, citing the authorities and statutes relied upon.

(h) A conclusion, specifying with particularity the relief to which the party believes himself entitled.

2. Whenever, in the brief of any party, a reference is made to the appendix or the record, it must be accompanied by the appropriate page number. When the reference is to a part of the evidence, the page citation must be specific. If the reference is to an exhibit, both the page number at which the exhibit appears and at which it was offered in evidence must be indicated, e.g., (Pl. Ex. 14; R. 199, 2134).

3. The brief filed by an appellee or respondent shall conform to the foregoing requirements, except that no statement of the case need be made beyond what may be deemed necessary in correcting any inaccuracy or omission in the statement of the other side, and except that items (a), (b), (c) and (d) need not be included unless the appellee or respondent is dissatisfied with their presentation by the other side.

4. Reply briefs shall conform to such portions of this rule as are applicable to the briefs of an appellee or respondent, but need not contain a summary of argument, regardless of their

length, if appropriately divided by topical headings.

5. Briefs must be compact, logically arranged with proper headings, concise, and free from burdensome, irrelevant, immaterial, and scandalous matter. Briefs not complying with this paragraph may be disregarded and stricken by the court.

### Rule 41. Briefs on the merits—time for filing

1. Counsel for the appellant or petitioner shall file with the clerk forty copies of his printed brief on the merits, within forty-five days of the order noting or postponing probable jurisdiction or of the order granting the writ or certiorari.

2. Forty printed copies of the brief of the appellee or respondent shall be filed with the clerk within thirty days after the receipt by him of the brief filed by the appellant or petitioner.

3. Reply briefs will be received up to three days before the case is called for hearing; but, since later filing may delay consideration of the case, only by leave of court thereafter.

4. The periods of time stated in paragraphs 1 and 2 of this rule may be enlarged as provided in Rule 34, upon motion duly made; or, if a case is advanced for hearing, the time for filing briefs may be abridged as circumstances shall require, pursuant to order of the court on its own or a party's motion.

5. Whenever a party desires to present late authorities, newly enacted legislation, or other intervening matters that were not available in time to have been included in his brief in chief, he may file forty printed copies of a supplemental brief, restricted to such new matter and otherwise in conformity with these rules, up to the time the case is called for hearing, or, by leave of court, thereafter.

6. No brief will be received through the clerk or otherwise after a case has been argued or submitted, except upon special leave.

7. No brief will be received by the clerk unless the same shall be accompanied by proof of service as required by Rule 33.

### Rule 42. Briefs of an amicus curiae

1. A brief of an *amicus curiae* prior to consideration of the jurisdictional statement or of the petition for writ of certiorari, filed with the consent of the parties, or a motion for leave to file when consent is refused, may be filed only if submitted a reasonable time prior to the consideration of the jurisdictional statement or of the petition for writ of certiorari. Such motions are not favored. Distribution to the court under the applicable rules of the jurisdictional statement or of the petition for writ of certiorari, and its consideration thereof, will not be delayed pending the receipt of such brief or the filing of such motion.

2. A brief of an *amicus curiae* in cases before the court on the merits may be filed only after order of the court or when accompanied by written consent of all parties to the case and presented within the time allowed for the filing of the brief of the party supported.

3. When consent to the filing of a brief of an *amicus curiae* is refused by a party to the case, a motion for leave to file may timely be presented to the court. It shall concisely state the nature of the applicant's interest, set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties, and their relevancy to the disposition of the case; and it shall in no event exceed five printed pages in length. A party served with such motion may seasonably file an objection concisely stating the reasons for withholding consent.

4. Consent to the filing of a brief of an *amicus curiae* need not be had when the brief is presented for the United States sponsored by the Solicitor General; for any agency of the United States authorized by law to appear in its own behalf, sponsored by its appropriate legal representative; for a State, Territory, or Commonwealth sponsored by its attorney general; or for a political subdivision of a State, Territory, or Commonwealth sponsored by the authorized law officer thereof.

5. All briefs, motions, and responses filed under this rule shall be printed; shall comply with the applicable provisions of Rules 35, 39, and 40 (except that it shall be sufficient to set forth the interest of the *amicus curiae*, the argument, the summary of argument if required by Rule 40(1)(f), and the conclusion); and shall be accompanied by proof of service as required by Rule 33.

### Rule 43. Call and order of the calendar

1. The clerk shall, at the commencement of each term, prepare a calendar, consisting of the cases that have become or will be available for argument, which shall be arranged in the first instance in the order in which they are ordered set down for argument, and which shall indicate the time allotted to each. The arrangement of cases on the calendar shall be subject to modification in the light of availability of appendices, extensions of time to file briefs, and of orders granting motions to advance or postpone or specially setting particular cases for argument. Cases will be calendared so that they will not normally be called for argument less than two weeks after the brief of the appellee or respondent has been filed. The clerk shall keep the calendar current throughout the term, adding cases as they are set down for argument, and making rearrangements as required. He shall periodically publish hearing lists in advance of each argument session, for the convenience of counsel and the information of the public.

2. Unless otherwise ordered, the court, on the second Monday of each term, will commence calling cases for argument in the order in which they stand on the calendar, and proceed from day to day during the term in the same order, except as hereinafter provided.

3. Cases will not be called until they are actually reached for argument. The clerk will seasonably advise counsel when they are required to be present in court.

4. Cases may be advanced or postponed by order of the court, upon motion duly made showing good cause therefor.

5. Two or more cases, involving the same question, may, on the court's own motion or by special permission on the motion or stipulation

of the parties, be argued together as one case, or on such terms as may be prescribed.

### Rule 44. Oral argument

1. Oral argument should undertake to emphasize and clarify the written argument appearing in the briefs theretofore filed. The court looks with disfavor on any oral argument that is read from a prepared text.

2. The appellant or petitioner shall be entitled to open and conclude the argument. But when there are cross-appeals or cross-writs of certiorari they shall be argued together as one case and in the time of one case, and the court will, by order seasonably made, advise the parties which one is to open and close.

3. Unless otherwise directed, one half hour on each side will be allowed for argument. Any request for additional time shall be presented not later than fifteen days after service of the petitioner's, or appellant's, brief on the merits by letter addressed to the clerk (copy to be sent opposing counsel), and shall set forth with specificity and consciseness why the case cannot be presented within the half hour limitation.

4. Unless additional time has been granted, one counsel only will be heard for each side, except by special permission when there are several parties on the same side. Divided arguments are not favored by the court.

5. In any case, and regardless of the number of counsel participating, a fair opening of the case shall be made by the party having the opening and closing.

6. Oral argument will not be heard on behalf of any party for whom no brief has been filed.

7. Counsel for an *amicus curiae* whose brief has been duly filed pursuant to Rule 42 may, with the consent of a party, argue orally on the side of such party, provided that neither the time nor the number of counsel permitted for oral argument on behalf of that party under the preceding paragraphs of this rule will thereby be exceeded. In the absence of such consent, argument by counsel for an *amicus curiae* may be made only by special leave of court, on motion particularly setting forth why such argument is thought to provide assistance to the court not otherwise available. Such motions, unless made on behalf of the United States or of a State, Territory, Commonwealth, or Possession, are not favored.

### Rule 45. Submission on briefs by one or both parties without oral argument

1. The court looks with disfavor on the submission of cases on briefs, without oral argument, and therefore may, notwithstanding such submission, require oral argument by the parties.

2. When a case is called and no counsel appear to present argument, but briefs have been filed, the case will be treated as having been submitted.

3. When a case is called, if a brief has been filed for only one of the parties and no counsel appears to present oral argument for either party, the case will be regarded as submitted on that brief.

### Rule 46. Joint or several appeals or petitions for writs of certiorari; summons and severance abolished

Parties interested jointly, severally, or otherwise in a judgment may join in an appeal or a petition for writ of certiorari therefrom; or, without summons and severance, any one or more of them may appeal or petition separately or any two or more of them may join in an appeal or petition.

### Rule 47. Form of typewritten papers

1. All papers specifically permitted by these rules to be presented to the court without being printed shall, subject to Rule 53(1), be typewritten or otherwise duplicated upon opaque, unglazed paper, 8½ by 13 inches in size (legal cap), and shall be stapled or bound at the upper left-hand corner. The typed matter, except quotations, must be double-spaced. When more than one original is required by any rule, the copies must be legible.

2. The original copy of all typewritten motions and applications must be signed in manuscript by the party or by counsel, but, in a cause not yet docketed, such counsel need not be a member of the bar of this court.

### Rule 48. Death, substitution, and revivor—public officers, substitution and description

1. Whenever either party shall die after filing notice of appeal to this court or filing of petition for writ of certiorari in this court, the proper representative of the deceased may appear and, upon motion, be substituted as a party to the proceeding. If such representative shall not voluntarily become a party, the other party may suggest the death on the record, and on motion obtain an order that, unless such representative shall become a party within a designated time, the party moving for such an order, if appellee or respondent, shall be entitled to have the appeal or petition for writ of certiorari dismissed or the judgment vacated for mootness, as may be appropriate; and, if the party so moving be appellant or petitioner, shall be entitled to proceed as in other cases of nonappearance by appellee or respondent. Such substitution, or, in default thereof, such suggestions, must be made within six months after the death of the party, else the case shall abate.

2. Whenever, in the case of a suggestion made as provided in paragraph 1 of this rule, the case cannot be revived in the court whose judgment is sought to be reviewed because the deceased party has no proper representative within the jurisdiction of that court, but does have a proper representative elsewhere, proceedings shall then be had as this court may direct.

3. When a public officer is a party to a proceeding here in his official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

4. When a public officer is a party in a proceeding here in his official capacity, he may be described as a party by his official title rather than by name; but the court may require his name to be added.

### Rule 49. Custody of prisoners in habeas corpus proceedings

1. Pending review of a decision in a habeas corpus proceeding commenced before a court, justice or judge of the United States for the release of a prisoner, a person having custody of the prisoner shall not transfer custody to another unless such transfer is directed in accordance with the provisions of this rule. Upon application of a custodian showing a need therefor, the court, justice or judge rendering the decision may make an order authorizing transfer and providing for the substitution of the successor custodian as a party.

2. Pending review of a decision failing or refusing to release a prisoner in such a proceeding, the prisoner may be detained in the custody from which release is sought, or in other appropriate custody, or may be enlarged upon his recognizance, with or without surety, as may appear fitting to the court or justice or judge rendering the decision, or to the court of appeals or to this court, or to a judge or justice of either court.

3. Pending review of a decision ordering the release of a prisoner in such a proceeding, the prisoner shall be enlarged upon his recognizance, with or without surety, unless the court or justice or judge rendering the decision, or the court of appeals or this court, or a judge or justice of either court, shall otherwise order.

4. An initial order respecting the custody or enlargement of the prisoner, and any recognizance or surety taken, shall govern review in the court of appeals and in this court unless for special reasons shown to the court of appeals or to this court, or to a judge or justice of either court, the order shall be modified or an independent order respecting custody, enlargement or surety shall be made.

### Rule 50. Applications to individual justices; practice in chambers

1. All motions and applications addressed to individual justices shall normally be submitted to the clerk, who will promptly transmit them to the justice concerned. If oral argument on the application is desired, request therefor shall accompany the application.

2. All motions and applications addressed to individual justices shall be accompanied by proof of service on all other parties. In urgent cases, proof of telegraphic dispatch to such parties of notice that the motion, application, or request is being made will suffice.

3. The clerk will in due course advise all counsel concerned, by means as speedy as may be appropriate, of the time and place of the hearing, if any, or, if no hearing is requested or granted, of the disposition made of the motion or application.

4. During the term, applications will be addressed to the justice duly allotted to the circuit within which the case arises. The court or the chief justice will seasonably instruct the clerk as to the distribution of applications during vacation, and whenever a circuit justice is temporarily absent or disabled.

5. A justice denying an application made to him will note his denial thereon. Thereafter, unless action on such application is by law restricted to the circuit justice, or is out of time under Rule 34(3), the party making the application may renew the same to any other justice, subject to the provisions of this rule. Except where the denial has been without prejudice, such renewed applications are not favored.

6. Any justice to whom an application for a stay or for bail is submitted may refer the same to the court for determination.

### Rule 51. Stays

1. Stays may be granted by a justice of this court as permitted by law; and writs of injuction may be granted by any justice in cases where they might be granted by the court. For supersedeas on appeal, see Rule 18; for stay pending review on certiorari, see Rule 27.

2. All applications for stays or injunctions made pursuant to this or any other rule must show whether application for the relief sought has first been made to the appropriate court or courts below, or to a judge or judges thereof, and shall be submitted as provided in Rule 50. See Rules 18(2) and 27.

3. If an application for a stay addressed to the court is received in vacation, the clerk will refer it pursuant to Rule 50(4).

### Rule 52. Fees

In pursuance of 28 U.S.C. § 1911, the fees to be charged by the clerk of this court are fixed as follows:

(a) For docketing a case on appeal (except a motion to docket and dismiss under Rule 14(3), wherein the fee is $25.00) or on petition for writ of certiorari or docketing any other proceeding, $100.00, to be increased to $150.00 in a case on appeal or writ of certiorari when oral argument is permitted.

(b) For making a copy (except a photographic reproduction) of any record or paper, and comparison thereof, 40 cents per page of 250 words of fraction thereof; for comparing for certification a copy (except a photographic reproduction) of any record or paper when such copy is furnished by the person requesting its certification, 10 cents for each page of 250 words or fraction thereof.

For a photographic reproduction and certification of any record or paper, 50 cents per page; and for comparing with the original thereof any photographic reproduction of any record or paper, when furnished by the person requesting its certification, 5 cents for each page, and 50 cents for each certificate.

(c) For a certificate and seal, $3.00.

(d) For an admission to the Bar and certificate under seal, $25.00.

(e) For a duplicate certificate of an admission to the Bar under seal, $10.00.

#### Cross References

Power of Supreme Court to fix fees, see section 1911 of this title.

## PART IX—SPECIAL PROCEEDINGS

### Rule 53. Proceedings in forma pauperis

1. A party desiring to proceed in this court *in forma pauperis* shall file a motion for leave so to proceed, together with his affidavit setting forth facts showing that he comes within the statutory requirements. See 28 U.S.C. § 1915; *Adkins* v. *DuPont Co.*, 335 U.S. 331. One copy of each will suffice. Papers in cases presented under this rule should, whenever possible, comply with Rule 47.

2. With the motion and affidavit there shall be filed the appropriate substantive document—statement as to jurisdiction, petition for writ of certiorari, or motion for leave to file, as the case may be—which shall comply in all respects with the rules governing the same, except that it shall be sufficient to file a single copy thereof.

3. When the papers required by paragraphs 1 and 2 of this rule are presented to the clerk, accompanied by proof of service as prescribed by Rule 33, he will, without payment of any docket or other fees, file them, and place the case on the docket.

4. The appellee or respondent in a case *in forma pauperis* may respond in the same manner and within the same time as in any other case of the same nature, except that the filing of a single response, typewritten or otherwise duplicated, with proof of service as required by Rule 33, will suffice whenever petitioner or appellant has filed unprinted papers.

5. While making due allowance for cases presented under this rule by persons appearing *pro se*, the clerk will refuse to receive any motion for leave to proceed *in forma pauperis* when it and the papers submitted therewith do not comply with the substance of this court's rules, or when it appears that the accompanying papers are obviously out of time.

6. If, in a case presented under this rule, the court enters an order noting or postponing probable jurisdiction, or granting a writ of certiorari, and the case is set down for argument, the court will make such order respecting the furnishing of a record and the printing of an appendix as may be appropriate. The court may, in any case presented under this rule, require the furnishing of the record prior to its consideration of the motion papers.

7. Whenever the court appoints a member of the bar to serve as counsel for an indigent party, the briefs prepared by such counsel will, unless he requests otherwise, be printed under the supervision of the clerk; and the clerk will in any event reimburse such counsel for necessary travel expenses including first-class transportation from his home to Washington, D.C., and return in connection with the argument of the cause.

8. In any case arising on direct review of a judgment in a criminal case originating in a federal court where this court has granted certiorari or, noted or postponed jurisdiction and where the defendant in the original proceeding is financially unable to obtain adequate representation or to meet the necessary expenses in this court, the court will appoint counsel who may be compensated, and whose necessary expenses may be repaid, to the extent provided by the Criminal Justice Act of 1964 (78 Stat. 552; 18 U.S.C. § 3006A).

### Rule 54. Veterans' and seamen's cases

1. A veteran suing to establish reemployment rights under the provisions of Section 9(d) of the Universal Military Training and Service Act, as amended (50 U.S.C. App. § 459(d)), or under similar provisions of law exempting veterans from the payment of fees or court costs, may proceed upon typewritten papers as under Rule 53, except that the motion shall ask leave to proceed as a veteran, the affidavit shall set forth the moving party's status as a veteran, and the case will be placed on the docket.

2. A seaman suing pursuant to 28 U.S.C. § 1916 may proceed without prepayment of fees or costs or furnishing security therefor, but he is not relieved of printing costs nor entitled to proceed on typewritten papers except by separate motion, or unless, by motion and affidavit, he brings himself within Rule 53.

#### REFERENCES IN TEXT

Section 9(d) of the Universal Military Training and Service Act, as amended (50 U.S.C. App. § 459(d)), referred to in text, was repealed by Pub. L. 93-508, title IV, § 405(1), Dec. 3, 1974, 88 Stat. 1600.

## PART X—DISPOSITION OF CAUSES

### Rule 55. Opinions of the court

1. All opinions of the court shall be handed to the clerk immediately upon the delivery thereof. He shall cause the same to be printed and shall deliver a copy to the reporter of decisions.

2. The original opinions shall be filed by the clerk for preservation.

3. Opinions printed under the supervision of the justices delivering the same need not be copied by the clerk into a book of records; but at the end of each term he shall cause them to be bound in a substantial manner, and when so bound they shall be deemed to have been recorded.

### Rule 56. Interest and damages

1. Where judgments for the payment of money are affirmed, and interest is properly allowable, it shall be calculated from the date of the entry of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the state where such judgment was rendered.

2. In all cases where an appeal delays proceedings on the judgment of the lower court, and appears to have been sued out merely for delay, damages at a rate not exceeding 10 per cent, in addition to interest, may be awarded upon the amount of the judgment.

3. In cases in admiralty, damages and interest may be allowed only if specially directed by the court.

4. Where a petition for writ of certiorari has been filed, and there appears to be no ground for granting such a writ, the court may, in appropriate cases, adjudge to the respondent reasonable damages for his delay.

#### CROSS REFERENCES

Damages and costs on affirmance, Supreme Court, see section 1912 of this title.

### Rule 57. Costs

1. In all cases of affirmance of any judgment or decree by this court, costs shall be paid by appellant or petitioner unless otherwise ordered by the court.

2. In cases of reversal or vacating of any judgment or decree by this court, costs shall be allowed to the appellant or petitioner, unless otherwise ordered by the court. The cost of the transcript of record from the court below shall be a part of such costs, and be taxable in that court as costs in the case.

3. The cost of printing the appendix in this court is a taxable item. The cost of printing briefs, motions, petitions, and jurisdictional statements is not a taxable item.

4. In cases where questions have been certified, including such cases where the certificate is dismissed, costs shall be equally divided unless otherwise ordered by the court; but where the entire record has been sent up (Rule 28, par. 2), and a decision is rendered on the whole matter in controversy, costs shall be allowed as provided in paragraphs 1 and 2 of this rule.

5. In all actions commenced prior to July 18, 1966, no costs shall be allowed in this court either for or against the United States or an officer or agency thereof, except where specially authorized by statute and directed by the court. In all other actions, costs as provided in this rule shall be allowed for or against the United States or an officer or agent thereof (unless expressly waived or otherwise ordered by the court) except that no such costs shall be allowed in criminal cases.

6. When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail. The prevailing side in such a case is not to submit to the clerk any bill of costs.

7. In appropriate instances, the court may adjudge double costs.

#### Cross References

United States, security for costs or damages not required, see section 2408 of this title.

### Rule 58. Rehearings

1. A petition for rehearing of judgments or decisions other than those denying or granting certiorari, may be filed with the clerk in term time or in vacation, within twenty-five days after judgment or decision, unless the time is shortened or enlarged by the court or a justice thereof. Such petition must briefly and distinctly state its grounds; it must be supported by a certificate of counsel to the effect that it is presented in good faith and not for delay; it must be printed in conformity with Rule 39; and forty copies, one of which shall bear the manuscript signature of counsel to the certificate, must be filed, accompanied by proof of service as prescribed by Rule 33. A petition for rehearing is not subject to oral argument, and will not be granted, except at the instance of a justice who concurred in the judgment or decision and with the concurrence of a majority of the court.

2. A petition for rehearing of orders on petitions for writs of certiorari may be filed with the clerk in term time or vacation, subject to the requirements respecting time, printing, number of copies furnished, manuscript signature to certificate, and service, as provided in paragraph 1 of this rule. Any petition filed under this paragraph must briefly and distinctly state grounds which are confined to intervening circumstances of substantial or controlling effect (e.g., *Sanitary Refrigerator Co.* v. *Winters*, 280 U.S. 30, 34, footnote 1; *Massey* v. *United States*, 291 U.S. 608), or to other substantial grounds available to petitioner although not previously presented (e.g., *Scribner-Schroth Co.* v. *Cleveland Trust Co.*, 305 U.S. 47, 50). Such petition is not subject to oral argument. A petition for rehearing filed under this paragraph must be supported by a certificate of counsel to the effect that it is presented in good faith and not for delay, and counsel must also certify that the petition is restricted to the grounds above specified.

3. No reply to a petition for rehearing will be received unless requested by the court. No petition for rehearing will be granted in the absence of such a request and an opportunity to submit a reply in response thereto.

4. Consecutive petitions for rehearings, and petitions for rehearing that are out of time under this rule, will not be received.

### Rule 59. Process; mandates

1. All process of this court shall be in the name of the President of the United States, and shall contain the given names, as well as the surnames, of the parties.

2. Subject to paragraph 3 of this rule, mandates shall issue as of course after the expiration of twenty-five days from the day the judgment is entered, unless the time is shortened or enlarged by an order of the court or of a justice thereof, or unless the parties stipulate that it be issued sooner. The filing of a petition for rehearing will, unless otherwise ordered, stay the mandate until disposition of such petition, and if the petition is then denied, the mandate shall issue forthwith. When, however, a petition for rehearing is not acted upon prior to adjournment or is filed after the court adjourns, the judgment or mandate of the court will not be stayed unless specifically so ordered by the court or a justice thereof.

3. In cases coming from federal courts, a formal mandate shall not issue unless specially directed. In the absence of such direction, it shall suffice for the clerk to send to the proper court, within the time and under the conditions set out in paragraph 2 of this rule, a copy of the opinion or order of this court, and a certified copy of the judgment of this court, which in cases under this paragraph shall include provisions for the recovery of costs if any are awarded.

#### Cross References

Determination by Supreme Court, remand, see section 2106 of this title.

Marshal to serve and execute process, see section 672 of this title.

Original jurisdiction, service of process, see section 1251 of this title.

Seal and teste of process, see section 1691 of this title.

Taxation of cost of serving process, see section 1911 of this title.

### Rule 60. Dismissing causes

1. Whenever the parties thereto shall, by their attorneys of record, file with the clerk an agreement in writing that an appeal, petition for or writ of certiorari, or motion for leave to file or petition for an extraordinary writ be dismissed, specifying the terms as respects costs, and shall pay to the clerk any fees that may be due him, the clerk shall, without further reference to the court, enter an order of dismissal.

2. Whenever an appellant or petitioner in this court shall, by his attorney of record, file with the clerk a motion to dismiss a proceeding to which he is a party, with proof of service as prescribed by Rule 33, and shall tender to the clerk any fees and costs that may be due, the adverse party may within fifteen days after service thereof file an objection, limited to the quantum of damages and costs in this court alleged to be payable, or, in a proper case, to a showing that the moving party does not represent all appellants or petitioners if there are more than one. The clerk will refuse to receive any objection not so limited.

3. Where the objection goes to the standing of the moving party to represent the entire side, the party moving for dismissal may within ten days thereafter file a reply, after which time the matter shall be laid before the court for its determination.

4. If no objection is filed, or if upon objection going only to the quantum of damages and costs in this court, the party moving for dismissal shall within ten days thereafter tender the whole of such additional damages and costs remanded, the clerk shall, without further reference to the court, enter an order of dismissal. If, after objection as to quantum of damages and costs in this court, the moving party does not respond with such a tender, then the clerk shall report the matter to the court for its determination.

5. No mandate or other process shall issue on a dismissal under this rule without an order of the court.

## PART XI—APPLICATION OF TERMS

### Rule 61. Term "state court" includes Supreme Court of Puerto Rico

The term "state court" when used in these rules includes the Supreme Court of the Commonwealth of Puerto Rico, and references in these rules to the law and statutes of a state include the law and statutes of the Commonwealth of Puerto Rico.

## PART XII—EFFECTIVE DATE

### Rule 62. Effective date of amendments

The amendments to these rules adopted June 15, 1970, shall become effective July 1, 1970.

# FEDERAL RULES OF APPELLATE PROCEDURE

*As amended to January 1, 1977*

TITLE I—APPLICABILITY OF RULES

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TITLE II—APPEALS FROM JUDGMENTS AND ORDERS OF DISTRICT COURTS

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TITLE III—REVIEW OF DECISIONS OF THE TAX COURT OF THE UNITED STATES

13. Review of Decisions of the Tax Court
14. Applicability of Other Rules to Review of Decisions of the Tax Court

TITLE IV—REVIEW AND ENFORCEMENT OF ORDERS OF ADMINISTRATIVE AGENCIES, BOARDS, COMMISSIONS AND OFFICERS

15. Review or Enforcement of Agency Orders—How Obtained; Intervention
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TITLE V—EXTRAORDINARY WRITS

21. Writs of Mandamus and Prohibition Directed to a Judge or Judges and Other Extraordinary Writs

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Rule
44. Cases Involving Constitutional Questions Where United States is Not a Party
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FORMS

Form
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2. Notice of Appeal to a Court of Appeals from a Decision of the Tax Court
3. Petition for Review of Order of an Agency, Board, Commission or Officer
4. Affidavit to Accompany Motion for Leave to Appeal in Forma Pauperis

### EFFECTIVE DATE AND APPLICATION OF RULES

Section 2 of the Order of the Supreme Court, dated Dec. 4, 1967, provided: "That the foregoing rules shall take effect on July 1, 1968, and shall govern all proceedings in appeals and petitions for review or enforcement of orders thereafter brought in and in all such proceedings then pending, except to the extent that in the opinion of the court of appeals their application in a particular proceeding then pending would not be feasible or would work injustice, in which case the former procedure may be followed."

### EFFECTIVE DATE OF 1970 AMENDMENT; TRANSMISSION TO CONGRESS

Sections 2 and 3 of the Order of the Supreme Court, dated Mar. 30, 1970, provided:

"2. That the foregoing amendments to the Federal Rules of Appellate Procedure shall take effect on July 1, 1970, and shall govern all proceedings in actions brought thereafter and also in all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action then pending would not be feasible or would work injustice, in which event the former procedure applies.

"3. That the Chief Justice be, and he hereby is, authorized to transmit to the Congress the foregoing amendments to existing rules, in accordance with the provisions of Title 18, U.S.C. § 3372, and Title 28, U.S.C. §§ 2072 and 2075."

## TITLE I—APPLICABILITY OF RULES

### Rule 1. Scope of Rules

#### (a) Scope of Rules

**These rules govern procedure in appeals to United States courts of appeals from the United States district courts and the Tax Court of the United States; in proceedings in the courts of appeals for review or enforcement of orders of administrative agencies, boards, commissions and officers of the United States; and in applications for writs or other relief which a court of appeals or a judge thereof is competent to give.**

**(b) Rules Not to Affect Jurisdiction**

These rules shall not be construed to extend or limit the jurisdiction of the courts of appeals as established by law.

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

These rules are drawn under the authority of 28 U.S.C. § 2072, as amended by the Act of November 6, 1966, 80 Stat. 1323 (1 U.S. Code Cong. & Ad. News, p. 1546 (1966)) (Rules of Civil Procedure); 28 U.S.C. § 2075 (Bankruptcy Rules); and 18 U.S.C. §§ 3771 (Procedure to and including verdict) and 3772 (Procedure after verdict). Those statutes combine to give to the Supreme Court power to make rules of practice and procedure for all cases within the jurisdiction of the courts of appeals. By the terms of the statutes, after the rules have taken effect all laws in conflict with them are of no further force or effect. Practice and procedure in the eleven courts of appeals are now regulated by rules promulgated by each court under the authority of 28 U.S.C. § 2071. Rule 47 expressly authorizes the courts of appeals to make rules of practice not inconsistent with these rules.

As indicated by the titles under which they are found, the following rules are of special application: Rules 3 through 12 apply to appeals from judgments and orders of the district courts; Rules 13 and 14 apply to appeals from decisions of the Tax Court (Rule 13 establishes an appeal as the mode of review of decisions of the Tax Court in place of the present petition for review); Rules 15 through 20 apply to proceedings for review or enforcement of orders of administrative agencies, boards, commissions and officers. Rules 22 through 24 regulate habeas corpus proceedings and appeals in forma pauperis. All other rules apply to all proceedings in the courts of appeals.

CROSS REFERENCES

Authority to create courts inferior to Supreme Court, see U.S.C. Const. Art. 3, § 1.

"Courts of the United States" as including courts of appeals, see section 451 of this title.

Creation and composition of courts, see section 43 of this title.

Forging or counterfeiting seals of courts, penalties, see section 505 of Title 18, Crimes and Criminal Procedure.

Number and composition of circuits, see section 41 of this title.

Writs and process issued by court to be under seal, see section 1691 of this title.

**Rule 2. Suspension of Rules**

In the interest of expediting decision, or for other good cause shown, a court of appeals may, except as otherwise provided in Rule 26(b), suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction.

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

The primary purpose of this rule is to make clear the power of the courts of appeals to expedite the determination of cases of pressing concern to the public or to the litigants by prescribing a time schedule other than that provided by the rules. The rule also contains a general authorization to the courts to relieve litigants of the consequences of default where manifest injustice would otherwise result. Rule 26(b) prohibits a court of appeals from extending the time for taking appeal or seeking review.

CROSS REFERENCES

Injunction, power of appellate court to suspend, modify or grant pending appeal, see Rule 62, Federal Rules of Civil Procedure, this Appendix.

Power of the Supreme Court to prescribe rules generally, see section 2072 of this title.

## TITLE II—APPEALS FROM JUDGMENTS AND ORDERS OF DISTRICT COURTS

**Rule 3. Appeal as of Right—How Taken**

**(a) Filing the Notice of Appeal**

An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. Appeals by permission under 28 U.S.C. § 1292(b) and appeals by allowance in bankruptcy shall be taken in the manner prescribed by Rule 5 and Rule 6 respectively.

**(b) Joint or Consolidated Appeals**

If two or more persons are entitled to appeal from a judgment or order of a district court and their interests are such as to make joinder practicable, they may file a joint notice of appeal, or may join in appeal after filing separate timely notices of appeal, and they may thereafter proceed on appeal as a single appellant. Appeals may be consolidated by order of the court of appeals upon its own motion or upon motion of a party, or by stipulation of the parties to the several appeals.

**(c) Content of the Notice of Appeal**

The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in the appendix of Forms is a suggested form of a notice of appeal.

**(d) Service of the Notice of Appeal**

The clerk of the district court shall serve notice of the filing of a notice of appeal by mailing a copy thereof to counsel of record of each party other than the appellant, or, if a party is not represented by counsel, to the party at his last known address: and in criminal cases, habeas corpus proceedings, or proceedings under 28 U.S.C. § 2255, the clerk shall mail a copy of the notice of appeal and of the docket entries to the clerk of the court of appeals named in the notice. When an appeal is taken by a defendant in a criminal case, the clerk shall also serve a copy of the notice of appeal upon him, either by personal service or by mail addressed to him. The clerk shall note on each copy served the date on which the notice of appeal was filed. Failure of the clerk to serve notice shall not affect the validity of the appeal. Service shall be sufficient notwithstanding the death of a party or his counsel. The clerk shall note in the docket the names of the parties to whom he mails copies, with the date of mailing.

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

*General Note.* Rule 3 and Rule 4 combine to require that a notice of appeal be filed with the clerk of the district court within the time prescribed for taking an appeal. Because the timely filing of a notice of appeal is "mandatory and jurisdictional," *United States* v.

*Robinson*, 361 U.S. 220, 224, 80 S.Ct. 282, 4 L.Ed.2d 259 (1960), compliance with the provisions of those rules is of the utmost importance. But the proposed rules merely restate, in modified form, provisions now found in the civil and criminal rules (FRCP 5(e), 73; FRCrP 37), and decisions under the present rules which dispense with literal compliance in cases in which it cannot fairly be exacted should control interpretation of these rules. Illustrative decisions are: *Fallen* v. *United States*, 378 U.S. 139, 84 S.Ct. 1689, 12 L.Ed.2d 760 (1964) (notice of appeal by a prisoner, in the form of a letter delivered, well within the time fixed for appeal, to prison authorities for mailing to the clerk of the district court held timely filed notwithstanding that it was received by the clerk after expiration of the time for appeal; the appellant "did all he could" to effect timely filing); *Richey* v. *Wilkins*, 335 F.2d 1 (2d Cir. 1964) (notice filed in the court of appeals by a prisoner without assistance of counsel held sufficient); *Halfen* v. *United States*, 324 F.2d 52 (10th Cir. 1963) (notice mailed to district judge in time to have been received by him in normal course held sufficient); *Riffle* v. *United States*, 299 F.2d 802 (5th Cir. 1962) (letter of prisoner to judge of court of appeals held sufficient). Earlier cases evidencing "a liberal view of papers filed by indigent and incarcerated defendants" are listed in *Coppedge* v. *United States*, 369 U.S. 438, 442, n. 5, 82 S.Ct. 917, 8 L.Ed.2d 21 (1962).

*Subdivision* (*a*). The substance of this subdivision is derived from FRCP 73(a) and FRCrP 37(a)(1). The proposed rule follows those rules in requiring nothing other than the filing of a notice of appeal in the district court for the perfection of the appeal. The petition for allowance (except for appeals governed by Rules 5 and 6), citations, assignments of error, summons and severance—all specifically abolished by earlier modern rules—are assumed to be sufficiently obsolete as no longer to require pointed abolition.

*Subdivision* (*b*). The first sentence is derived from FRCP 74. The second sentence is added to encourage consolidation of appeals whenever feasible.

*Subdivision* (*c*). This subdivision is identical with corresponding provisions in FRCP 73(b) and FRCrP 37(a)(1).

*Subdivision* (*d*). This subdivision is derived from FRCP 73(b) and FRCrP 37(a)(1). The duty of the clerk to forward a copy of the notice of appeal and of the docket entries to the court of appeals in a criminal case extended to habeas corpus and 28 U.S.C. § 2255 proceedings.

### CROSS REFERENCES

Circuits to which decisions reviewable, see section 1294 of this title.

Final decisions of federal district courts, jurisdiction of courts of appeals, see section 1291 of this title.

Interlocutory decisions, jurisdiction of appeal from, see section 1292 of this title.

## Rule 4. Appeal as of Right—When Taken

### (a) Appeals in Civil Cases

In a civil case (including a civil action which involves an admiralty or maritime claim and a proceeding in bankruptcy or a controversy arising therein) in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days of the date of the entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days of such entry. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this subdivision, whichever period last expires.

The running of the time for filing a notice of appeal is terminated as to all parties by a timely motion filed in the district court by any party pursuant to the Federal Rules of Civil Procedure hereafter enumerated in this sentence, and the full time for appeal fixed by this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: (1) granting or denying a motion for judgment under Rule 50(b); (2) granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) granting or denying a motion under Rule 59 to alter or amend the judgment; (4) denying a motion for a new trial under Rule 59. A judgment or order is entered within the meaning of this subdivision when it is entered in the civil docket.

Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision. Such an extension may be granted before or after the time otherwise prescribed by this subdivision has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate.

### (b) Appeals in Criminal Cases

In a criminal case the notice of appeal by a defendant shall be filed in the district court within 10 days after the entry of the judgment or order appealed from. A notice of appeal filed after the announcement of a decision, sentence or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof. If a timely motion in arrest of judgment or for a new trial on any ground other than newly discovered evidence has been made, an appeal from a judgment of conviction may be taken within 10 days after the entry of an order denying the motion. A motion for a new trial based on the ground of newly discovered evidence will similarly extend the time for appeal from a judgment of conviction if the motion is made before or within 10 days after entry of the judgment. When an appeal by the government is authorized by statute, the notice of appeal shall be filed in the district court within 30 days after the entry of the judgment or order appealed from. A judgment or order is entered within the meaning of this subdivision when it is entered in the criminal docket. Upon a showing of excusable neglect the district court may, before or after the time has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision.

### NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

*Subdivision* (*a*). This subdivision is derived from FRCP 73(a) without any change of substance. The requirement that a request for an extension of time for filing the notice of appeal made after expiration of the time be made by motion and on notice codifies the result reached under the present provisions of FRCP 73(a) and 6(b). *North Umberland Mining Co.* v. *Standard Accident Ins. Co.*, 193 F.2d 951 (9th Cir., 1952); *Cohen* v. *Plateau Natural Gas Co.*, 303 F.2d 273 (10th Cir., 1962); *Plant Economy, Inc.* v. *Mirror Insulation Co.*, 308 F.2d 275 (3d Cir., 1962).

Since this subdivision governs appeals in all civil cases, it supersedes the provisions of section 25 of the Bankruptcy Act (11 U.S.C. § 48). Except in cases to which the United States or an officer or agency thereof is a party, the change is a minor one, since a successful litigant in a bankruptcy proceeding may, under section 25, oblige an aggrieved party to appeal within 30 days after entry of judgment—the time fixed by this subdivision in cases involving private parties only—by serving him with notice of entry on the day thereof, and by the terms of section 25 an aggrieved party must in any event appeal within 40 days after entry of judgment. No reason appears why the time for appeal in bankruptcy should not be the same as that in civil cases generally. Furthermore, section 25 is a potential trap for the uninitiated. The time for appeal which it provides is not applicable to all appeals which may fairly be termed appeals in bankruptcy. Section 25 governs only those cases referred to in section 24 as "proceedings in bankruptcy" and "controversies arising in proceedings in bankruptcy." *Lowenstein* v. *Reikes*, 54 F.2d 481 (2d Cir., 1931), *cert. den.*, 285 U.S. 539, 52 S.Ct. 311, 76 L.Ed. 932 (1932). The distinction between such cases and other cases which arise out of bankruptcy is often difficult to determine. See 2 Moore's Collier on Bankruptcy ¶24.12 through ¶24.36 (1962). As a result it is not always clear whether an appeal is governed by section 25 or by FRCP 73(a), which is applicable to such appeals in bankruptcy as are not governed by section 25.

In view of the unification of the civil and admiralty procedure accomplished by the amendments of the Federal Rules of Civil Procedure effective July 1, 1966, this subdivision governs appeals in those civil actions which involve admiralty or maritime claims and which prior to that date were known as suits in admiralty.

The only other change possibly effected by this subdivision is in the time for appeal from a decision of a district court on a petition for impeachment of an award of a board of arbitration under the Act of May 20, 1926, c. 347, § 9 (44 Stat. 585), 45 U.S.C. § 159. The act provides that a notice of appeal from such a decision shall be filed within 10 days of the decision. This singular provision was apparently repealed by the enactment in 1948 of 28 U.S.C. § 2107, which fixed 30 days from the date of entry of judgment as the time for appeal in all actions of a civil nature except actions in admiralty or bankruptcy matters or those in which the United States is a party. But it was not expressly repealed, and its status is in doubt. See 7 Moore's Federal Practice ¶73.09[2] (1966). The doubt should be resolved, and no reason appears why appeals in such cases should not be taken within the time provided for civil cases generally.

Subdivision (b). This subdivision is derived from FRCrP 37(a)(2) without change of substance.

### CROSS REFERENCES

Abatement, reviewing of rulings, see section 2105 of this title.

Amount or value in controversy affecting right to review, see section 2108 of this title.

Circuits in which decisions reviewable generally, see section 1294 of this title.

Determination of appeal generally, see section 2106 of this title.

Final decisions of district courts reviewable by courts of appeals, see section 1291 of this title.

Rule-making power of courts generally, see section 2071 of this title.

Time for appeal to court of appeals, see section 2107 of this title.

## Rule 5. Appeals by Permission Under 28 U.S.C. § 1292(b)

### (a) Petition for Permission to Appeal

An appeal from an interlocutory order containing the statement prescribed by 28 U.S.C. § 1292(b) may be sought by filing a petition for permission to appeal with the clerk of the court of appeals within 10 days after the entry of such order in the district court with proof of service on all other parties to the action in the district court. An order may be amended to include the prescribed statement at any time, and permission to appeal may be sought within 10 days after entry of the order as amended.

### (b) Content of Petition; Answer

The petition shall contain a statement of the facts necessary to an understanding of the controlling question of law determined by the order of the district court; a statement of the question itself; and a statement of the reasons why a substantial basis exists for a difference of opinion on the question and why an immediate appeal may materially advance the termination of the litigation. The petition shall include or have annexed thereto a copy of the order from which appeal is sought and of any findings of fact, conclusions of law and opinion relating thereto. Within 7 days after service of the petition an adverse party may file an answer in opposition. The application and answer shall be submitted without oral argument unless otherwise ordered.

### (c) Form of Papers; Number of Copies

All papers may be typewritten. Three copies shall be filed with the original, but the court may require that additional copies be furnished.

### (d) Grant of Permission; Cost Bond; Filing of Record

If permission to appeal is granted the appellant shall file a bond for costs as required by Rule 7, within 10 days after entry of the order granting permission to appeal, and the record shall be transmitted and filed and the appeal docketed in accordance with Rules 11 and 12. The time fixed by those rules for transmitting the record and docketing the appeal shall run from the date of the entry of the order granting permission to appeal. A notice of appeal need not be filed.

### NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

This rule is derived in the main from Third Circuit Rule 11(2), which is similar to the rule governing appeals under 28 U.S.C. § 1292(b) in a majority of the circuits. The second sentence of subdivision (a) resolves a conflict over the question of whether the district court can amend an order by supplying the statement required by § 1292(b) at any time after entry of the order, with the result that the time fixed by the statute commences to run on the date of entry of the order as amended. Compare *Milbert* v. *Bison Laboratories*, 260 F.2d 431 (3d Cir., 1958) with *Sperry Rand Corporation* v. *Bell Telephone Laboratories*, 272 F.2d (2d Cir., 1959), *Hadjipateras* v. *Pacifica, S.A.*, 290 F.2d 697 (5th Cir., 1961), and *Houston Fearless Corporation* v. *Teter*, 313 F.2d 91 (10th Cir., 1962). The view taken by the Second, Fifth and Tenth Circuits seems theoretically and practically sound, and the rule adopts it. Although a majority of the circuits now require the filing of a notice of appeal following the grant of permission to appeal, filing of the notice serves no function other than to provide a time from which the time for transmitting the record and docketing the appeal begins to run.

#### Cross References

Circuits to which decisions reviewable, see section 1294 of this title.

### Rule 6. Appeals by Allowance in Bankruptcy Proceedings

#### (a) Petition for Allowance

Allowance of an appeal under section 24 of the Bankruptcy Act (11 U.S.C. § 47) from orders, decrees, or judgments of a district court involving less than $500, or from an order making or refusing to make allowances of compensation or reimbursement under sections 250 or 498 thereof (11 U.S.C. § 650, § 898) shall be sought by filing a petition for allowance with the clerk of the court of appeals within the time provided by Rule 4(a) for filing a notice of appeal, with proof of service on all parties to the action in the district court. A notice of appeal need not be filed.

#### (b) Content of Petition; Answer

The petition shall contain a statement of the facts necessary to an understanding of the questions to be presented by the appeal; a statement of those questions and of the relief sought; a statement of the reasons why in the opinion of the petitioner the appeal should be allowed; and a copy of the order, decree or judgment complained of and of any opinion or memorandum relating thereto. Within 7 days after service of the petition an adverse party may file an answer in opposition. The petition and answer shall be submitted without oral argument unless otherwise ordered.

#### (c) Form of Papers; Number of Copies

All papers may be typewritten. Three copies shall be filed with the original, but the court may require that additional copies be furnished.

#### (d) Allowance of the Appeal; Cost Bond; Filing of Record

If the appeal is allowed the appellant shall file a bond for costs as required by Rule 7, within 10 days of the entry of the order granting permission to appeal, and the record shall be transmitted and filed and the appeal docketed in accordance with Rules 11 and 12. The time fixed by those rules for transmitting the record and docketing the appeal shall run from the date of the entry of the order allowing the appeal. A notice of appeal need not be filed.

#### Notes of Advisory Committee on Appellate Rules

This rule is substantially a restatement of present procedure. See D.C. Cir. Rule 34; 6th Cir. Rule 11; 7th Cir. Rule 10(d); 10th Cir. Rule 13.

Present circuit rules commonly provide that the petition for allowance of an appeal shall be filed within the time allowed by Section 25 of the Bankruptcy Act for taking appeals of right. For the reasons explained in the Note accompanying Rule 4, that rule makes the time for appeal in bankruptcy cases the same as that which obtains in other civil cases and thus supersedes Section 25. Thus the present rule simply continues the former practice of making the time for filing the petition in appeals by allowance the same as that provided for filing the notice of appeal in appeals of right.

#### Cross References

Arrangements for debtors, appellate jurisdiction, see section 716 of Title 11, Bankruptcy.

Corporate reorganizations, appellate jurisdiction, see section 521 of Title 11.

Filing petition for review of referee's order, see section 67 of Title 11.

Final decisions of the district court appealable to courts of appeals, see section 1291 of this title.

Interlocutory decisions of district courts appealable to courts of appeals, see section 1292 of Title 28.

Railroad reorganizations, appellate jurisdictions, see section 816 of Title 11, Bankruptcy.

Receivers and trustees not required to give bond when taking appeals, see section 48 of Title 11.

Time for appeal from bankruptcy judgment, order, or decree, see section 48 of Title 11.

Wage earners' plans, appellate jurisdiction, see section 1016 of Title 11.

### Rule 7. Bond for Costs on Appeal in Civil Cases

Unless an appellant is exempted by law, or has filed a supersedeas bond or other undertaking which includes security for the payment of costs on appeal, in civil cases a bond for costs on appeal or equivalent security shall be filed by the appellant in the district court with the notice of appeal; but security shall not be required of an appellant who is not subject to costs. The bond or equivalent security shall be in the sum or value of $250 unless the district court fixes a different amount. A bond for costs on appeal shall have sufficient surety, and it or any equivalent security shall be conditioned to secure the payment of costs if the appeal is finally dismissed or the judgment affirmed, or of such costs as the court of appeals may direct if the judgment is modified. If a bond or equivalent security in the sum or value of $250 is given, no approval thereof is necessary. After a bond for costs on appeal is filed, an appellee may raise for determination by the clerk of the district court objections to the form of the bond or to the sufficiency of the surety. The provisions of Rule 8(b) apply to a surety upon a bond given pursuant to this rule.

#### Notes of Advisory Committee on Appellate Rules

This rule is derived from FRCP 73(c) without change in substance.

#### Cross References

Deposit of bonds or notes of United States in lieu of surety, see section 15 of Title 6, Surety Bonds.

Security for damages or costs not required of the United States, see section 2408 of this title.

### Rule 8. Stay or Injunction Pending Appeal

#### (a) Stay Must Ordinarily Be Sought in the First Instance in District Court; Motion for Stay in Court of Appeals

Application for a stay of the judgment or order of a district court pending appeal, or for approval of a supersedeas bond, or for an order suspending, modifying, restoring or granting an injunction during the pendency of an appeal must ordinarily be made in the first instance in the district court. A motion for such relief may be made to the court of appeals or to a judge thereof, but the motion shall show that application to the district court for the relief sought is not practicable, or that the district court has denied an application, or has failed to afford the relief which the applicant requested, with the reasons given by the district court for its action. The motion shall also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute the motion shall be supported by affidavits or other sworn statements or copies thereof. With the motion shall be filed such parts of the record as are relevant. Reasonable notice of the motion shall be given to all parties. The motion shall be filed with the clerk and normally will be considered by a panel or division of the court, but in exceptional cases where such procedure would be impracticable due to the requirements of time, the application may be made to and considered by a single judge of the court.

### (b) Stay May Be Conditioned Upon Giving of Bond; Proceedings Against Sureties

Relief available in the court of appeals under this rule may be conditioned upon the filing of a bond or other appropriate security in the district court. If security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits himself to the jurisdiction of the district court and irrevocably appoints the clerk of the district court as his agent upon whom any papers affecting his liability on the bond or undertaking may be served. His liability may be enforced on motion in the district court without the necessity of an independent action. The motion and such notice of the motion as the district court prescribes may be served on the clerk of the district court, who shall forthwith mail copies to the sureties if their addresses are known.

### (c) Stays in Criminal Cases

Stays in criminal cases shall be had in accordance with the provisions of Rule 38(a) of the Federal Rules of Criminal Procedure.

### NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

*Subdivision (a).* While the power of a court of appeals to stay proceedings in the district court during the pendency of an appeal is not explicitly conferred by statute, it exists by virtue of the all writs statute, 28 U.S.C. § 1651. *Eastern Greyhound Lines* v. *Fusco*, 310 F.2d 632 (6th Cir., 1962); *United States* v. *Lynd*, 301 F.2d 818 (5th Cir., 1962); *Public Utilities Commission of Dist. of Col.* v. *Capital Transit Co.*, 94 U.S.App.D.C. 140, 214 F.2d 242 (1954). And the Supreme Court has termed the power "inherent" (*In re McKenzie*, 180 U.S. 536, 551, 21 S.Ct. 468, 45 L.Ed. 657 (1901)) and "part of its (the court of appeals) traditional equipment for the administration of justice." (*Scripps-Howard Radio* v. *F.C.C.*, 316 U.S. 4, 9–10, 62 S.Ct. 875, 86 L.Ed. 1229 (1942)). The power of a single judge of the court of appeals to grant a stay pending appeal was recognized in *In re McKenzie, supra. Alexander* v. *United States*, 173 F.2d 865 (9th Cir., 1949) held that a single judge could not stay the judgment of a district court, but it noted the absence of a rule of court authorizing the practice. FRCP 62(g) adverts to the grant of a stay by a single judge of the appellate court. The requirement that application be first made to the district court is the case law rule. *Cumberland Tel. & Tel. Co.* v. *Louisiana Public Service Commission*, 260 U.S. 212, 219, 43 S.Ct. 75, 67 L.Ed. 217 (1922); *United States* v. *El-O-Pathic Pharmacy*, 192 F.2d 62 (9th Cir., 1951); *United States* v. *Hansell*, 109 F.2d 613 (2d Cir., 1940). The requirement is explicitly stated in FRCrP 38(c) and in the rules of the First, Third, Fourth and Tenth Circuits. See also Supreme Court Rules 18 and 27.

The statement of the requirement in the proposed rule would work a minor change in present practice. FRCP 73(e) requires that if a bond for costs on appeal or a supersedeas bond is offered after the appeal is docketed, leave to file the bond must be obtained from the court of appeals. There appears to be no reason why matters relating to supersedeas and cost bonds should not be initially presented to the district court whenever they arise prior to the disposition of the appeal. The requirement of FRCP 73(e) appears to be a concession to the view that once an appeal is perfected, the district court loses all power over its judgment. See *In re Federal Facilities Trust*, 227 F.2d 651 (7th Cir., 1955) and cases—cited at 654–655. No reason appears why all questions related to supersedeas or the bond for costs on appeal should not be presented in the first instance to the district court in the ordinary case.

*Subdivision (b).* The provisions respecting a surety upon a bond or other undertaking are based upon FRCP 65.1.

### CROSS REFERENCES

Deposit of bonds or notes of the United States in lieu of surety, see section 15 of Title 6, Surety Bonds.

Receivers and trustees not to give bond when taking appeals, see section 48 of Title 11, Bankruptcy.

Security for damages or costs not required of United States, see section 2408 of this title.

## Rule 9. Release in Criminal Cases

### (a) Appeals from Orders Respecting Release Entered Prior to a Judgment of Conviction

An appeal authorized by law from an order refusing or imposing conditions of release shall be determined promptly. Upon entry of an order refusing or imposing conditions of release, the district court shall state in writing the reasons for the action taken. The appeal shall be heard without the necessity of briefs after reasonable notice to the appellee upon such papers, affidavits, and portions of the record as the parties shall present. The court of appeals or a judge thereof may order the release of the appellant pending the appeal.

### (b) Release Pending Appeal from a Judgment of Conviction

Application for release after a judgment of conviction shall be made in the first instance in the district court. If the district court refuses release pending appeal, or imposes conditions of release, the court shall state in writing the reasons for the action taken. Thereafter, if an appeal is pending, a motion for release, or for modification of the conditions of release, pending review may be made to the court of appeals or to a judge thereof. The motion shall be determined promptly upon such papers, affidavits, and portions of the record as the parties shall present and after reasonable notice to the appellee. The court of appeals or a judge thereof may order the release of the appellant pending disposition of the motion.

### (c) Criteria for Release

The decision as to release pending appeal shall be made in accordance with Title 18, U.S.C. § 3148. The burden of establishing that the defendant will not flee or pose a danger to any other person or to the community rests with the defendant.

(As amended Apr. 24, 1972, eff. Oct. 1, 1972.)

### NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

#### 1967 NOTE

*Subdivision (a).* The appealability of release orders entered prior to a judgment of conviction is determined by the provisions of 18 U.S.C. § 3147, as qualified by 18 U.S.C. § 3148, and by the rule announced in *Stack* v. *Boyle*, 342 U.S. 1, 72 S.Ct. 1, 96 L.Ed. 3 (1951), holding certain orders respecting release appealable as final orders under 28 U.S.C. § 1291. The language of the rule, "(an)n appeal authorized by law from an order refusing or imposing conditions of release," is intentionally broader than that used in 18 U.S.C. § 3147 in describing orders made appealable by that section. The summary procedure ordained by the rule is intended to apply to all appeals from orders respecting release, and it would appear that at least some orders not made appealable by 18 U.S.C. § 3147 are nevertheless appealable under the *Stack* v. *Boyle* rationale. See, for example, *United States* v. *Foster*, 278 F.2d 567 (2d Cir., 1960), holding appealable an order refusing to extend bail limits. Note also the provisions of 18 U.S.C. § 3148, which after withdrawing from persons charged with an offense punishable by death and from those who have been convicted of an offense the right of appeal granted by 18 U.S.C. § 3147, expressly preserves "other rights to judicial review of conditions of release or orders of detention."

The purpose of the subdivision is to insure the expeditious determination of appeals respecting release orders, an expedition commanded by 18 U.S.C. § 3147 and by the Court in *Stack* v. *Boyle*, supra. It permits such appeals to be heard on an informal record without the necessity of briefs and on reasonable notice. Equally important to the just and speedy disposition of these appeals is the requirement that the district court state the reasons for its decision. See *Jones* v. *United States*, 358 F.2d 543 (D.C. Cir., 1966); *Rhodes* v. *United States*, 275 F.2d 78 (4th Cir., 1960); *United States* v. *Williams*, 253 F.2d 144 (7th Cir., 1958).

*Subdivision* (*b*). This subdivision regulates procedure for review of an order respecting release at a time when the jurisdiction of the court of appeals has already attached by virtue of an appeal from the judgment of conviction. Notwithstanding the fact that jurisdiction has passed to the court of appeals, both 18 U.S.C. § 3148 and FRCrP 38(c) contemplate that the initial determination of whether a convicted defendant is to be released pending the appeal is to be made by the district court. But at this point there is obviously no need for a separate appeal from the order of the district court respecting release. The court of appeals or a judge thereof has power to effect release on motion as an incident to the pending appeal. See FRCrP 38(c) and 46(a)(2). But the motion is functionally identical with the appeal regulated by subdivision (a) and requires the same speedy determination if relief is to be effective. Hence the similarity of the procedure outlined in the two subdivisions.

#### 1972 Note

Subdivision (c) is intended to bring the rule into conformity with 18 U.S.C. § 3148 and to allocate to the defendant the burden of establishing that he will not flee and that he poses no danger to any other person or to the community. The burden is placed upon the defendant in the view that the fact of his conviction justifies retention in custody in situations where doubt exists as to whether he can be safely released pending disposition of his appeal. Release pending appeal may also be denied if "it appears that an appeal is frivolous or taken for delay." 18 U.S.C. § 3148. The burden of establishing the existence of these criteria remains with the government.

#### Cross References

Admission to bail,
  Extraterritorial jurisdiction of United States, see section 3042 of Title 18, Crimes and Criminal Procedures.
  Juvenile delinquents, see section 5035 of Title 18.
  Power of courts and magistrates, see sections 3041, 3141 of Title 18.
  Procedure after verdict, rules of practice made by Supreme Court as prescribing conditions for granting bail, see section 3772 of Title 18.
  Upon appeal by and on behalf of United States, see section 3731 of Title 18.
Amount of bail,
  Additional bail, see section 3143 of Title 18.
  Excessive bail shall not be required, see U.S.C.Const. Amend. 8.
  Obstructing justice by false bail, see section 1506 of Title 18.
Penal Bonds,
  Bonds or notes of the United States in lieu of recognizance, stipulation, bond, guaranty, or undertaking, see section 15 of Title 6, Surety Bonds.
  Surety companies as sureties, see sections 6 to 13 of Title 6.
  State court criminal proceedings, bond on removal to Supreme Court, see section 3144 of Title 18, Crimes and Criminal Procedure.
  Surrender by bail, see section 3142 of Title 18.
  Witnesses, appearance in criminal case, return to clerk of court, see section 3041 of Title 18.

### Rule 10. The Record on Appeal

#### (a) Composition of the Record on Appeal

The original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court shall constitute the record on appeal in all cases.

#### (b) The Transcript of Proceedings; Duty of Appellant to Order; notice to Appellee if Partial Transcript is Ordered

Within 10 days after filing the notice of appeal the appellant shall order from the reporter a transcript of such parts of the proceedings not already on file as he deems necessary for inclusion in the record. If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, he shall include in the record a transcript of all evidence relevant to such finding or conclusion. Unless the entire transcript is to be included, the appellant shall, within the time above provided, file and serve on the appellee a description of the parts of the transcript which he intends to include in the record and a statement of the issues he intends to present on the appeal. If the appellee deems a transcript of other parts of the proceedings to be necessary he shall, within 10 days after the service of the statement of the appellant, file and serve on the appellant a designation of additional parts to be included. If the appellant shall refuse to order such parts, the appellee shall either order the parts or apply to the district court for an order requiring the appellant to do so. At the time of ordering, a party must make satisfactory arrangements with the reporter for payment of the cost of the transcript.

#### (c) Statement of the Evidence or Proceedings When No Report Was Made or When the Transcript is Unavailable

If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection. The statement shall be served on the appellee, who may serve objections or propose amendments thereto within 10 days after service. Thereupon the statement and any objections or proposed amendments shall be submitted to the district court for settlement and approval and as settled and approved shall be included by the clerk of the district court in the record on appeal.

**(d) Agreed Statement as the Record on Appeal**

In lieu of the record on appeal as defined in subdivision (a) of this rule, the parties may prepare and sign a statement of the case showing how the issues presented by the appeal arose and were decided in the district court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented. If the statement conforms to the truth, it, together with such additions as the court may consider necessary fully to present the issues raised by the appeal, shall be approved by the district court and shall then be certified to the court of appeals as the record on appeal and transmitted thereto by the clerk of the district court within the time provided by Rule 11. Copies of the agreed statement may be filed as the appendix required by Rule 30.

**(e) Correction or Modification of the Record**

If any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the district court either before or after the record is transmitted to the court of appeals, or the court of appeals, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the court of appeals.

### NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

This rule is derived from FRCP 75(a), (b), (c) and (d) and FRCP 76, without change in substance.

### CROSS REFERENCES

Records; obsolete papers, see section 457 of this title.

Reporters' transcript of proceedings, see section 753 of this title.

## Rule 11. Transmission of the Record

**(a) Time for Transmission; Duty of Appellant**

The record on appeal, including the transcript and exhibits necessary for the determination of the appeal, shall be transmitted to the court of appeals within 40 days after the filing of the notice of appeal unless the time is shortened or extended by an order entered under subdivision (d) of this rule. After filing the notice of appeal the appellant shall comply with the provisions of Rule 10(b) and shall take any other action necessary to enable the clerk to assemble and transmit the record. If more than one appeal is taken, each appellant shall comply with the provisions of Rule 10(b) and this subdivision, and a single record shall be transmitted within 40 days after the filing of the final notice of appeal.

**(b) Duty of Clerk to Transmit the Record**

When the record is complete for purposes of the appeal, the clerk of the district court shall transmit it to the clerk of the court of appeals. The clerk of the district court shall number the documents comprising the record and shall transmit with the record a list of the documents correspondingly numbered and identified with reasonable definiteness. Documents of unusual bulk or weight and physical exhibits other than documents shall not be transmitted by the clerk unless he is directed to do so by a party or by the clerk of the court of appeals. A party must make advance arrangements with the clerks for the transportation and receipt of exhibits of unusual bulk or weight.

Transmission of the record is effected when the clerk of the district court mails or otherwise forwards the record to the clerk of the court of appeals. The clerk of the district court shall indicate, by endorsement on the face of the record or otherwise, the date upon which it is transmitted to the court of appeals.

**(c) Temporary Retention of Record in District Court for Use in Preparing Appellate Papers**

Notwithstanding the provisions of subdivisions (a) and (b) of this rule, the parties may stipulate, or the district court on motion of any party may order, that the clerk of the district court shall temporarily retain the record for use by the parties in preparing appellate papers. In that event, the appellant shall nevertheless cause the appeal to be docketed and the record to be filed within the time fixed or allowed for transmission of the record by complying with the provisions of Rule 12(a) and by presenting to the clerk of the court of appeals a partial record in the form of a copy of the docket entries, accompanied by a certificate of counsel for the appellant, or of the appellant if he is without counsel, reciting that the record, including the transcript or parts thereof designated for inclusion and all necessary exhibits, is complete for purposes of the appeal. Upon receipt of the brief of the appellee, or at such earlier time as the parties may agree or the court may order, the appellant shall request the clerk of the district court to transmit the record.

**(d) Extension of Time for Transmission of the Record; Reduction of Time**

The district court for cause shown may extend the time for transmitting the record. A request for extension must be made within the time originally prescribed or within an extension previously granted, and the district court shall not extend the time to a day more than 90 days from the date of filing of the first notice of appeal. If the district court is without authority to grant the relief sought or has denied a request therefor, the court of appeals may on motion for cause shown extend the time for transmitting the record or may permit the record to be transmitted and filed after the expiration of the time allowed or fixed. If a request for an extension of time for transmitting the record has been previously denied, the motion shall set forth the denial and shall state the reasons therefor, if any were given. The district court or the court of appeals may require the record to be transmitted and the appeal to be docketed at any time within the time otherwise fixed or allowed therefor.

### (e) Retention of the Record in the District Court by Order of Court

The court of appeals may provide by rule or order that a certified copy of the docket entries shall be transmitted in lieu of the entire record, subject to the right of any party to request at any time during the pendency of the appeal that designated parts of the record be transmitted.

If the record or any part thereof is required in the district court for use there pending the appeal, the district court may make an order to that effect, and the clerk of the district court shall retain the record or parts thereof subject to the request of the court of appeals, and shall transmit a copy of the order and of the docket entries together with such parts of the original record as the district court shall allow and copies of such parts as the parties may designate.

### (f) Stipulation of Parties that Parts of the Record be Retained in the District Court

The parties may agree by written stipulation filed in the district court that designated parts of the record shall be retained in the district court unless thereafter the court of appeals shall order or any party shall request their transmittal. The parts thus designated shall nevertheless be a part of the record on appeal for all purposes.

### (g) Record for Preliminary Hearing in the Court of Appeals

If prior to the time the record is transmitted a party desires to make in the court of appeals a motion for dismissal, for release, for a stay pending appeal, for additional security on the bond on appeal or on a supersedeas bond, or for any intermediate order, the clerk of the district court at the request of any party shall transmit to the court of appeals such parts of the original record as any party shall designate.

### NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

*Subdivisions (a) and (b).* These subdivisions are derived from FRCP 73(g) and FRCP 75(e). FRCP 75(e) presently directs the clerk of the district court to transmit the record within the time allowed or fixed for its filing, which, under the provisions of FRCP 73(g) is within 40 days from the date of filing the notice of appeal, unless an extension is obtained from the district court. The precise time at which the record must be transmitted thus depends upon the time required for delivery of the record from the district court to the court of appeals, since, to permit its timely filing, it must reach the court of appeals before expiration of the 40-day period of an extension thereof. Subdivision (a) of this rule provides that the record is to be transmitted within the 40-day period, or any extension thereof; subdivision (b) provides that transmission is effected when the clerk of the district court mails or otherwise forwards the record to the clerk of the court of appeals; Rule 12(b) directs the clerk of the court of appeals to file the record upon its receipt following timely docketing and transmittal. It can thus be determined with certainty precisely when the clerk of the district court must forward the record to the clerk of the court of appeals in order to effect timely filing: the final day of the 40-day period or of any extension thereof.

*Subdivision (c).* This subdivision is derived from FRCP 75(e) without change of substance.

*Subdivision (d).* This subdivision is derived from FRCP 73(g) and FRCrP 39(c). Under present rules the district court is empowered to extend the time for filing the record and docketing the appeal. Since under the proposed rule timely transmission now insures timely filing (see note to subdivisions (a) and (b) above) the power of the district court is expressed in terms of its power to extend the time for transmitting the record. Restriction of that power to a period of 90 days after the filing of the notice of appeal represents a change in the rule with respect to appeals in criminal cases. FRCrP 39(c) now permits the district court to extend the time for filing and docketing without restriction. No good reason appears for a difference between the civil and criminal rule in this regard, and subdivision (d) limits the power of the district court to extend the time for transmitting the record in all cases to 90 days from the date of filing the notice of appeal, just as its power is now limited with respect to docketing and filing in civil cases. Subdivision (d) makes explicit the power of the court of appeals to permit the record to be filed at any time. See *Pyramid Motor Freight Corporation* v. *Ispass*, 330, U.S. 695, 67 S.Ct. 954, 91 L.Ed. 1184 (1947).

*Subdivisions (e), (f) and (g).* These subdivisions are derived from FRCP 75(f), (a) and (g), respectively, without change of substance.

### CROSS REFERENCES

Records: obsolete papers, see section 457 of this title.

Reporters' transcript of proceedings, see section 753 of this title.

## Rule 12. Docketing the Appeal; Filing of the Record

### (a) Docketing the Appeal

Within the time allowed or fixed for transmission of the record, the appellant shall pay to the clerk of the court of appeals the docket fee fixed by the Judicial Conference of the United States pursuant to 28 U.S.C. § 1913, and the clerk shall thereupon enter the appeal upon the docket. If an appellant is authorized to prosecute the appeal without prepayment of fees, the clerk shall enter the appeal upon the docket at the request of a party or at the time of filing the record. The court of appeals may upon motion for cause shown enlarge the time for docketing the appeal or permit the appeal to be docketed out of time. An appeal shall be docketed under the title given to the action in the district court, with the appellant identified as such, but if such title does not contain the name of the appellant, his name, identified as appellant, shall be added to the title.

### (b) Filing of the Record

Upon receipt of the record or of papers authorized to be filed in lieu of the record under the provisions of Rule 11(c) and (e) by the clerk of the court of appeals following timely transmittal, and after the appeal has been timely docketed, the clerk shall file the record. The clerk shall immediately give notice to all parties of the date on which the record was filed.

### (c) Dismissal for Failure of Appellant to Cause Timely Transmission or to Docket Appeal

If the appellant shall fail to cause timely transmission of the record or to pay the docket fee if a docket fee is required, any appellee may file a motion in the court of appeals to dismiss the appeal. The motion shall be supported by a certificate of the clerk of the district court showing the date and substance of the judgment or order from which the appeal was taken, the date on which the notice of appeal was filed, the expiration date of any order extending the time for transmitting the record, and by proof of service. The appellant may respond within 14 days of such service. The clerk shall docket the appeal for the purpose of permitting the court to entertain the motion without requiring payment of the docket fee, but the appellant shall not be permitted to respond without payment of the fee unless he is otherwise exempt therefrom.

### NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

*Subdivision (a)*. All that is involved in the docketing of an appeal is the payment of the docket fee. In practice, after the clerk of the court of appeals receives the record from the clerk of the district court he notifies the appellant of its receipt and requests payment of the fee. Upon receipt of the fee, the clerk enters the appeal upon the docket and files the record. The appellant is allowed to pay the fee at any time within the time allowed or fixed for transmission of the record and thereby to discharge his responsibility for docketing. The final sentence is added in the interest of facilitating future reference and citation and location of cases in indexes. Compare 3d Cir. Rule 10(2); 4th Cir. Rule 9(8); 6th Cir. Rule 14(1).

*Subdivision (c)*. The rules of the circuits generally permit the appellee to move for dismissal in the event the appellant fails to effect timely filing of the record. See 1st Cir. Rule 21(3); 3d Cir. Rule 21(4); 5th Cir. Rule 16(1); 8th Cir. Rule 7(d).

### CROSS REFERENCES

Power of the courts to issue writs, see section 1651 of this title.

Rule making power generally, see section 2071 of this title.

Seal and teste of process, see section 1691 of this title.

## TITLE III—REVIEW OF DECISIONS OF THE TAX COURT OF THE UNITED STATES

### Rule 13. Review of Decisions of the Tax Court

**(a) How Obtained; Time for Filing Notice of Appeal**

Review of a decision of the Tax Court of the United States shall be obtained by filing a notice of appeal with the clerk of the Tax Court within 90 days after the decision of the Tax Court is entered. If a timely notice of appeal is filed by one party, any other party may take an appeal by filing a notice of appeal within 120 days after the decision of the Tax Court is entered.

The running of the time for appeal is terminated as to all parties by a timely motion to vacate or revise a decision made pursuant to the Rules of Practice of the Tax Court. The full time for appeal commences to run and is to be computed from the entry of an order disposing of such motion, or from the entry of decision, whichever is later.

**(b) Notice of Appeal—How Filed**

The notice of appeal may be filed by deposit in the office of the clerk of the Tax Court in the District of Columbia or by mail addressed to the clerk. If a notice is delivered to the clerk by mail and is received after expiration of the last day allowed for filing, the postmark date shall be deemed to be the date of delivery, subject to the provisions of § 7502 of the Internal Revenue Code of 1954, as amended, and the regulations promulgated pursuant thereto.

**(c) Content of the Notice of Appeal; Service of the Notice; Effect of Filing and Service of the Notice**

The content of the notice of appeal, the manner of its service, and the effect of the filing of the notice and of its service shall be as prescribed by Rule 3. Form 2 in the Appendix of Forms is a suggested form of the notice of appeal.

**(d) The Record on Appeal; Transmission of the Record; Filing of the Record**

The provisions of Rules 10, 11 and 12 respecting the record and the time and manner of its transmission and filing and the docketing of the appeal in the court of appeals in cases on appeal from the district courts shall govern in cases on appeal from the Tax Court. Each reference in those rules and in Rule 3 to the district court and to the clerk of the district court shall be read as a reference to the Tax Court and to the clerk of the Tax Court, respectively. If appeals are taken from a decision of the Tax Court to more than one court of appeals, the original record shall be transmitted to the court of appeals named in the first notice of appeal filed. Provision for the record in any other appeal shall be made upon appropriate application by the appellant to the court of appeals to which such other appeal is taken.

### NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

*Subdivision (a)*. This subdivision effects two changes in practice respecting review of Tax Court decisions: (1) Section 7483 of the Internal Revenue Code, 68A Stat. 891, 26 U.S.C. § 7483, provides that review of a Tax Court decision may be obtained by filing a petition for review. The subdivision provides for review by the filing of the simple and familiar notice of appeal used to obtain review of district court judgments; (2) Section 7483, *supra*, requires that a petition for review be filed within 3 months after a decision is rendered, and provides that if a petition is so filed by one party, any other party may file a petition for review within 4 months after the decision is rendered. In the interest of fixing the time for review with precision, the proposed rule substitutes "90 days" and "120 days" for the statutory "3 months" and "4 months", respectively. The power of the Court to regulate these details of practice is clear. Title 28 U.S.C. § 2072, as amended by the Act of November 6, 1966, 80 Stat. 1323 (1 U.S. Code Cong. & Ad. News, p. 1546 (1966)), authorizes the Court to regulate ". . . practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States. . . ."

The second paragraph states the settled teaching of the case law. See *Robert Louis Stevenson Apartments, Inc.* v. *C.I.R.*, 337 F.2d 681, 10 A.L.R.3d 112 (8th Cir., 1964); *Denholm & McKay Co.* v. *C.I.R.*, 132 F.2d 243 (1st Cir., 1942); *Helvering* v. *Continental Oil Co.*, 63 App.D.C. 5, 68 F.2d 750 (1934); *Burnet* v. *Lexington Ice & Coal Co.*, 62 F.2d 906 (4th Cir., 1933); *Griffiths* v. *C.I.R.*, 50 F.2d 782 (7th Cir., 1931).

*Subdivision (b)*. The subdivision incorporates the statutory provision (Title 26, U.S.C. § 7502) that timely mailing is to be treated as timely filing. The statute contains special provisions respecting other than ordinary mailing. If the notice of appeal is sent by registered mail, registration is deemed prima facie evidence that the notice was delivered to the clerk of the Tax Court, and the date of registration is deemed the postmark date. If the notice of appeal is sent by certified mail, the effect of certification with respect to prima facie evidence of delivery and the postmark date depends upon regulations of the Secretary of the Treasury. The effect of a postmark made other than by the United States Post Office likewise depends upon regulations of the Secretary. Current regulations are found in 26 CFR § 301.7502-1.

#### CROSS REFERENCES

Courts of review; jurisdiction and venue, see section 7482 of Title 26, Internal Revenue Code.

Finality of decision on mandate of Court of Appeals, see section 7481 of Title 26.

Notice of appeal, see section 7483 of Title 26.

### Rule 14. Applicability of Other Rules to Review of Decisions of the Tax Court

All provisions of these rules are applicable to review of a decision of the Tax Court, except that Rules 4-9, Rules 15-20, and Rules 22 and 23 are not applicable.

#### NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

The proposed rule continues the present uniform practice of the circuits of regulating review of decisions of the Tax Court by the general rules applicable to appeals from judgments of the district courts.

#### CROSS REFERENCES

Courts of review; jurisdiction and venue, see section 7482 of Title 26, Internal Revenue Code.

Finality of decision on mandate of court of appeals, see section 7481 of Title 26.

Notice of appeal, see section 7483 of Title 26.

Rules of practice before the United States Tax Court, see provisions following section 7453 of Title 26.

## TITLE IV—REVIEW AND ENFORCEMENT OF ORDERS OF ADMINISTRATIVE AGENCIES, BOARDS, COMMISSIONS AND OFFICERS

### Rule 15. Review or Enforcement of Agency Orders—How Obtained; Intervention

#### (a) Petition for Review of Order; Joint Petition

Review of an order of an administrative agency, board, commission or officer (hereinafter, the term "agency" shall include agency, board, commission or officer) shall be obtained by filing with the clerk of a court of appeals which is authorized to review such order, within the time prescribed by law, a petition to enjoin, set aside, suspend, modify or otherwise review, or a notice of appeal, whichever form is indicated by the applicable statute (hereinafter, the term "petition for review" shall include a petition to enjoin, set aside, suspend, modify or otherwise review, or a notice of appeal). The petition shall specify the parties seeking review and shall designate the respondent and the order or part thereof to be reviewed. Form 3 in the Appendix of Forms is a suggested form of a petition for review. In each case the agency shall be named respondent. The United States shall also be deemed a respondent if so required by statute, even though not so designated in the petition. If two or more persons are entitled to petition the same court for review of the same order and their interests are such as to make joinder practicable, they may file a joint petition for review and may thereafter proceed as a single petitioner.

#### (b) Application for Enforcement of Order; Answer; Default; Cross-Application for Enforcement

An application for enforcement of an order of an agency shall be filed with the clerk of a court of appeals which is authorized to enforce the order. The application shall contain a concise statement of the proceedings in which the order was entered, the facts upon which venue is based, and the relief prayed. Within 20 days after the application is filed, the respondent shall serve on the petitioner and file with the clerk an answer to the application. If the respondent fails to file an answer within such time, judgment will be awarded for the relief prayed. If a petition is filed for review of an order which the court has jurisdiction to enforce, the respondent may file a cross-application for enforcement.

#### (c) Service of Petition or Application

A copy of a petition for review or of an application or cross-application for enforcement of an order shall be served by the clerk of the court of appeals on each respondent in the manner prescribed by Rule 3(d), unless a different manner of service is prescribed by an applicable statute. At the time of filing, the petitioner shall furnish the clerk with a copy of the petition or application for each respondent. At or before the time of filing a petition for review, the petitioner shall serve a copy thereof on all parties who shall have been admitted to participate in the proceedings before the agency other than respondents to be served by the clerk, and shall file with the clerk a list of those so served.

#### (d) Intervention

Unless an applicable statute provides a different method of intervention, a person who desires to intervene in a proceeding under this rule shall serve upon all parties to the proceeding and file with the clerk of the court of appeals a motion for leave to intervene. The motion shall contain a concise statement of the interest of the moving party and the grounds upon which intervention is sought. A motion for leave to intervene or other notice of intervention authorized by an applicable statute shall be filed within 30 days of the date on which the petition for review is filed.

#### NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

*General Note.* The power of the Supreme Court to prescribe rules of practice and procedure for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers is conferred by 28 U.S.C. § 2072, as amended by the Act of November 6, 1966, § 1, 80 Stat. 1323 (1 U.S. Code Cong. & Ad. News, p. 1546 (1966)). Section 11 of the Hobbs Administrative Orders Review Act of 1950, 64 Stat. 1132, reenacted as 28 U.S.C. § 2352 (28 U.S.C.A. § 2352 (Suppl. 1966)), repealed by the Act of November 6, 1966, § 4, supra, directed the courts of appeals to adopt and promulgate, subject to approval by the Judicial Conference rules governing practice and procedure in proceedings to review the orders of boards, commissions and officers whose orders were made reviewable in the courts of appeals by the Act. Thereafter, the Judicial Conference approved a uniform rule, and that rule, with minor variations, is now in effect in all circuits. Third Circuit Rule 18 is a typical circuit rule, and for convenience it is referred to as the uniform rule in the notes which accompany rules under this Title.

*Subdivision (a).* The uniform rule (see General Note above) requires that the petition for review contain "a concise statement, in barest outline, of the nature of the proceedings as to which relief is sought, the facts upon which venue is based, the grounds upon which relief is sought, and the relief prayed." That language is derived from Section 4 of the Hobbs Administrative Orders Review Act of 1950, 64 Stat. 1130, reenacted as 28 U.S.C. § 2344 (28 U.S.C.A. § 2344 (Suppl. 1966)). A few other statutes also prescribe the content of the petition, but the great majority are silent on the point. The proposed rule supersedes 28 U.S.C. § 2344 and other statutory provisions prescribing the form of the petition for review and permits review to be initiated by the filing of a simple petition similar in form to the notice of appeal used in appeals from judgments of district courts. The more elaborate form of petition for review now required is rarely useful either to the litigants or to the courts. There is no effective, reasonable way of obliging petitioners to come to the real issues before those issues are formulated in the briefs. Other provisions of this subdivision are derived from sections 1 and 2 of the uniform rule.

*Subdivision (b).* This subdivision is derived from sections 3, 4 and 5 of the uniform rule.

*Subdivision (c).* This subdivision is derived from section 1 of the uniform rule.

*Subdivision (d).* This subdivision is based upon section 6 of the uniform rule. Statutes occasionally permit intervention by the filing of a notice of intention to intervene. The uniform rule does not fix a time limit for intervention, and the only time limits fixed by statute are the 30-day periods found in the Communications Act Amendments, 1952, § 402(e), 66 Stat. 719, 47 U.S.C. § 402(e), and the Sugar Act of 1948, § 205(d), 61 Stat. 927, 7 U.S.C. § 1115(d).

#### Cross References

Administrative procedure, generally, see section 551 et seq. of Title 5, Government Organization and Employees.

Federal Communications Commission, Civil Aeronautics Board and Federal Reserve Board, review of orders, see section 21 of Title 15, Commerce and Trade.

Federal Power Commission, review of orders, see section 825*l* of Title 16, Conservation.

Federal Trade Commission, review of order, see sections 21 and 45 of Title 15, Commerce and Trade.

Interstate Commerce Commission, review of orders, see sections 1253 and 2321 et seq. of this title, and section 21 of Title 15.

Review of orders of Federal agencies, see section 2341 et seq. of this title.

## Rule 16. The Record on Review or Enforcement

### (a) Composition of the Record

The order sought to be reviewed or enforced, the findings or report on which it is based, and the pleadings, evidence and proceedings before the agency shall constitute the record on review in proceedings to review or enforce the order of an agency.

### (b) Omissions from or Misstatements in the Record

If anything material to any party is omitted from the record or is misstated therein, the parties may at any time supply the omission or correct the misstatement by stipulation, or the court may at any time direct that the omission or misstatement be corrected and, if necessary, that a supplemental record be prepared and filed.

#### Notes of Advisory Committee on Appellate Rules

Subdivision (a) is based upon 28 U.S.C. § 2112(b). There is no distinction between the record compiled in the agency proceeding and the record on review; they are one and the same. The record in agency cases is thus the same as that in appeals from the district court—the original papers, transcripts and exhibits in the proceeding below. Subdivision (b) is based upon section 8 of the uniform rule (see General Note following Rule 15).

#### Cross References

Administrative Procedure, generally, see section 551 et seq. of Title 5, Government Organization and Employees.

Federal Communications Commission, Civil Aeronautics Board and Federal Reserve Board, review of orders, see section 21 of Title 15, Commerce and Trade.

Federal Power Commission, review of orders, see section 825*l* of Title 16, Conservation.

Federal Trade Commission, review of orders, see sections 21 and 45 of Title 15, Commerce and Trade.

Interstate Commerce Commission, review of orders, see sections 1253 and 2321 et seq. of this title, and section 21 of Title 15.

Orders of Federal agencies, see section 2341 et seq. of this title.

## Rule 17. Filing of The Record

### (a) Agency to File; Time for Filing; Notice of Filing

The agency shall file the record with the clerk of the court of appeals within 40 days after service upon it of the petition for review unless a different time is provided by the statute authorizing review. In enforcement proceedings the agency shall file the record within 40 days after filing an application for enforcement, but the record need not be filed unless the respondent has filed an answer contesting enforcement of the order, or unless the court otherwise orders. The court may shorten or extend the time above prescribed. The clerk shall give notice to all parties of the date on which the record is filed.

### (b) Filing—What Constitutes

The agency may file the entire record or such parts thereof as the parties may designate by stipulation filed with the agency. The original papers in the agency proceeding or certified copies thereof may be filed. Instead of filing the record or designated parts thereof, the agency may file a certified list of all documents, transcripts of testimony, exhibits and other material comprising the record, or a list of such parts thereof as the parties may designate, adequately describing each, and the filing of the certified list shall constitute filing of the record. The parties may stipulate that neither the record nor a certified list be filed with the court. The stipulation shall be filed with the clerk of the court of appeals and the date of its filing shall be deemed the date on which the record is filed. If a certified list is filed, or if the parties designate only parts of the record for filing or stipulate that neither the record nor a certified list be filed, the agency shall retain the record or parts thereof. Upon request of the court or the request of a party, the record or any part thereof thus retained shall be transmitted to the court notwithstanding any prior stipulation. All parts of the record retained by the agency shall be a part of the record on review for all purposes.

#### Notes of Advisory Committee on Appellate Rules

*Subdivision (a).* This subdivision is based upon section 7 of the uniform rule (see General Note following Rule 15). That rule does not prescribe a time for filing the record in enforcement cases. Forty days are allowed in order to avoid useless preparation of the record or certified list in cases where the application for enforcement is not contested.

*Subdivision (b).* This subdivision is based upon 28 U.S.C. § 2112 and section 7 of the uniform rule. It permits the agency to file either the record itself or a certified list of its contents. It also permits the parties to stipulate against transmission of designated parts of the record without the fear that an inadvertent stipulation may "diminish" the record. Finally, the parties may, in cases where consultation of the record is unnecessary, stipulate that neither the record nor a certified list of its contents be filed.

CROSS REFERENCES

Administrative Procedure, generally, see section 551 et seq. of Title 5, Government Organization and Employees.

Federal Communications Commission, Civil Aeronautics Board and Federal Reserve Board, review of orders, see section 21 of Title 15, Commerce and Trade.

Federal Power Commission, review of orders, see section 825*l* of Title 16, Conservation.

Federal Trade Commission, review of orders, see sections 21 and 45 of Title 15, Commerce and Trade.

Interstate Commerce Commission, review of orders, see sections 1253 and 2321 et seq. of this title and section 21 of Title 15.

Orders of Federal agencies, see section 2341 et seq. of this title.

### Rule 18. Stay Pending Review

Application for a stay of a decision or order of an agency pending direct review in the court of appeals shall ordinarily be made in the first instance to the agency. A motion for such relief may be made to the court of appeals or to a judge thereof, but the motion shall show that application to the agency for the relief sought is not practicable, or that application has been made to the agency and denied, with the reasons given by it for denial, or that the action of the agency did not afford the relief which the applicant had requested. The motion shall also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute the motion shall be supported by affidavits or other sworn statements or copies thereof. With the motion shall be filed such parts of the record as are relevant to the relief sought. Reasonable notice of the motion shall be given to all parties to the proceeding in the court of appeals. The court may condition relief under this rule upon the filing of a bond or other appropriate security. The motion shall be filed with the clerk and normally will be considered by a panel or division of the court, but in exceptional cases where such procedure would be impracticable due to the requirements of time, the application may be made to and considered by a single judge of the court.

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

While this rule has no counterpart in present rules regulating review of agency proceedings, it merely assimilates the procedure for obtaining stays in agency proceedings with that for obtaining stays in appeals from the district courts. The same considerations which justify the requirement of an initial application to the district court for a stay pending appeal support the requirement of an initial application to the agency pending review. See Note accompanying Rule 8. Title 5, U.S.C. § 705 (5 U.S.C.A. § 705 (1966 Pamphlet)) confers general authority on both agencies and reviewing courts to stay agency action pending review. Many of the statutes authorizing review of agency action by the courts of appeals deal with the question of stays, and at least one, the Act of June 15, 1936, 49 Stat. 1499 (7 U.S.C. § 10a), prohibits a stay pending review. The proposed rule in nowise affects such statutory provisions respecting stays. By its terms, it simply indicates the procedure to be followed when a stay is sought.

CROSS REFERENCES

Administrative Procedure, generally, see section 551 et seq. of Title 5, Government Organization and Employees.

Federal Communications Commission, Civil Aeronautics Board and Federal Reserve Board, review of orders, see section 21 of Title 15, Commerce and Trade.

Federal Power Commission, review of orders, see section 825*l* of Title 16, Conservation.

Federal Trade Commission, review of orders, see sections 21 and 45 of Title 15, Commerce and Trade.

Interstate Commerce Commission, review of orders, see sections 1253 and 2321 et seq. of this title and section 21 of Title 15.

Orders of Federal agencies, see section 2341 et seq. of this title.

### Rule 19. Settlement of Judgments Enforcing Orders

When an opinion of the court is filed directing the entry of a judgment enforcing in whole or in part the order of an agency, the agency shall within 14 days thereafter serve upon the respondent and file with the clerk a proposed judgment in conformity with the opinion. If the respondent objects to the proposed judgment as not in conformity with the opinion, he shall within 7 days thereafter serve upon the agency and file with the clerk a proposed judgment which he deems to be in conformity with the opinion. The court will thereupon settle the judgment and direct its entry without further hearing or argument.

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

This is section 12 of the uniform rule (see General Note following Rule 15) with changes in phraseology.

CROSS REFERENCES

Administrative Procedure, generally, see section 551 et seq. of Title 5, Government Organization and Employees.

Federal Communications Commission, Civil Aeronautics Board and Federal Reserve Board, review of orders, see section 21 of Title 15, Commerce and Trade.

Federal Power Commission, review of orders, see section 825*l* of Title 16, Conservation.

Federal Trade Commission, review of orders, see sections 21 and 45 of Title 15, Commerce and Trade.

Interstate Commerce Commission, review of orders, see sections 1253 and 2321 et seq. of this title, and section 21 of Title 15.

Orders of Federal agencies, see section 2341 et seq. of this title.

### Rule 20. Applicability of Other Rules to Review or Enforcement of Agency Orders

All provisions of these rules are applicable to review or enforcement of orders of agencies, except that Rules 3–14 and Rules 22 and 23 are not applicable. As used in any applicable rule, the term "appellant" includes a petitioner and the term "appellee" includes a respondent in proceedings to review or enforce agency orders.

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

The proposed rule continues the present uniform practice of the circuits of regulating agency review or enforcement proceedings by the general rules applicable to appeals from judgments of the district courts.

CROSS REFERENCES

Administrative Procedure, generally, see section 551 et seq. of Title 5, Government Organization and Employees.

Federal Communications Commission, Civil Aeronautics Board and Federal Reserve Board, review of orders, see section 21 of Title 15, Commerce and Trade.

Federal Power Commission, review of orders, see sections 825l of Title 16, Conservation.

Federal Trade Commission, review of orders, see sections 21 and 45 of Title 15, Commerce and Trade.

Interstate Commerce Commission, review of orders, see sections 1253 and 2321 et seq. of this title, and section 21 of Title 15.

Orders of Federal agencies, see section 2341 et seq. of this title.

## TITLE V—EXTRAORDINARY WRITS

### Rule 21. Writs of Mandamus and Prohibition Directed to a Judge or Judges and Other Extraordinary Writs

**(a) Mandamus or Prohibition to a Judge or Judges; Petition for Writ; Service and Filing**

Application for a writ of mandamus or of prohibition directed to a judge or judges shall be made by filing a petition therefor with the clerk of the court of appeals with proof of service on the respondent judge or judges and on all parties to the action in the trial court. The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the issues presented and of the relief sought; a statement of the reasons why the writ should issue; and copies of any order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. Upon receipt of the prescribed docket fee, the clerk shall docket the petition and submit it to the court.

**(b) Denial; Order Directing Answer**

If the court is of the opinion that the writ should not be granted, it shall deny the petition. Otherwise, it shall order that an answer to the petition be filed by the respondents within the time fixed by the order. The order shall be served by the clerk on the judge or judges named respondents and on all other parties to the action in the trial court. All parties below other than the petitioner shall also be deemed respondents for all purposes. Two or more respondents may answer jointly. If the judge or judges named respondents do not desire to appear in the proceeding, they may so advise the clerk and all parties by letter, but the petition shall not thereby be taken as admitted. The clerk shall advise the parties of the dates on which briefs are to be filed, if briefs are required, and of the date of oral argument. The proceeding shall be given preference over ordinary civil cases.

**(c) Other Extraordinary Writs**

Application for extraordinary writs other than those provided for in subdivisions (a) and (b) of this rule shall be made by petition filed with the clerk of the court of appeals with proof of service on the parties named as respondents. Proceedings on such application shall conform, so far as is practicable, to the procedure prescribed in subdivisions (a) and (b) of this rule.

**(d) Form of Papers; Number of Copies**

All papers may be typewritten. Three copies shall be filed with the original, but the court may direct that additional copies be furnished.

#### Notes of Advisory Committee on Appellate Rules

The authority of courts of appeals to issue extraordinary writs is derived from 28 U.S.C. § 1651. Subdivisions (a) and (b) regulate in detail the procedure surrounding the writs most commonly sought—mandamus or prohibition directed to a judge or judges. Those subdivisions are based upon Supreme Court Rule 31, with certain changes which reflect the uniform practice among the circuits (Seventh Circuit Rule 19 is a typical circuit rule). Subdivision (c) sets out a very general procedure to be followed in applications for the variety of other writs which may be issued under the authority of 28 U.S.C. § 1651.

#### Cross References

All Writs Act, see section 1651 of this title.

## TITLE VI—HABEAS CORPUS; PROCEEDINGS IN FORMA PAUPERIS

### Rule 22. Habeas Corpus Proceedings

**(a) Application for the Original Writ**

An application for a writ of habeas corpus shall be made to the appropriate district court. If application is made to a circuit judge, the application will ordinarily be transferred to the appropriate district court. If an application is made to or transferred to the district court and denied, renewal of the application before a circuit judge is not favored; the proper remedy is by appeal to the court of appeals from the order of the district court denying the writ.

**(b) Necessity of Certificate of Probable Cause for Appeal**

In a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court, an appeal by the applicant for the writ may not proceed unless a district or a circuit judge issues a certificate of probable cause. If an appeal is taken by the applicant, the district judge who rendered the judgment shall either issue a certificate of probable cause or state the reasons why such a certificate should not issue. The certificate or the statement shall be forwarded to the court of appeals with the notice of appeal and the file of the proceedings in the district court. If the district judge has denied the certificate, the applicant for the writ may then request issuance of the certificate by a circuit judge. If such a request is addressed to the court of appeals, it shall be deemed addressed to the judges thereof and shall be considered by a circuit judge or judges as the court deems appropriate. If no express request for a certificate is filed, the notice of appeal shall be deemed to constitute a request addressed to the judges of the court of appeals. If an appeal is taken by a state or its representative, a certificate of probable cause is not required.

#### Notes of Advisory Committee on Appellate Rules

*Subdivision (a).* Title 28 U.S.C. § 2241(a) authorizes circuit judges to issue the writ of habeas corpus. Section 2241(b), however, authorizes a circuit judge to decline to entertain an application and to transfer it to the appropriate district court, and this is the usual practice. The first two sentences merely make present practice explicit. Title 28 U.S.C. § 2253 seems clearly to contemplate that once an application is presented to a district judge and is denied by him, the remedy is an appeal from the order of denial. But the language of 28 U.S.C. § 2241 seems to authorize a second original application to a circuit judge following a denial by a district judge. *In re Gersing*, 79 U.S. App. D.C. 245, 145 F.2d 481 (D.C. Cir., 1944) and *Chapman* v. *Teets*, 241 F.2d 186 (9th Cir., 1957) acknowledge the availability of such a procedure. But the procedure is ordinarily a waste of time for all involved, and the final sentence attempts to discourage it.

A court of appeals has no jurisdiction as a court to grant an original writ of habeas corpus, and courts of appeals have dismissed applications addressed to them. *Loum* v. *Alvis*, 263 F.2d 836 (6th Cir., 1959); *In re Berry*, 221 F.2d 798 (9th Cir., 1955); *Posey* v. *Dowd*, 134 F.2d 613 (7th Cir., 1943). The fairer and more expeditious practice is for the court of appeals to regard an application addressed to it as being addressed to one of its members, and to transfer the application to the appropriate district court in accordance with the provisions of this rule. Perhaps such a disposition is required by the rationale of *In re Burwell*, 350 U.S. 521, 76 S.Ct. 539, 100 L.Ed. 666 (1956).

*Subdivision (b)*. Title 28 U.S.C. § 2253 provides that an appeal may not be taken in a habeas corpus proceeding where confinement is under a judgment of a state court unless the judge who rendered the order in the habeas corpus proceeding, or a circuit justice or judge, issues a certificate of probable cause. In the interest of insuring that the matter of the certificate will not be overlooked and that, if the certificate is denied, the reasons for denial in the first instance will be available on any subsequent application, the proposed rule requires the district judge to issue the certificate or to state reasons for its denial.

While 28 U.S.C. § 2253 does not authorize the court of appeals as a court to grant a certificate of probable cause, *In re Burwell*, 350 U.S. 521, 76 S.Ct. 539, 100 L.Ed. 666 (1956) makes it clear that a court of appeals may not decline to consider a request for the certificate addressed to it as a court but must regard the request as made to the judges thereof. The fourth sentence incorporates the Burwell rule.

Although 28 U.S.C. § 2253 appears to require a certificate of probable cause even when an appeal is taken by a state or its representative, the legislative history strongly suggests that the intention of Congress was to require a certificate only in the case in which an appeal is taken by an applicant for the writ. See *United States ex rel. Tillery* v. *Cavell*, 294 F.2d 12 (3d Cir., 1960). Four of the five circuits which have ruled on the point have so interpreted section 2253. *United States ex rel. Tillery* v. *Cavell*, supra; *Buder* v. *Bell*, 306 F.2d 71 (6th Cir., 1962); *United States ex rel. Calhoun* v. *Pate*, 341 F.2d 885 (7th Cir., 1965); *State of Texas* v. *Graves*, 352 F.2d 514 (5th Cir., 1965). Cf. *United States ex rel. Carrol* v. *LaVallee*, 342 F.2d 641 (2d Cir., 1965). The final sentence makes it clear that a certificate of probable cause is not required of a state or its representative.

### CROSS REFERENCES

Habeas corpus generally, see sections 2241 to 2255 of this title.

Suspension of habeas corpus, see U.S.C. Const. Art. 1, § 9, cl. 2.

## Rule 23. Custody of Prisoners in Habeas Corpus Proceedings

### (a) Transfer of Custody Pending Review

Pending review of a decision in a habeas corpus proceeding commenced before a court, justice or judge of the United States for the release of a prisoner, a person having custody of the prisoner shall not transfer custody to another unless such transfer is directed in accordance with the provisions of this rule. Upon application of a custodian showing a need therefor, the court, justice or judge rendering the decision may make an order authorizing transfer and providing for the substitution of the successor custodian as a party.

### (b) Detention or Release of Prisoner Pending Review of Decision Failing to Release

Pending review of a decision failing or refusing to release a prisoner in such a proceeding, the prisoner may be detained in the custody from which release is sought, or in other appropriate custody, or may be enlarged upon his recognizance, with or without surety, as may appear fitting to the court or justice or judge rendering the decision, or to the court of appeals or to the Supreme Court, or to a judge or justice of either court.

### (c) Release of Prisoner Pending Review of Decision Ordering Release

Pending review of a decision ordering the release of a prisoner in such a proceeding, the prisoner shall be enlarged upon his recognizance, with or without surety, unless the court or justice or judge rendering the decision, or the court of appeals or the Supreme Court, or a judge or justice of either court shall otherwise order.

### (d) Modification of Initial Order Respecting Custody

An initial order respecting the custody or enlargement of the prisoner and any recognizance or surety taken, shall govern review in the court of appeals and in the Supreme Court unless for special reasons shown to the court of appeals or to the Supreme Court, or to a judge or justice of either court, the order shall be modified, or an independent order respecting custody, enlargement or surety shall be made.

### NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

The rule is the same as Supreme Court Rule 49, as amended on June 12, 1967, effective October 2, 1967.

### CROSS REFERENCES

Habeas corpus generally, see sections 2241 to 2255 of this title.

Suspension of habeas corpus, see U.S.C. Const. Art. 1, § 9, cl. 2.

## Rule 24. Proceedings in Forma Pauperis

### (a) Leave to Proceed on Appeal in Forma Pauperis from District Court to Court of Appeals

A party to an action in a district court who desires to proceed on appeal in forma pauperis shall file in the district court a motion for leave so to proceed, together with an affidavit, showing, in the detail prescribed by Form 4 of the Appendix of Forms, his inability to pay fees and costs or to give security therefor, his belief that he is entitled to redress, and a statement of the issues which he intends to present on appeal. If the motion is granted, the party may proceed without further application to the court of appeals and without prepayment of fees or costs in either court or the giving of security therefor. If the motion is denied, the district court shall state in writing the reasons for the denial.

Notwithstanding the provisions of the preceding paragraph, a party who has been permitted to proceed in an action in the district court in forma pauperis, or who has been permitted to proceed there as one who is financially unable to obtain an adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization unless, before or after the notice of appeal is filed, the district court shall certify that the appeal is not taken in good faith or shall find that the party is otherwise not entitled so to proceed, in which event the district court shall state in writing the reasons for such certification or finding.

If a motion for leave to proceed on appeal in forma pauperis is denied by the district court, or if the district court shall certify that the appeal is not taken in good faith or shall find that the party is otherwise not entitled to proceed in forma pauperis, the clerk shall forthwith serve notice of such action. A motion for leave so to proceed may be filed in the court of appeals within 30 days after service of notice of the action of the district court. The motion shall be accompanied by a copy of the affidavit filed in the district court, or by the affidavit prescribed by the first paragraph of this subdivision if no affidavit has been filed in the district court, and by a copy of the statement of reasons given by the district court for its action.

**(b) Leave to Proceed on Appeal or Review in Forma Pauperis in Administrative Agency Proceedings**

A party to a proceeding before an administrative agency, board, commission or officer (including, for the purpose of this rule, the Tax Court of the United States) who desires to proceed on appeal or review in a court of appeals in forma pauperis, when such appeal or review may be had directly in a court of appeals, shall file in the court of appeals a motion for leave so to proceed together with the affidavit prescribed by the first paragraph of subdivision (a) of this rule.

**(c) Form of Briefs, Appendices and Other Papers**

Parties allowed to proceed in forma pauperis may file briefs, appendices and other papers in typewritten form, and may request that the appeal be heard on the original record without the necessity of reproducing parts thereof in any form.

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

*Subdivision (a).* Authority to allow prosecution of an appeal in forma pauperis is vested in "[a]ny court of the United States" by 28 U.S.C. § 1915(a). The second paragraph of section 1915(a) seems to contemplate initial application to the district court for permission to proceed in forma pauperis, and although the circuit rules are generally silent on the question, the case law requires initial application to the district court. *Hayes* v. *United States*, 258 F.2d 400 (5th Cir., 1958), *cert. den.* 358 U.S. 856, 79 S.Ct. 87, 3 L.Ed.2d 89 (1958); *Elkins* v. *United States*, 250 F.2d 145 (9th Cir., 1957) see 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960); *United States* v. *Farley*, 238 F.2d 575 (2d Cir., 1956) see 354 U.S. 521, 77 S.Ct. 1371, 1 L.Ed.2d 1529 (1957). D.C. Cir. Rule 41(a) requires initial application to the district court. The content of the affidavit follows the language of the statute; the requirement of a statement of the issues comprehends the statutory requirement of a statement of "the nature of the . . . appeal. . . ." The second sentence is in accord with the decision in *McGann* v. *United States*, 362 U.S. 309, 80 S.Ct. 725, 4 L.Ed.2d 734 (1960). The requirement contained in the third sentence has no counterpart in present circuit rules, but it has been imposed by decision in at least two circuits. *Ragan* v. *Cox*, 305 F.2d 58 (10th Cir., 1962); *United States ex rel. Breedlove* v. *Dowd*, 269 F.2d 693 (7th Cir., 1959).

The second paragraph permits one whose indigency has been previously determined by the district court to proceed on appeal in forma pauperis without the necessity of a redetermination of indigency, while reserving to the district court its statutory authority to certify that the appeal is not taken in good faith, 28 U.S.C. § 1915(a), and permitting an inquiry into whether the circumstances of the party who was originally entitled to proceed in forma pauperis have changed during the course of the litigation. Cf. Sixth Circuit Rule 26.

The final paragraph establishes a subsequent motion in the court of appeals, rather than an appeal from the order of denial or from the certification of lack of good faith, as the proper procedure for calling in question the correctness of the action of the district court. The simple and expeditious motion procedure seems clearly preferable to an appeal. This paragraph applies only to applications for leave to appeal in forma pauperis. The order of a district court refusing leave to initiate an action in the district court in forma pauperis is reviewable on appeal. See *Roberts* v. *United States District Court*, 339 U.S. 844, 70 S.Ct. 954, 94 L.Ed. 1326 (1950).

*Subdivision (b).* Authority to allow prosecution in forma pauperis is vested only in a "court of the United States" (see Note to subdivision (a), above). Thus in proceedings brought directly in a court of appeals to review decisions of agencies or of the Tax Court, authority to proceed in forma pauperis should be sought in the court of appeals. If initial review of agency action is had in a district court, an application to appeal to a court of appeals in forma pauperis from the judgment of the district court is governed by the provisions of subdivision (a).

CROSS REFERENCES

Affidavit of inability to pay fees and expenses of consuls, counsel, interpreters and witnesses, see section 3495 of Title 18, Crimes and Criminal Procedure.

Extradition by foreign government, witnesses for indigent fugitives, see section 3191 of Title 18.

Fees for transcripts in criminal or habeas corpus proceedings to persons allowed to sue, defend, or appeal in forma pauperis, payment by United States, see section 753 of this title.

Habeas corpus proceeding, indigent petitioner entitled to documents without cost, see section 2250 of this title.

## TITLE VII—GENERAL PROVISIONS

### Rule 25. Filing and Service

**(a) Filing**

Papers required or permitted to be filed in a court of appeals shall be filed with the clerk. Filing may be accomplished by mail addressed to the clerk, but filing shall not be timely unless the papers are received by the clerk within the time fixed for filing, except that briefs and appendices shall be deemed filed on the day of mailing if the most expeditious form of delivery by mail, excepting special delivery, is utilized. If a motion requests relief which may be granted by a single judge, the judge may permit the motion to be filed with him, in which event he shall note thereon the date of filing and shall thereafter transmit it to the clerk.

**(b) Service of All Papers Required**

Copies of all papers filed by any party and not required by these rules to be served by the clerk shall, at or before the time of filing, be served by a party or person acting for him on all other parties to the appeal or review. Service on a party represented by counsel shall be made on counsel.

**(c) Manner of Service**

Service may be personal or by mail. Personal service includes delivery of the copy to a clerk or other responsible person at the office of counsel. Service by mail is complete on mailing.

**(d) Proof of Service**

Papers presented for filing shall contain an acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service and of the names of the person served, certified by the person who made service. Proof of service may appear on or be affixed to the papers filed. The clerk may permit papers to be filed without acknowledgment or proof of service but shall require such to be filed promptly thereafter.

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

The rule that filing is not timely unless the papers filed are received within the time allowed is the familiar one. *Ward* v. *Atlantic Coast Line R.R. Co.*, 265 F.2d 75 (5th Cir., 1959), rev'd on other grounds 362 U.S. 396, 80 S.Ct. 789, 4 L.Ed.2d 820 (1960); *Kahler-Ellis Co.* v. *Ohio Turnpike Commission*, 225 F.2d 922 (6th Cir., 1955). An exception is made in the case of briefs and appendices in order to afford the parties the maximum time for their preparation. By the terms of the exception, air mail delivery must be used whenever it is the most expeditious manner of delivery.

A majority of the circuits now require service of all papers filed with the clerk. The usual provision in present rules is for service on "adverse" parties. In view of the extreme simplicity of service by mail, there seems to be no reason why a party who files a paper should not be required to serve all parties to the proceeding in the court of appeals, whether or not they may be deemed adverse. The common requirement of proof of service is retained, but the rule permits it to be made by simple certification, which may be endorsed on the copy which is filed.

CROSS REFERENCES

Notice of motions, see rule 27.

### Rule 26. Computation and Extension of Time

**(a) Computation of Time**

In computing any period of time prescribed by these rules, by an order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period extends until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation. As used in this rule "legal holiday" includes New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States. It shall also include a day appointed as a holiday by the state wherein the district court which rendered the judgment or order which is or may be appealed from is situated, or by the state wherein the principal office of the clerk of the court of appeals in which the appeal is pending is located.

**(b) Enlargement of Time**

The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; but the court may not enlarge the time for filing a notice of appeal, a petition for allowance, or a petition for permission to appeal. Nor may the court enlarge the time prescribed by law for filing a petition to enjoin, set aside, suspend, modify, enforce or otherwise review, or a notice of appeal from, an order of an administrative agency, board, commission or officer of the United States, except as specifically authorized by law.

**(c) Additional Time After Service by Mail**

Whenever a party is required or permitted to do an act within a prescribed period after service of a paper upon him and the paper is served by mail, 3 days shall be added to the prescribed period.

(As amended Mar. 1, 1971, eff. July 1, 1971.)

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES
1967 NOTE

The provisions of this rule are based upon FRCP 6 (a), (b) and (e). See also Supreme Court Rule 34 and FRCrP 45. Unlike FRCP 6(b), this rule, read with Rule 27, requires that every request for enlargement of time be made by motion, with proof of service on all parties. This is the simplest, most convenient way of keeping all parties advised of developments. By the terms of Rule 27(b) a motion for enlargement of time under Rule 26(b) may be entertained and acted upon immediately, subject to the right of any party to seek reconsideration. Thus the requirement of motion and notice will not delay the granting of relief of a kind which a court is inclined to grant as of course. Specifically, if a court is of the view that an extension of time sought before expiration of the period originally prescribed or as extended by a previous order ought to be granted in effect ex parte, as FRCP 6(b) permits, it may grant motions seeking such relief without delay.

1971 NOTE

The amendment adds Columbus Day to the list of legal holidays to conform the subdivision to the Act of June 28, 1968, 82 Stat. 250, which constituted Columbus Day a legal holiday effective after January 1, 1971.

The Act, which amended Title 5, U.S.C. §6103(a), changes the day on which certain holidays are to be observed. Washington's Birthday, Memorial Day and Veterans Day are to be observed on the third Monday in February, the last Monday in May and the fourth Monday in October, respectively, rather than, as heretofore, on February 22, May 30, and November 11, respectively. Columbus Day is to be observed on the second Monday in October. New Year's Day, Independence Day, Thanksgiving Day and Christmas continue to be observed on the traditional days.

CROSS REFERENCES

Time to appeal to courts of appeal, see section 2107 of this title.

### Rule 27. Motions

**(a) Content of Motions; Response; Reply**

Unless another form is elsewhere prescribed by these rules, an application for an order or other relief shall be made by filing a motion for such order or relief with proof of service on all other parties. The motion shall contain or be accompanied by any matter required by a specific provision of these rules governing such a motion, shall state with particularity the grounds on which it is based, and shall set forth the order or relief sought. If a motion is supported by briefs, affidavits or other papers, they shall be served and filed with the motion. Any party may file a response in opposition to a motion other than one for a procedural order [for which see subdivision (b)] within 7 days after service of the motion, but motions authorized by Rules 8, 9, 18 and 41 may be acted upon after reasonable notice, and the court may shorten or extend the time for responding to any motion.

### (b) Determination of Motions for Procedural Orders

Notwithstanding the provisions of the preceding paragraph as to motions generally, motions for procedural orders, including any motion under Rule 26(b) may be acted upon at any time, without awaiting a response thereto. Any party adversely affected by such action may request reconsideration, vacation or modification of such action.

### (c) Power of a Single Judge to Entertain Motions

In addition to the authority expressly conferred by these rules or by law, a single judge of a court of appeals may entertain and may grant or deny any request for relief which under these rules may properly be sought by motion, except that a single judge may not dismiss or otherwise determine an appeal or other proceeding, and except that a court of appeals may provide by order or rule that any motion or class of motions must be acted upon by the court. The action of a single judge may be reviewed by the court.

### (d) Form of Papers; Number of Copies

All papers relating to motions may be typewritten. Three copies shall be filed with the original, but the court may require that additional copies be furnished.

### NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

*Subdivisions (a) and (b).* Many motions seek relief of a sort which is ordinarily unopposed or which is granted as of course. The provision of subdivision (a) which permits any party to file a response in opposition to a motion within 7 days after its service upon him assumes that the motion is one of substance which ought not be acted upon without affording affected parties an opportunity to reply. A motion to dismiss or otherwise determine an appeal is clearly such a motion. Motions authorized by Rules 8, 9, 18 and 41 are likewise motions of substance; but in the nature of the relief sought, to afford an adversary an automatic delay of at least 7 days is undesirable, thus such motions may be acted upon after notice which is reasonable under the circumstances.

The term "motions for procedural orders" is used in subdivision (b) to describe motions which do not substantially affect the rights of the parties or the ultimate disposition of the appeal. To prevent delay in the disposition of such motions, subdivision (b) provides that they may be acted upon immediately without awaiting a response, subject to the right of any party who is adversely affected by the action to seek reconsideration.

*Subdivision (c).* Within the general consideration of procedure on motions is the problem of the power of a single circuit judge. Certain powers are granted to a single judge of a court of appeals by statute. Thus, under 28 U.S.C. § 2101(f) a single judge may stay execution and enforcement of a judgment to enable a party aggrieved to obtain certiorari; under 28 U.S.C. § 2251 a judge before whom a habeas corpus proceeding involving a person detained by state authority is pending may stay any proceeding against the person; under 28 U.S.C. § 2253 a single judge may issue a certificate of probable cause. In addition, certain of these rules expressly grant power to a single judge. See Rules 8, 9 and 18.

This subdivision empowers a single circuit judge to act upon virtually all requests for intermediate relief which may be made during the course of an appeal or other proceeding. By its terms he may entertain and act upon any motion other than a motion to dismiss or otherwise determine an appeal or other proceeding. But the relief sought must be "relief which under these rules may properly be sought by motion."

Examples of the power conferred on a single judge by this subdivision are: to extend the time for transmitting the record or docketing the appeal (Rules 11 and 12); to permit intervention in agency cases (Rule 15), or substitution in any case (Rule 43); to permit an appeal in forma pauperis (Rule 24); to enlarge any time period fixed by the rules other than that for initiating a proceeding in the court of appeals (Rule 26(b)); to permit the filing of a brief by amicus curiae (Rule 29); to authorize the filing of a deferred appendix (Rule 30(c)), or dispense with the requirement of an appendix in a specific case (Rule 30(f)), or permit carbon copies of briefs or appendices to be used (Rule 32(a)); to permit the filing of additional briefs (Rule 28(c)), or the filing of briefs of extraordinary length (Rule 28(g)); to postpone oral argument (Rule 34(a)), or grant additional time therefor (Rule 34(b)).

Certain rules require that application for the relief or orders which they authorize be made by petition. Since relief under those rules may not properly be sought by motion, a single judge may not entertain requests for such relief. Thus a single judge may not act upon requests for permission to appeal (see Rules 5 and 6); or for mandamus or other extraordinary writs (see Rule 21), other than for stays or injunctions *pendente lite*, authority to grant which is "expressly conferred by these rules" on a single judge under certain circumstances (see Rules 8 and 18); or upon petitions for rehearing (see Rule 40).

A court of appeals may by order or rule abridge the power of a single judge if it is of the view that a motion or a class of motions should be disposed of by a panel. Exercise of any power granted a single judge is discretionary with the judge. The final sentence in this subdivision makes the disposition of any matter by a single judge subject to review by the court.

### CROSS REFERENCES

Admission of attorneys to bar, see rule 46.
Dismissal of appeal on motion, see rule 42.
Postponement of argument, see rule 34.

## Rule 28. Briefs

### (a) Brief of the Appellant

The brief of the appellant shall contain under appropriate headings and in the order here indicated:

(1) A table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the brief where they are cited.

(2) A statement of the issues presented for review.

(3) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. There shall follow a statement of the facts relevant to the issues presented for review, with appropriate references to the record (see subdivision (e)).

(4) An argument. The argument may be preceded by a summary. The argument shall contain the contentions of the appellant with respect to the issues presented, and the reasons

therefor, with citations to the authorities, statutes and parts of the record relied on.

(5) A short conclusion stating the precise relief sought.

**(b) Brief of the Appellee**

The brief of the appellee shall conform to the requirements of subdivision (a) (1)—(4), except that a statement of the issues or of the case need not be made unless the appellee is dissatisfied with the statement of the appellant.

**(c) Reply Brief**

The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross appeal. No further briefs may be filed except with leave of court.

**(d) References in Briefs to Parties**

Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such designations as "appellant" and "appellee". It promotes clarity to use the designations used in the lower court or in the agency proceedings, or the actual names of parties, or descriptive terms such as "the employee," "the injured person," "the taxpayer," "the ship," "the stevedore," etc.

**(e) References in Briefs to the Record**

References in the briefs to parts of the record reproduced in the appendix filed with the brief of the appellant (see Rule 30(a)) shall be to the pages of the appendix at which those parts appear. If the appendix is prepared after the briefs are filed, references in the briefs to the record shall be made by one of the methods allowed by Rule 30(c). If the record is reproduced in accordance with the provisions of Rule 30(f), or if references are made in the briefs to parts of the record not reproduced, the references shall be to the pages of the parts of the record involved; *e.g.*, Answer p. 7, Motion for Judgment p. 2, Transcript p. 231. Intelligible abbreviations may be used. If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the appendix or of the transcript at which the evidence was identified, offered, and received or rejected.

**(f) Reproduction of Statutes, Rules, Regulations, etc.**

If determination of the issues presented requires the study of statutes, rules, regulations, etc. or relevant parts thereof, they shall be reproduced in the brief or in an addendum at the end, or they may be supplied to the court in pamphlet form.

**(g) Length of Briefs**

Except by permission of the court, principal briefs shall not exceed 50 pages of standard typographic printing or 70 pages of printing by any other process of duplicating or copying, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, etc. And except by permission of the court, reply briefs shall not exceed 25 pages of standard typographic printing or 35 pages of printing by any other process of duplicating or copying.

**(h) Briefs in Cases Involving Cross Appeals**

If a cross appeal is filed, the plaintiff in the court below shall be deemed the appellant for the purposes of this rule and Rules 30 and 31, unless the parties otherwise agree or the court otherwise orders. The brief of the appellee shall contain the issues and argument involved in his appeal as well as the answer to the brief of the appellant.

**(i) Briefs in cases involving multiple appellants or appellees**

In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

This rule is based upon Supreme Court Rule 40. For variations in present circuit rules on briefs see 2d Cir. Rule 17, 3d Cir. Rule 24, 5th Cir. Rule 24, and 7th Cir. Rule 17. All circuits now limit the number of pages of briefs, a majority limiting the brief to 50 pages of standard typographic printing. Fifty pages of standard typographic printing is the approximate equivalent of 70 pages of typewritten text, given the page sizes required by Rule 32 and the requirement set out there that text produced by a method other than standard typographic must be double spaced.

CROSS REFERENCES

Harmless error, see section 2111 of this title.

### Rule 29. Brief of an Amicus Curiae

A brief of an amicus curiae may be filed only if accompanied by written consent of all parties, or by leave of court granted on motion or at the request of the court, except that consent or leave shall not be required when the brief is presented by the United States or an officer or agency thereof, or by a State, Territory or Commonwealth. The brief may be conditionally filed with the motion for leave. A motion for leave shall identify the interest of the applicant and shall state the reasons why a brief of an amicus curiae is desirable. Save as all parties otherwise consent, any amicus curiae shall file its brief within the time allowed the party whose position as to affirmance or reversal the amicus brief will support unless the court for cause shown shall grant leave for later filing, in which event it shall specify within what period an opposing party may answer. A motion of an amicus curiae to participate in the oral argument will be granted only for extraordinary reasons.

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

Only five circuits presently regulate the filing of the brief of an amicus curiae. See D.C. Cir. Rule 18(j); 1st Cir. Rule 23(10); 6th Cir. Rule 17(4); 9th Cir. Rule 18(9); 10th Cir. Rule 20. This rule follows the practice of a majority of circuits in requiring leave of court to file an amicus brief except under the circumstances stated therein. Compare Supreme Court Rule 42.

CROSS REFERENCES

Rule-making power generally, see section 2071 of this title.

### Rule 30. Appendix to the Briefs

#### (a) Duty of Appellant to Prepare and File; Content of Appendix; Time for Filing; Number of Copies

The appellant shall prepare and file an appendix to the briefs which shall contain: (1) the relevant docket entries in the proceeding below; (2) any relevant portions of the pleadings, charge, findings or opinion; (3) the judgment, order or decision in question; and (4) any other parts of the record to which the parties wish to direct the particular attention of the court. The fact that parts of the record are not included in the appendix shall not prevent the parties or the court from relying on such parts.

Unless filing is to be deferred pursuant to the provisions of subdivision (c) of this rule, the appellant shall serve and file the appendix with his brief. Ten copies of the appendix shall be filed with the clerk, and one copy shall be served on counsel for each party separately represented, unless the court shall by rule or order direct the filing or service of a lesser number.

#### (b) Determination of Contents of Appendix; Cost of Producing

The parties are encouraged to agree as to the contents of the appendix. In the absence of agreement, the appellant shall, not later than 10 days after the date on which the record is filed, serve on the appellee a designation of the parts of the record which he intends to include in the appendix and a statement of the issues which he intends to present for review. If the appellee deems it necessary to direct the particular attention of the court to parts of the record not designated by the appellant, he shall, within ten days after receipt of the designation, serve upon the appellant a designation of those parts. The appellant shall include in the appendix the parts thus designated. In designating parts of the record for inclusion in the appendix, the parties shall have regard for the fact that the entire record is always available to the court for reference and examination and shall not engage in unnecessary designation.

Unless the parties otherwise agree, the cost of producing the appendix shall initially be paid by the appellant, but if the appellant considers that parts of the record designated by the appellee for inclusion are unnecessary for the determination of the issues presented he may so advise the appellee and the appellee shall advance the cost of including such parts. The cost of producing the appendix shall be taxed as costs in the case, but if either party shall cause matters to be included in the appendix unnecessarily the court may impose the cost of producing such parts on the party.

#### (c) Alternative Method of Designating Contents of the Appendix; How References to the Record may be Made in the Briefs When Alternative Method is Used

If the court shall so provide by rule for classes of cases or by order in specific cases, preparation of the appendix may be deferred until after the briefs have been filed, and the appendix may be filed 21 days after service of the brief of the appellee. If the preparation and filing of the appendix is thus deferred, the provisions of subdivision (b) of this Rule 30 shall apply, except that the designations referred to therein shall be made by each party at the time his brief is served, and a statement of the issues presented shall be unnecessary.

If the deferred appendix authorized by this subdivision is employed, references in the briefs to the record may be to the pages of the parts of the record involved, in which event the original paging of each part of the record shall be indicated in the appendix by placing in brackets the number of each page at the place in the appendix where that page begins. Or if a party desires to refer in his brief directly to pages of the appendix, he may serve and file typewritten or page proof copies of his brief within the time required by Rule 31(a), with appropriate references to the pages of the parts of the record involved. In that event, within 14 days after the appendix is filed he shall serve and file copies of the brief in the form prescribed by Rule 32(a) containing references to the pages of the appendix in place of or in addition to the initial references to the pages of the parts of the record involved. No other changes may be made in the brief as initially served and filed, except that typographical errors may be corrected.

#### (d) Arrangement of the Appendix

At the beginning of the Appendix there shall be inserted a list of the parts of the record which it contains, in the order in which the parts are set out therein, with references to the pages of the appendix at which each part begins. The relevant docket entries shall be set out following the list of contents. Thereafter, other parts of the record shall be set out in chronological order. When matter contained in the reporter's transcript of proceedings is set out in the appendix, the page of the transcript at which such matter may be found shall be indicated in brackets immediately before the matter which is set out. Omissions in the text of papers or of the transcript must be indicated by asterisks. Immaterial formal matters (captions, subscriptions, acknowledgments, etc.) shall be omitted. A question and its answer may be contained in a single paragraph.

#### (e) Reproduction of Exhibits

Exhibits designated for inclusion in the appendix may be contained in a separate volume, or volumes, suitably indexed. Four copies thereof shall be filed with the appendix and one copy shall be served on counsel for each party separately represented. The transcript of a proceeding before an administrative agency, board, commission or officer used in an action in the district court shall be regarded as an exhibit for the purpose of this subdivision.

#### (f) Hearing of Appeals on the Original Record Without the Necessity of an Appendix

A court of appeals may by rule applicable to all cases, or to classes of cases, or by order in specific cases, dispense with the requirement of an appendix and permit appeals to be heard on the original record, with such copies of the record, or relevant parts thereof, as the court may require.

(As amended Mar. 30, 1970, eff. July 1, 1970.)

#### NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

#### 1967 NOTE

*Subdivision (a)*. Only two circuits presently require a printed record (5th Cir. Rule 23(a); 8th Cir. Rule 10 (in civil appeals only)), and the rules and practice in those circuits combine to make the difference between a printed record and the appendix, which is now used in eight circuits and in the Supreme Court in lieu of the printed record, largely nominal. The essential characteristics of the appendix method are: (1) the entire record may not be reproduced; (2) instead, the parties are to set out in an appendix to the briefs those parts of the record which in their judgment the judges must consult in order to determine the issues presented by the appeal; (3) the appendix is not the record but merely a selection therefrom for the convenience of the judges of the court of appeals; the record is the actual trial court record, and the record itself is always available to supply inadvertent omissions from the appendix. These essentials are incorporated, either by rule or by practice, in the circuits that continue to require the printed record rather than the appendix. See 5th Cir. Rule 23(a)(9) and 8th Cir. Rule 10(a)-(d).

*Subdivision* (*b*). Under the practice in six of the eight circuits which now use the appendix method, unless the parties agree to use a single appendix, the appellant files with his brief an appendix containing the parts of the record which he deems it essential that the court read in order to determine the questions presented. If the appellee deems additional parts of the record necessary he must include such parts as an appendix to his brief. The proposed rules differ from that practice. By the new rule a single appendix is to be filed. It is to be prepared by the appellant, who must include therein those parts which he deems essential and those which the appellee designates as essential.

Under the practice by which each party files his own appendix the resulting reproduction of essential parts of the record is often fragmentary; it is not infrequently necessary to piece several appendices together to arrive at a usable reproduction. Too, there seems to be a tendency on the part of some appellants to reproduce less than what is necessary for a determination of the issues presented (see *Moran Towing Corp.* v. *M. A. Gammino Construction Co.*, 363 F.2d 108 (1st Cir. 1966); *Walters* v. *Shari Music Publishing Corp.*, 298 F.2d 206 (2d Cir. 1962) and cases cited therein; *Morrison* v. *Texas Co.*, 289 F.2d 382 (7th Cir. 1961) and cases cited therein), a tendency which is doubtless encouraged by the requirement in present rules that the appellee reproduce in his separately prepared appendix such necessary parts of the record as are not included by the appellant.

Under the proposed rule responsibility for the preparation of the appendix is placed on the appellant. If the appellee feels that the appellant has omitted essential portions of the record, he may require the appellant to include such portions in the appendix. The appellant is protected against a demand that he reproduce parts which he considers unnecessary by the provisions entitling him to require the appellee to advance the costs of reproducing such parts and authorizing denial of costs for matter unnecessarily reproduced.

*Subdivision* (*c*). This subdivision permits the appellant to elect to defer the production of the appendix to the briefs until the briefs of both sides are written, and authorizes a court of appeals to require such deferred filing by rule or order. The advantage of this method of preparing the appendix is that it permits the parties to determine what parts of the record need to be reproduced in the light of the issues actually presented by the briefs. Often neither side is in a position to say precisely what is needed until the briefs are completed. Once the argument on both sides is known, it should be possible to confine the matter reproduced in the appendix to that which is essential to a determination of the appeal or review. This method of preparing the appendix is presently in use in the Tenth Circuit (Rule 17) and in other circuits in review of agency proceedings, and it has proven its value in reducing the volume required to be reproduced. When the record is long, use of this method is likely to result in substantial economy to the parties.

*Subdivision* (*e*). The purpose of this subdivision is to reduce the cost of reproducing exhibits. While subdivision (a) requires that 10 copies of the appendix be filed, unless the court requires a lesser number, subdivision (e) permits exhibits necessary for the determination of an appeal to be bound separately, and requires only 4 copies of such a separate volume or volumes to be filed and a single copy to be served on counsel.

*Subdivision* (*f*). This subdivision authorizes a court of appeals to dispense with the appendix method of reproducing parts of the record and to hear appeals on the original record and such copies of it as the court may require.

Since 1962 the Ninth Circuit has permitted all appeals to be heard on the original record and a very limited number of copies. Under the practice as adopted in 1962, any party to an appeal could elect to have the appeal heard on the original record and two copies thereof rather than on the printed record theretofore required. The resulting substantial saving of printing costs led to the election of the new practice in virtually all cases, and by 1967 the use of printed records had ceased. By a recent amendment, the Ninth Circuit has abolished the printed record altogether. Its rules now provide that all appeals are to be heard on the original record, and it has reduced the number of copies required to two sets of copies of the transmitted original papers (excluding copies of exhibits, which need not be filed unless specifically ordered). See 9 Cir. Rule 10, as amended June 2, 1967, effective September 1, 1967. The Eighth Circuit permits appeals in criminal cases and in habeas corpus and 28 U.S.C. § 2255 proceedings to be heard on the original record and two copies thereof. See 8 Cir. Rule 8 (i)-(j). The Tenth Circuit permits appeals in all cases to be heard on the original record and four copies thereof whenever the record consists of two hundred pages or less. See 10 Cir. Rule 17(a). This subdivision expressly authorizes the continuation of the practices in the Eighth, Ninth and Tenth Circuits.

The judges of the Court of Appeals for the Ninth Circuit have expressed complete satisfaction with the practice there in use and have suggested that attention be called to the advantages which it offers in terms of reducing cost.

### 1970 NOTE

*Subdivision* (*a*). The amendment of subdivision (a) is related to the amendment of Rule 31(a), which authorizes a court of appeals to shorten the time for filing briefs. By virtue of this amendment, if the time for filing the brief of the appellant is shortened the time for filing the appendix is likewise shortened.

*Subdivision* (*c*). As originally written, subdivision (c) permitted the appellant to elect to defer filing of the appendix until 21 days after service of the brief of the appellee. As amended, subdivision (c) requires that an order of court be obtained before filing of the appendix can be deferred, unless a court permits deferred filing by local rule. The amendment should not cause use of the deferred appendix to be viewed with disfavor. In cases involving lengthy records, permission to defer filing of the appendix should be freely granted as an inducement to the parties to include in the appendix only matter that the briefs show to be necessary for consideration by the judges. But the Committee is advised that appellants have elected to defer filing of the appendix in cases involving brief records merely to obtain the 21 day delay. The subdivision is amended to prevent that practice.

### TAXATION OF FEES IN APPEALS IN WHICH THE REQUIREMENT OF AN APPENDIX IS DISPENSED WITH

The Judicial Conference of the United States at its session on October 28th and 29th approved the following resolution relating to fees to be taxed in the courts of appeals as submitted by the Judicial Council of the Ninth Circuit with the proviso that its application to any court of appeals shall be at the election of each such court:

For some time it has been the practice in the Ninth Circuit Court of Appeals to dispense with an appendix in an appellate record and to hear the appeal on the original record, with a number of copies thereof being supplied (Rule 30f, Federal Rules of Appellate Procedure). It has been the practice of the Court to tax a fee of $5 in small records and $10 in large records for the time of the clerk involved in preparing such appeals and by way of reimbursement for postage expense. Judicial Conference approval heretofore has not been secured and the Judicial Council of the Ninth Circuit now seeks to fix a flat fee of $15 to be charged as fees for costs to be charged by *any* court of appeals "in any appeal in which the requirement of an appendix is dispensed with pursuant to Rule 30f. Federal Rules of Appellate Procedure."

### CROSS REFERENCES

Typewritten appendices allowed in forma pauperis, see rule 24.

## Rule 31. Filing and Service of Briefs

### (a) Time for Serving and Filing Briefs

The appellant shall serve and file his brief within 40 days after the date on which the record is filed. The appellee shall serve and file his brief within 30 days after service of the brief of the appellant. The appellant may serve and file a reply brief within 14 days after service of the brief of the appellee, but, except for good cause shown, a reply brief must be filed at least 3 days before argument. If a court of appeals is prepared to consider cases on the merits promptly after briefs are filed, and its practice is to do so, it may shorten the periods prescribed above for serving and filing briefs, either by rule for all cases or for classes of cases, or by order for specific cases.

### (b) Number of Copies to be Filed and Served

Twenty-five copies of each brief shall be filed with the clerk, unless the court by order in a particular case shall direct a lesser number, and two copies shall be served on counsel for each party separately represented. If a party is allowed to file typewritten ribbon and carbon copies of the brief, the original and three legible copies shall be filed with the clerk, and one copy shall be served on counsel for each party separately represented.

### (c) Consequence of Failure to File Briefs

If an appellant fails to file his brief within the time provided by this rule, or within the time as extended, an appellee may move for dismissal of the appeal. If an appellee fails to file his brief, he will not be heard at oral argument except by permission of the court.

(As amended Mar. 30, 1970, eff. July 1, 1970.)

### NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

### 1967 NOTE

A majority of the circuits now require the brief of the appellant to be filed within 30 days from the date on which the record is filed. But in those circuits an exchange of designations is unnecessary in the preparation of the appendix. The appellant files with his brief an appendix containing the parts of the record which he deems essential. If the appellee considers other parts essential, he includes those parts in his own appendix. Since the proposed rule requires the appellant to file with his brief an appendix containing necessary parts of the record as designated by both parties, the rule allows the appellant 40 days in order to provide time for the exchange of designations respecting the content of the appendix (see Rule 30(b)).

### 1970 NOTE

The time prescribed by Rule 31(a) for preparing briefs—40 days to the appellant, 30 days to the appellee—is well within the time that must ordinarily elapse in most circuits before an appeal can be reached for consideration. In those circuits, the time prescribed by the Rule should not be disturbed. But if a court of appeals maintains a current calendar, that is, if an appeal can be heard as soon as the briefs have been filed, or if the practice of the court permits the submission of appeals for preliminary consideration as soon as the briefs have been filed, the court should be free to prescribe shorter periods in the interest of expediting decision.

### CROSS REFERENCES

Form, see rule 32.
Motion supported by brief, see rule 27.

## Rule 32. Form of Briefs, the Appendix and Other Papers

### (a) Form of Briefs and the Appendix

Briefs and appendices may be produced by standard typographic printing or by any duplicating or copying process which produces a clear black image on white paper. Carbon copies of briefs and appendices may not be submitted without permission of the court, except in behalf of parties allowed to proceed in forma pauperis. All printed matter must appear in at least 11 point type on opaque, unglazed paper. Briefs and appendices produced by the standard typographic process shall be bound in volumes having pages 6⅛ by 9¼ inches and type matter 4⅛ by 7⅙ inches. Those produced by any other process shall be bound in volumes having pages not exceeding 8½ by 11 inches and type matter not exceeding 6½ by 9½ inches, with double spacing between each line of text. In patent cases the pages of briefs and appendices may be of such size as is necessary to utilize copies of patent documents. Copies of the reporter's transcript and other papers reproduced in a manner authorized by this rule may be inserted in the appendix; such pages may be informally renumbered if necessary.

If briefs are produced by commercial printing or duplicating firms, or, if produced otherwise and the covers to be described are available, the cover of the brief of the appellant should be blue; that of the appellee, red; that of an intervenor or amicus curiae, green; that of any reply brief, gray. The cover of the appendix, if separately printed, should be white. The front covers of the briefs and of appendices, if separately printed, shall contain: (1) the name of the court and the number of the case; (2) the title of the case (see Rule 12(a)); (3) the nature of the proceeding in the court (*e.g.,* Appeal; Petition for Review) and the name of the court, agency or board below; (4) the title of the document (*e.g.* Brief for Appellant, Appendix); and (5) the names and addresses of counsel representing the party on whose behalf the document is filed.

### (b) Form of Other Papers

Petitions for rehearing shall be produced in a manner prescribed by subdivision (a). Motions and other papers may be produced in like manner, or they may be typewritten upon opaque, unglazed paper 8½ by 11 inches in size. Lines of typewritten text shall be double spaced. Consecutive sheets shall be attached at the left margin. Carbon copies may be used for filing and service if they are legible.

A motion or other paper addressed to the court shall contain a caption setting forth the name of the court, the title of the case, the file number, and a brief descriptive title indicating the purpose of the paper.

### Notes of Advisory Committee on Appellate Rules

Only two methods of printing are now generally recognized by the circuits—standard typographic printing and the offset duplicating process (multilith). A third, mimeographing, is permitted in the Fifth Circuit. The District of Columbia, Ninth, and Tenth Circuits permit records to be reproduced by copying processes. The Committee feels that recent and impending advances in the arts of duplicating and copying warrant experimentation with less costly forms of reproduction than those now generally authorized. The proposed rule permits, in effect, the use of any process other than the carbon copy process which produces a clean, readable page. What constitutes such is left in first instance to the parties and ultimately to the court to determine. The final sentence of the first paragraph of subdivision (a) is added to allow the use of multilith, mimeograph, or other forms of copies of the reporter's original transcript whenever such are available.

### Cross References

Typewritten briefs, appendices, and other papers allowed in forma pauperis, see rule 24.

## Rule 33. Prehearing Conference

The court may direct the attorneys for the parties to appear before the court or a judge thereof for a prehearing conference to consider the simplification of the issues and such other matters as may aid in the disposition of the proceeding by the court. The court or judge shall make an order which recites the action taken at the conference and the agreements made by the parties as to any of the matters considered and which limits the issues to those not disposed of by admissions or agreements of counsel, and such order when entered controls the subsequent course of the proceeding, unless modified to prevent manifest injustice.

### Notes of Advisory Committee on Appellate Rules

The uniform rule for review or enforcement of orders of administrative agencies, boards, commissions or officers (see the general note following Rule 15) authorizes a prehearing conference in agency review proceedings. The same considerations which make a prehearing conference desirable in such proceedings may be present in certain cases on appeal from the district courts. The proposed rule is based upon subdivision 11 of the present uniform rule for review of agency orders.

### Cross References

Pre-trial procedure in the district courts, see Rule 16, Federal Rules of Civil Procedure, this Appendix.

## Rule 34. Oral Argument

### (a) Notice of Argument; Postponement

The clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the argument must be made by motion filed reasonably in advance of the date fixed for hearing.

### (b) Time Allowed for Argument

Unless otherwise provided by rule for all cases or for classes of cases, each side will be allowed 30 minutes for argument. If counsel is of the opinion that additional time is necessary for the adequate presentation of his argument, he may request such additional time as he deems necessary. Requests may be made by letter addressed to the clerk reasonably in advance of the date fixed for the argument and shall be liberally granted if cause therefor is shown. A party is not obliged to use all of the time allowed, and the court may terminate the argument whenever in its judgment further argument is unnecessary.

### (c) Order and Content of Argument

The appellant is entitled to open and conclude the argument. The opening argument shall include a fair statement of the case. Counsel will not be permitted to read at length from briefs, records or authorities.

### (d) Cross and Separate Appeals

A cross or separate appeal shall be argued with the initial appeal at a single argument, unless the court otherwise directs. If a case involves a cross-appeal, the plaintiff in the action below shall be deemed the appellant for the purpose of this rule unless the parties otherwise agree or the court otherwise directs. If separate appellants support the same argument, care shall be taken to avoid duplication of argument.

### (e) Non-Appearance of Parties

If the appellee fails to appear to present argument, the court will hear argument on behalf of the appellant, if present. If the appellant fails to appear, the court may hear argument on behalf of the appellee, if his counsel is present. If neither party appears, the case will be decided on the briefs unless the court shall otherwise order.

### (f) Submission on Briefs

By agreement of the parties, a case may be submitted for decision on the briefs, but the court may direct that the case be argued.

### (g) Use of Physical Exhibits at Argument; Removal

If physical exhibits other than documents are to be used at the argument, counsel shall arrange to have them placed in the court room before the court convenes on the date of the argument. After the argument counsel shall cause the exhibits to be removed from the court room unless the court otherwise directs. If exhibits are not reclaimed by counsel within a reasonable time after notice is given by the clerk, they shall be destroyed or otherwise disposed of as the clerk shall think best.

### Notes of Advisory Committee on Appellate Rules

A majority of circuits now limit oral argument to thirty minutes for each side, with the provision that additional time may be made available upon request. The Committee is of the view that thirty minutes to each side is sufficient in most cases, but that where additional time is necessary it should be freely granted on a proper showing of cause therefor. It further feels that the matter of time should be left ultimately to each court of appeals, subject to the spirit of the rule that a reasonable time should be allowed for argument. The term "side" is used to indicate that the time allowed by the rule is afforded to opposing interests rather than to individual parties. Thus if multiple appellants or appellees have a common interest, they constitute only a single side. If counsel for multiple parties who constitute a single side feel that additional time is necessary, they may request it. In other particulars this rule follows the usual practice among the circuits. See 3d Cir. Rule 31; 6th Cir. Rule 20; 10th Cir. Rule 23.

#### CROSS REFERENCES

Rehearing, no oral argument permitted, see rule 40.

### Rule 35. Determination of Causes by the Court in Banc

#### (a) When Hearing or Rehearing in Banc Will be Ordered

A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals in banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

#### (b) Suggestion of a Party for Hearing or Rehearing in Banc

A party may suggest the appropriateness of a hearing or rehearing in banc. The clerk shall transmit any such suggestion to the judges of the court who are in regular active service but a vote will not be taken to determine whether the cause shall be heard or reheard in banc unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard requests a vote on such a suggestion made by a party.

#### (c) Time for Suggestion of a Party for Rehearing in Banc; Suggestion Does Not Stay Mandate

If a party desires to suggest a rehearing in banc, the suggestion must be made within the time prescribed by Rule 40 for filing a petition for rehearing, whether the suggestion is made in such petition or otherwise. The pendency of such a suggestion whether or not included in a petition for rehearing shall not affect the finality of the judgment of the court of appeals or stay the issuance of the mandate.

#### NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

Statutory authority for in banc hearings is found in 28 U.S.C. § 46(c). The proposed rule is responsive to the Supreme Court's view in *Western Pacific Ry. Corp.* v. *Western Pacific Ry. Co.*, 345 U.S. 247, 73 S.Ct. 656, 97 L.Ed. 986 (1953), that litigants should be free to suggest that a particular case is appropriate for consideration by all the judges of a court of appeals. The rule is addressed to the procedure whereby a party may suggest the appropriateness of convening the court in banc. It does not affect the power of a court of appeals to initiate in banc hearings *sua sponte*.

The provision that a vote will not be taken as a result of the suggestion of the party unless requested by a judge of the court in regular active service or by a judge who was a member of the panel that rendered a decision sought to be reheard is intended to make it clear that a suggestion of a party as such does not require any action by the court. See *Western Pacific Ry. Corp.* v. *Western Pacific Ry. Co.*, supra, 345 U.S. at 262, 73 S.Ct. 656. The rule merely authorizes a suggestion, imposes a time limit on suggestions for rehearings in banc, and provides that suggestions will be directed to the judges of the court in regular active service.

In practice, the suggestion of a party that a case be reheard in banc is frequently contained in a petition for rehearing, commonly styled "petition for rehearing in banc." Such a petition is in fact merely a petition for a rehearing, with a suggestion that the case be reheard in banc. Since no response to the suggestion, as distinguished from the petition for rehearing, is required, the panel which heard the case may quite properly dispose of the petition without reference to the suggestion. In such a case the fact that no response has been made to the suggestion does not affect the finality of the judgment or the issuance of the mandate, and the final sentence of the rule expressly so provides.

#### CROSS REFERENCES

Composition of court sitting in banc, see section 46 of this title.

### Rule 36. Entry of Judgment

The notation of a judgment in the docket constitutes entry of the judgment. The clerk shall prepare, sign and enter the judgment following receipt of the opinion of the court unless the opinion directs settlement of the form of the judgment, in which event the clerk shall prepare, sign and enter the judgment following final settlement by the court. If a judgment is rendered without an opinion, the clerk shall prepare, sign and enter the judgment following instruction from the court. The clerk shall, on the date judgment is entered, mail to all parties a copy of the opinion, if any, or of the judgment if no opinion was written, and notice of the date of entry of the judgment.

#### NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

This is the typical rule. See 1st Cir. Rule 29; 3rd Cir. Rule 32; 6th Cir. Rule 21. At present, uncertainty exists as to the date of entry of judgment when the opinion directs subsequent settlement of the precise terms of the judgment, a common practice in cases involving enforcement of agency orders. See Stern and Gressman, Supreme Court Practice, p. 203 (3d Ed., 1962). The principle of finality suggests that in such cases entry of judgment should be delayed until approval of the judgment in final form.

#### CROSS REFERENCES

Certified copy of judgment, copy of opinion, and direction as to costs as constituting mandate, see rule 41.

### Rule 37. Interest on Judgments

Unless otherwise provided by law, if a judgment for money in a civil case is affirmed, whatever interest is allowed by law shall be payable from the date the judgment was entered in the district court. If a judgment is modified or reversed with a direction that a judgment for money be entered in the district court, the mandate shall contain instructions with respect to allowance of interest.

#### NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

The first sentence makes it clear that if a money judgment is affirmed in the court of appeals, the interest which attaches to money judgments by force of law (see 28 U.S.C. § 1961 and § 2411) upon their initial entry is payable as if no appeal had been taken, whether or not the mandate makes mention of interest. There has been some confusion on this point. See *Blair* v. *Durham*, 139 F.2d 260 (6th Cir., 1943) and cases cited therein.

In reversing or modifying the judgment of the district court, the court of appeals may direct the entry of a money judgment, as, for example, when the court of appeals reverses a judgment notwithstanding the verdict and directs entry of judgment on the verdict. In such a case the question may arise as to whether interest is to run from the date of entry of the judgment directed by the court of appeals or from the date on which the judgment would have been entered in the district court except for the erroneous ruling corrected on appeal. In *Briggs* v. *Pennsylvania R. Co.*, 334 U.S. 304, 68 S.Ct. 1039, 92 L.Ed. 1403 (1948), the Court held that where the mandate of the court of appeals directed entry of judgment upon a verdict but made no mention of interest from the date of the verdict to the date of the entry of the judgment directed by the mandate, the district court was powerless to add such interest. The second sentence of the proposed rule is a reminder to the court, the clerk and counsel of the *Briggs* rule. Since the rule directs that the matter of interest be disposed of by the mandate, in cases where interest is simply overlooked, a party who conceives himself entitled to interest from a date other than the date of entry of judgment in accordance with the mandate should be entitled to seek recall of the mandate for determination of the question.

#### Cross References

Damages and costs on affirmance, see section 1912 of this title.

### Rule 38. Damages for Delay

If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

#### Notes of Advisory Committee on Appellate Rules

Compare 28 U.S.C. § 1912. While both the statute and the usual rule on the subject by courts of appeals (Fourth Circuit Rule 20 is a typical rule) speak of "damages for delay," the courts of appeals quite properly allow damages, attorney's fees and other expenses incurred by an appellee if the appeal is frivolous without requiring a showing that the appeal resulted in delay. See *Dunscombe* v. *Sayle*, 340 F.2d 311 (5th Cir., 1965), *cert. den.*, 382 U.S. 814, 86 S.Ct. 32, 15 L.Ed.2d 62 (1965); *Lowe* v. *Willacy*, 239 F.2d 179 (9th Cir., 1956); *Griffith Wellpoint Corp.* v. *Munro-Langstroth, Inc.*, 269 F.2d 64 (1st Cir., 1959); *Ginsburg* v. *Stern*, 295 F.2d 698 (3d Cir., 1961). The subjects of interest and damages are separately regulated, contrary to the present practice of combining the two (see Fourth Circuit Rule 20) to make it clear that the awards are distinct and independent. Interest is provided for by law; damages are awarded by the court in its discretion in the case of a frivolous appeal as a matter of justice to the appellee and as a penalty against the appellant.

#### Cross References

Damages and costs on affirmance, see section 1912 of this title.

### Rule 39. Costs

#### (a) To Whom Allowed

Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered; if a judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the court.

#### (b) Costs For and Against the United States

In cases involving the United States or an agency or officer thereof, if an award of costs against the United States is authorized by law, costs shall be awarded in accordance with the provisions of subdivision (a); otherwise, costs shall not be awarded for or against the United States.

#### (c) Costs of Briefs, Appendices, and Copies of Records

The cost of printing or otherwise producing necessary copies of briefs, appendices, or copies of records authorized by Rule 30(f) shall be taxable in the court of appeals at rates not higher than those generally charged for such work in the area where the clerk's office is located. A party who desires such costs to be taxed shall state them in an itemized and verified bill of costs which he shall file with the clerk, with proof of service, within 14 days after the entry of judgment.

#### (d) Clerk to Insert Costs in Mandate

The clerk shall prepare and certify an itemized statement of costs taxed in the court of appeals for insertion in the mandate. If the mandate has been issued before final determination of costs, the statement, or any amendment thereof, may be added to the mandate at any time upon request of the clerk of the court of appeals.

#### (e) Costs on Appeal Taxable in the District Courts

Costs incurred in the preparation and transmission of the record, the cost of the reporter's transcript, if necessary for the determination of the appeal, the premiums paid for cost of supersedeas bonds or other bonds to preserve rights pending appeal, and the fee for filing the notice of appeal shall be taxed in the district court as costs of the appeal in favor of the party entitled to costs under this rule.

#### Notes of Advisory Committee on Appellate Rules

*Subdivision (a).* Statutory authorization for taxation of costs is found in 28 U.S.C. § 1920. The provisions of this subdivision follow the usual practice in the circuits. A few statutes contain specific provisions in derogation of these general provisions. (See 28 U.S.C. § 1928, which forbids the award of costs to a successful plaintiff in a patent infringement action under the circumstances described by the statute). These statutes are controlling in cases to which they apply.

*Subdivision (b).* The rules of the courts of appeals at present commonly deny costs to the United States except as allowance may be directed by statute. Those rules were promulgated at a time when the United States was generally invulnerable to an award of costs against it, and they appear to be based on the view that if the United States is not subject to costs if it loses, it ought not be entitled to recover costs if it wins.

The number of cases affected by such rules has been greatly reduced by the Act of July 18, 1966, 80 Stat. 308 (1 U.S. Code Cong. & Ad. News, p. 349 (1966), 89th Cong., 2d Sess., which amended 28 U.S.C. § 2412, the former general bar to the award of costs against the United States. Section 2412 as amended generally places the United States on the same footing as private parties with respect to the award of costs in civil cases. But the United States continues to enjoy immunity from costs in certain cases. By its terms amended section 2412 authorizes an award of costs against the United States only in civil actions, and it excepts from its general authorization of an award of costs against the United States cases which are "otherwise specifically provided (for) by statute." Furthermore, the Act of July 18, 1966, *supra*, provides that the amendments of section 2412 which it effects shall apply only to actions filed subsequent to the date of its enactment. The second clause continues in effect, for these and all other cases in which the United States enjoys immunity from costs, the presently prevailing rule that the United States may recover costs as the prevailing party only if it would have suffered them as the losing party.

*Subdivision (c).* While only five circuits (D.C. Cir. Rule 20(d); 1st Cir. Rule 31(4); 3d Cir. Rule 35(4); 4th Cir. Rule 21(4); 9th Cir. Rule 25, as amended June 2, 1967) presently tax the cost of printing briefs, the proposed rule makes the cost taxable in keeping with the principle of this rule that all cost items expended in the prosecution of a proceeding should be borne by the unsuccessful party.

*Subdivision (e).* The costs described in this subdivision are costs of the appeal and, as such, are within the undertaking of the appeal bond. They are made taxable in the district court for general convenience. Taxation of the cost of the reporter's transcript is specifically authorized by 28 U.S.C. § 1920, but in the absence of a rule some district courts have held themselves without authority to tax the cost (*Perlman* v. *Feldmann*, 116 F.Supp. 102 (D.Conn., 1953); *Firtag* v. *Gendleman*, 152 F.Supp. 226 (D.D.C., 1957); *Todd Atlantic Shipyards Corps.* v. *The Southport*, 100 F.Supp. 763 (E.D.S.C., 1951). Provision for taxation of the cost of premiums paid for supersedeas bonds is common in the local rules of district courts and the practice is established in the Second, Seventh, and Ninth Circuits. *Berner* v. *British Commonwealth Pacific Air Lines, Ltd.*, 362 F.2d 799 (2d Cir. 1966); *Land Oberoesterreich* v. *Gude*, 93 F.2d 292 (2d Cir., 1937); *In re Northern Ind. Oil Co.*, 192 F.2d 139 (7th Cir., 1951); *Lunn* v. *F. W. Woolworth*, 210 F.2d 159 (9th Cir., 1954).

#### CROSS REFERENCES

Costs and fees, payment by clerk into treasury, see section 711 of this title.

Damages and costs on affirmance, see section 1912 of this title.

Judicial conference of United States to prescribe charges, see section 1913 of this title.

Liability of United States for costs, see section 2412 of this title.

### Rule 40. Petition for Rehearing

#### (a) Time for Filing; Content; Answer; Action by Court if Granted

A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order. The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is granted the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.

#### (b) Form of Petition; Length

The petition shall be in a form prescribed by Rule 32(a), and copies shall be served and filed as prescribed by Rule 31(b) for the service and filing of briefs. Except by permission of the court, a petition for rehearing shall not exceed 10 pages of standard typographic printing or 15 pages of printing by any other process of duplicating or copying.

#### NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

This is the usual rule among the circuits, except that the express prohibition against filing a reply to the petition is found only in the rules of the Fourth, Sixth and Eighth Circuits (it is also contained in Supreme Court Rule 58(3)). It is included to save time and expense to the party victorious on appeal. In the very rare instances in which a reply is useful, the court will ask for it.

#### CROSS REFERENCES

Mandate, issuance unless delayed by petition for rehearing, see rule 41.

### Rule 41. Issuance of Mandate; Stay of Mandate

#### (a) Date of Issuance

The mandate of the court shall issue 21 days after the entry of judgment unless the time is shortened or enlarged by order. A certified copy of the judgment and a copy of the opinion of the court, if any, and any direction as to costs shall constitute the mandate, unless the court directs that a formal mandate issue. The timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court. If the petition is denied, the mandate shall issue 7 days after entry of the order denying the petition unless the time is shortened or enlarged by order.

#### (b) Stay of Mandate Pending Application for Certiorari

A stay of the mandate pending application to the Supreme Court for a writ of certiorari may be granted upon motion, reasonable notice of which shall be given to all parties. The stay shall not exceed 30 days unless the period is extended for cause shown. If during the period of the stay there is filed with the clerk of the court of appeals a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately. A bond or other security may be required as a condition to the grant or continuance of a stay of the mandate.

#### NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

The proposed rule follows the rule or practice in a majority of circuits by which copies of the opinion and the judgment serve in lieu of a formal mandate in the ordinary case. Compare Supreme Court Rule 59. Although 28 U.S.C. § 2101(c) permits a writ of certiorari to be filed within 90 days after entry of judgment, seven of the eight circuits which now regulate the matter of stays pending application for certiorari limit the initial stay of the mandate to the 30-day period provided in the proposed rule. Compare D.C. Cir. Rule 27(e).

#### CROSS REFERENCES

Certiorari to Supreme Court, see sections 1254 and 2101 of this title.

Petition for rehearing, see rule 40.

### Rule 42. Voluntary Dismissal

#### (a) Dismissal in the District Court

If an appeal has not been docketed, the appeal may be dismissed by the district court

**upon the filing in that court of a stipulation for dismissal signed by all the parties, or upon motion and notice by the appellant.**

**(b) Dismissal in the Court of Appeals**

**If the parties to an appeal or other proceeding shall sign and file with the clerk of the court of appeals an agreement that the proceeding be dismissed, specifying the terms as to payment of costs, and shall pay whatever fees are due, the clerk shall enter the case dismissed, but no mandate or other process shall issue without an order of the court. An appeal may be dismissed on motion of the appellant upon such terms as may be agreed upon by the parties or fixed by the court.**

### NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

*Subdivision (a).* This subdivision is derived from FRCP 73(a) without change of substance.

*Subdivision (b).* The first sentence is a common provision in present circuit rules. The second sentence is added. Compare Supreme Court Rule 60.

### CROSS REFERENCES

Briefs, dismissal for default, see rule 31.
Costs upon dismissal, see rule 39.
Not docketed in time, see rule 12.

## Rule 43. Substitution of Parties

**(a) Death of a Party**

**If a party dies after a notice of appeal is filed or while a proceeding is otherwise pending in the court of appeals, the personal representative of the deceased party may be substituted as a party on motion filed by the representative or by any party with the clerk of the court of appeals. The motion of a party shall be served upon the representative in accordance with the provisions of Rule 25. If the deceased party has no representative, any party may suggest the death on the record and proceedings shall then be had as the court of appeals may direct. If a party against whom an appeal may be taken dies after entry of a judgment or order in the district court but before a notice of appeal is filed, an appellant may proceed as if death had not occurred. After the notice of appeal is filed substitution shall be effected in the court of appeals in accordance with this subdivision. If a party entitled to appeal shall die before filing a notice of appeal, the notice of appeal may be filed by his personal representative, or if he has no personal representative, by his attorney of record within the time prescribed by these rules. After the notice of appeal is filed substitution shall be effected in the court of appeals in accordance with this subdivision.**

**(b) Substitution for Other Causes**

**If substitution of a party in the court of appeals is necessary for any reason other than death, substitution shall be effected in accordance with the procedure prescribed in subdivision (a).**

**(c) Public Officers; Death or Separation from Office**

**(1) When a public officer is a party to an appeal or other proceeding in the court of appeals in his official capacity and during its pendency dies, resigns or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.**

**(2) When a public officer is a party to an appeal or other proceeding in his official capacity he may be described as a party by his official title rather than by name; but the court may require his name to be added.**

### NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

*Subdivision (a).* The first three sentences described a procedure similar to the rule on substitution in civil actions in the district court. See FRCP 25(a). The fourth sentence expressly authorizes an appeal to be taken against one who has died after the entry of judgment. Compare FRCP 73(b), which impliedly authorizes such an appeal.

The sixth sentence authorizes an attorney of record for the deceased to take an appeal on behalf of successors in interest if the deceased has no representative. At present, if a party entitled to appeal dies before the notice of appeal is filed, the appeal can presumably be taken only by his legal representative and must be taken within the time ordinarily prescribed. 13 Cyclopedia of Federal Procedure (3d Ed.) § 63.21. The states commonly make special provisions for the event of the death of a party entitled to appeal, usually by extending the time otherwise prescribed. Rules of Civil Procedure for Superior Courts of Arizona, Rule 73(t), 16 A.R.S.; New Jersey Rev. Rules 1:3-3; New York Civil Practice Law and Rules, Sec. 1022; Wisconsin Statutes Ann. 274.01(2). The provision in the proposed rule is derived from California Code of Civil Procedure, Sec. 941.

*Subdivision (c).* This subdivision is derived from FRCP 25(d) and Supreme Court Rule 48, with appropriate changes.

### CROSS REFERENCES

Substitution of parties, see Rule 25, Federal Rules of Civil Procedure, this Appendix.

## Rule 44. Cases Involving Constitutional Questions Where United States Is Not a Party

**It shall be the duty of a party who draws in question the constitutionality of any Act of Congress in any proceeding in a court of appeals to which the United States, or any agency thereof, or any officer or employee thereof, as such officer or employee, is not a party, upon the filing of the record, or as soon thereafter as the question is raised in the court of appeals, to give immediate notice in writing to the court of the existence of said question. The clerk shall thereupon certify such fact to the Attorney General.**

### NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

This rule is now found in the rules of a majority of the circuits. It is in response to the Act of August 24, 1937 (28 U.S.C. § 2403), which requires all courts of the United States to advise the Attorney General of the existence of an action or proceeding of the kind described in the rule.

### CROSS REFERENCES

Intervention by United States, see section 2403 of this title.

## Rule 45. Duties of Clerks

**(a) General Provisions**

**The clerk of a court of appeals shall take the oath and give the bond required by law. Nei-**

ther the clerk nor any deputy clerk shall practice as an attorney or as counselor in any court while he continues in office. The court of appeals shall be deemed always open for the purpose of filing any proper paper, of issuing and returning process and of making motions and orders. The office of the clerk with the clerk or a deputy in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays, but a court may provide by local rule or order that the office of its clerk shall be open for specified hours on Saturdays or on particular legal holidays other than New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day and Christmas Day.

### (b) The Docket; Calendar; Other Records Required

The clerk shall keep a book, known as the docket, in such form and style as may be prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States, and shall enter therein each case. Cases shall be assigned consecutive file numbers. The file number of each case shall be noted on the folio of the docket whereon the first entry is made. All papers filed with the clerk and all process, orders and judgments shall be entered chronologically in the docket on the folio assigned to the case. Entries shall be brief but shall show the nature of each paper filed or judgment or order entered. The entry of an order or judgment shall show the date the entry is made. The clerk shall keep a suitable index of cases contained in the docket.

The clerk shall prepare, under the direction of the court, a calendar of cases awaiting argument. In placing cases on the calendar for argument, he shall give preference to appeals in criminal cases and to appeals and other proceedings entitled to preference by law.

The clerk shall keep such other books and records as may be required from time to time by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States, or as may be required by the court.

### (c) Notice of Orders or Judgments

Immediately upon the entry of an order or judgment the clerk shall serve a notice of entry by mail upon each party to the proceeding together with a copy of any opinion respecting the order or judgment, and shall make a note in the docket of the mailing. Service on a party represented by counsel shall be made on counsel.

### (d) Custody of Records and Papers

The clerk shall have custody of the records and papers of the court. He shall not permit any original record of paper to be taken from his custody except as authorized by the orders or instructions of the court. Original papers transmitted as the record on appeal or review shall upon disposition of the case be returned to the court or agency from which they were received. The clerk shall preserve copies of briefs and appendices and other printed papers filed.

(As amended Mar. 1, 1971, eff. July 1, 1971.)

#### NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

#### 1967 NOTE

The duties imposed upon clerks of the courts of appeals by this rule are those imposed by rule or practice in a majority of the circuits. The second sentence of subdivision (a) authorizing the closing of the clerk's office on Saturday and non-national legal holidays follows a similar provision respecting the district court clerk's office found in FRCP 77(c) and in FRCrP 56.

#### 1971 NOTE

The amendment adds Columbus Day to the list of legal holidays. See the Note accompanying the amendment of Rule 26(a).

#### CROSS REFERENCES

Appointment and removal, see section 711 of this title.

Bonds of clerks, see section 951 of this title.

Costs and fees, payment by clerk into treasury, see section 711 of this title.

Oath of office of clerks, see section 951 of this title.

Practice of law restricted, see section 955 of this title.

## Rule 46. Attorneys

### (a) Admission to the Bar of a Court of Appeals; Eligibility; Procedure for Admission

An attorney who has been admitted to practice before the Supreme Court of the United States, or the highest court of a state, or another United States court of appeals, or a United States district court (including the district courts for the Canal Zone, Guam and the Virgin Islands), and who is of good moral and professional character, is eligible for admission to the bar of a court of appeals.

An applicant shall file with the clerk of the court of appeals, on a form approved by the court and furnished by the clerk, an application for admission containing his personal statement showing his eligibility for membership. At the foot of the application the applicant shall take and subscribe to the following oath or affirmation:

> I, ______________________, do solemnly swear (or affirm) that I will demean myself as an attorney and counselor of this court, uprightly and according to law; and that I will support the Constitution of the United States.

Thereafter, upon written or oral motion of a member of the bar of the court, the court will act upon the application. An applicant may be admitted by oral motion in open court, but it is not necessary that he appear before the court for the purpose of being admitted, unless the court shall otherwise order. An applicant shall upon admission pay to the clerk the fee prescribed by rule or order of the court.

### (b) Suspension or Disbarment

When it is shown to the court that any member of its bar has been suspended or disbarred from practice in any other court of record, or has been guilty of conduct unbecoming a member of the bar of the court, he will be subject to suspension or disbarment by the court. The member shall be afforded an opportunity to show good cause, within such time as the court shall prescribe, why he should not be suspended or disbarred. Upon his response to the rule to show cause, and after hearing, if requested, or upon expiration of the time prescribed for a response if no response is made, the court shall enter an appropriate order.

**(c) Disciplinary Power of the Court over Attorneys**

A court of appeals may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing, if requested, take any appropriate disciplinary action against any attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with these rules or any rule of the court.

### NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

*Subdivision (a).* The basic requirement of membership in the bar of the Supreme Court, or of the highest court of a state, or in another court of appeals or a district court is found, with minor variations, in the rules of ten circuits. The only other requirement in those circuits is that the applicant be of good moral and professional character. In the District of Columbia Circuit applicants other than members of the District of Columbia District bar or the Supreme Court bar must claim membership in the bar of the highest court of a state, territory or possession for three years prior to application for admission (D.C. Cir. Rule 7). Members of the District of Columbia District bar and the Supreme Court bar again excepted, applicants for admission to the District of Columbia Circuit bar must meet precisely defined prelaw and law school study requirements (D.C. Cir. Rule 7½).

A few circuits now require that application for admission be made by oral motion by a sponsor member in open court. The proposed rule permits both the application and the motion by the sponsor member to be in writing, and permits action on the motion without the appearance of the applicant or the sponsor, unless the court otherwise orders.

*Subdivision (b).* The provision respecting suspension or disbarment is uniform. Third Circuit Rule 8(3) is typical.

*Subdivision (c).* At present only Fourth Circuit Rule 36 contains an equivalent provision. The purpose of this provision is to make explicit the power of a court of appeals to impose sanctions less serious than suspension or disbarment for the breach of rules. It also affords some measure of control over attorneys who are not members of the bar of the court. Several circuits permit a non-member attorney to file briefs and motions, membership being required only at the time of oral argument. And several circuits permit argument pro hac vice by non-member attorneys.

### CROSS REFERENCES

Clerk as prohibited from practicing law, see section 955 of this title.

Practice of law prohibited by United States marshal or deputy marshal, see section 575 of this title.

## Rule 47. Rules by Courts of Appeals

Each court of appeals by action of a majority of the circuit judges in regular active service may from time to time make and amend rules governing its practice not inconsistent with these rules. In all cases not provided for by rule, the courts of appeals may regulate their practice in any manner not inconsistent with these rules. Copies of all rules made by a court of appeals shall upon their promulgation be furnished to the Administrative Office of the United States Courts.

### NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES

This rule continues the authority now vested in individual courts of appeals by 28 U.S.C. § 2071 to make rules consistent with rules of practice and procedure promulgated by the Supreme Court.

## Rule 48. Title

These rules may be known and cited as the Federal Rules of Appellate Procedure.

# APPENDIX OF FORMS

## Form 1. Notice of Appeal to a Court of Appeals from a Judgment or Order of a District Court

United States District Court for the ——————
District of ——————

File Number ————

A. B., Plaintiff
v.
C. D., Defendant } Notice of Appeal

Notice is hereby given that C. D., defendant above named, hereby appeals to the United States Court of Appeals for the ———— Circuit (from the final judgment) (from the order (describing it)) entered in this action on the —— day of ————, 19—.

Signed:

______________________________,
*Attorney for C. D.*

Address:

______________________________

### NOTE

Counsel for the appellant is requested to furnish the clerk of the district court with a sufficient number of copies of the original notice to permit the clerk to serve a copy on each party other than the appellant.

## Form 2. Notice of Appeal to a Court of Appeals from a Decision of the Tax Court

Tax Court of the United States

Washington, D.C.

A. B., Petitioner
v.
Commissioner of Internal Revenue, Respondent } Docket No ————

Notice of Appeal

Notice is hereby given that A. B. hereby appeals to the United States Court of Appeals for the ———— Circuit from [that part of] the decision of this court entered in the above captioned proceeding on the ——— day of ————, 19— [relating to ————].

Signed:

______________________________
*Counsel for A. B.*

Address:

______________________________

### NOTE

Use the language enclosed in brackets if the appeal is from a designated part of a decision rather than from the entire decision. Counsel for the appellant is requested to furnish the clerk of the Tax Court with a sufficient number of copies of the original notice to permit the clerk to serve a copy on each party other than the appellant.

### Form 3. Petition for Review of Order of an Agency, Board, Commission or Officer

United States Court of Appeals for the ——— Circuit

| | |
|---|---|
| A. B. Petitioner<br>*v.*<br>XYZ Commission, Respondent | *Petition for Review.* |

A. B. hereby petitions the court for review of the Order of the XYZ Commission (describe the order) entered on ———, 19—.

Signed:

______________________________

*Attorney for Petitioner.*

Address:

______________________________

NOTE

If the statute authorizing review specifies the title of the paper to be filed to initiate the proceeding in the court of appeals (as, for example, a petition to set aside the order, a notice of appeal) the title specified in the statute should be used and the appropriate changes made in the above statement. Rule 15(c) requires the petitioner to provide the clerk with a copy for each respondent.

### Form 4. Affidavit to Accompany Motion for Leave to Appeal in Forma Pauperis

United States District Court for the ——— District of ———

| | |
|---|---|
| United States of America<br>*v.*<br>A. B. | No.—— |

Affidavit in Support of Motion to Proceed on Appeal in Forma Pauperis

I, ———————— being first duly sworn, depose and say that I am the ————, in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are the following:

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account?

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

______________________________

SUBSCRIBED AND SWORN TO before me this ———day of ————, 19—.

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

______________________________

*District Judge.*

# GENERAL RULES OF THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

*As amended to January 1, 1977*

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## GENERAL RULES

### Rule 1. Scope of rules

These Rules govern the procedure in the Temporary Emergency Court of Appeals of the United States. Except as to matters specifically covered by these Rules, the Federal Rules of Appellate Procedure shall govern the procedure in all cases or proceedings in this court. The Rules shall be construed to secure the just, speedy and inexpensive determination of every action.

### Rule 2. Effective date

These Rules shall become effective and govern the course of all appeals as of February 2, 1976. Upon appropriate showing of hardship in cases pending at the time of adoption of these Rules the court will grant such relief as may be warranted.

### Rule 3. Name

The name of the court as provided by § 211 of the Economic Stabilization Act of 1970 as amended by The Economic Stabilization Act Amendments of 1971, P.L. 92-210, 85 Stat. 748-750, is the "Temporary Emergency Court of Appeals of the United States."

### Rule 4. Seal

The seal of the court shall contain the words "Temporary Emergency Court of Appeals" in the upper sector of space included within the two outer concentric circles, and the words "of the United States of America" in the lower sector, and shall contain the standardized eagle rampant in the center.

### Rule 5. Court executive, administrator, deputy clerks and supporting personnel

The court may appoint an administrator who shall also be clerk and who shall be subject to removal by the court. His official station shall be at the United States Courthouse, Washington, D.C. 20001. The clerk and his deputies shall take the oath of office of clerks and deputies as set forth by 28 U.S.C. § 951, and shall be subject to all of the provisions of Title 28, United States Code, Chapter 57. For their general duties see Rule 45 of the Federal Rules of Appellate Procedure, which is hereby made applicable. Such deputy clerks and supporting personnel other than a judge's personal staff may be appointed by the Chief Judge at such times and places as the volume of court business requires.

### Rule 6. Composition of court

The court shall be composed of a Chief Judge and other judges designated by the Chief Justice of the United States from the judges of the United States district courts and United States courts of appeals in accordance with § 211(b)(1) of P.L. 92-210.

### Rule 7. Divisions

The Chief Judge may, from time to time, divide the court into divisions of three or more members for the hearing and determination of cases, controversies and issues and may make such changes in the membership of such divisions as he may deem appropriate. Sessions shall be held at such places and times as the Chief Judge or presiding judge of a panel may designate. The Chief Judge shall assign cases to the divisions on an equitable basis having due regard for the geographical locations of the parties and the workloads of the divisions and individual judges thereof. Cases, controversies and issues shall be heard and determined by a division unless a hearing or rehearing before the court *en banc* is ordered by the court.

### Rule 8. Quorum

(a) A majority of the number of judges authorized to constitute a division of the court shall constitute a quorum for such division.

(b) Not less than five members of the court shall be required to constitute a quorum for the court sitting *en banc.*

(c) If a quorum does not attend on any day appointed for holding a session of the court or a division thereof, any judge who does attend may adjourn the court or division from time to time, or, in the absence of any judge, the clerk may adjourn the court or division from day to day.

### Rule 9. Sessions

The court shall not hold formal terms. The court shall be deemed always open.

### Rule 10. Precedence

The Chief Judge shall have precedence and preside at any session which he attends. Other judges shall have precedence and preside according to the seniority of their commissions as judges of the United States.

### Rule 11. Judicial Conference of TECA

There shall be held at such times and places as shall be designated by the Chief Judge of TECA a conference of all TECA judges for the purpose of considering the state of business of the court and advising ways and means of improving the administration of justice. The Chief Judge shall preside at the Conference.

### Rule 12. Office hours

The clerk's office shall be open from 9:00 a.m. to 4:30 p.m. on all business days.

### Rule 13. Attorneys

(a) Admission to the bar of this court shall be governed by the provisions of Rule 46, Federal Rules of Appellate Procedure, except as hereinafter set out.

(b) Prior to participation in a case, all attorneys shall file a written application for admission on a form provided by the clerk. Motions for admissions in open court will not be entertained.

(c) Attorneys can be admitted to argue an appeal *pro hac vice.*

(d) Suspension or disbarment shall be governed by Rule 46(b), Federal Rules of Appellate Procedure.

### Rule 14. Clerk's fees

The fees of the clerk are as follows:

(a) For docketing a case on appeal or review, or docketing any other proceeding, $50.00.

(b) For every search of the records of the court and certifying the results of the same, $2.00.

(c) For certifying any document or paper, whether the certification is made directly on the document, or by separate instrument, $1.00.

(d) For making a typed copy of any record or paper, $1.00 per page of 250 words or fraction thereof. For reproducing any record or paper (by any means other than retyping), 50 cents per page. These fees do not include certification.

(e) For comparing with the original thereof any copy of any transcript of record, entry, record or paper, when such copy is furnished by any person requesting certification, $1.00 per page or fraction thereof. This fee is in addition to the fee for certification.

(f) For each printed copy of any opinion, such copy to include all separate and dissenting opinions in a single case, regardless of whether such copy be certified or uncertified, the sum of $2.00 provided that such charge shall not be assessed for copies of opinions furnished each party of record according to the court's direction or to governmental offices and agencies.

### Rule 15. Notice of appeal

(a) A notice of appeal in any civil or criminal case arising under the Economic Stabilization Act of 1970 as amended; or under further legislation incorporating § 211 of the Economic Stabilization Act as amended; or a motion for injunctive relief as provided by § 211(e)(2), shall be filed with the clerk of this court within 30 days of the entry of judgment by the district court. This time limitation shall be binding upon both government appeals and private appeals. The appellant shall submit sufficient copies of the notice of appeal for service by the clerk of this court on all parties. [note TECA Rule 21, for timely filing by mail.]

(b) The notice of appeal shall specify the party or parties taking the appeal; contain a short statement indicating the judgment, date and purport of the district court's judgment, order or part thereof appealed from, and the district court judge.

(c) The appellant shall submit with his notice of appeal a statement which shall contain:

(1) A mailing list with the names, addresses and telephone numbers of all other counsel or *Pro Se* to the proceeding.

(2) A brief description of the subject matter and issues of the case, including the applicable regulations and statute under which the appeal is made.

(3) An indication if a party is proceeding in *Forma Pauperis* and/or *Pro Se.*

(4) An indication if an appeal has been taken in this case to any other court of appeals.

(5) Transcript information if one is to be provided [date ordered, reporter's name, estimated pages].

(d) The clerk of this court shall serve notice of the filing of the notice of appeal by mailing a copy thereof to each counsel or *Pro Se* listed on the mailing list. The clerk shall note on each copy served the date on which the notice of appeal was filed. Failure of the clerk to serve the notice of appeal shall not affect the validity of the appeal. Service shall be sufficient notwithstanding the death of a party or his counsel. The clerk shall note on the docket the name of the parties to whom he mails copies with date of mailing.

(e) All parties in the court below shall be deemed parties involved in the appeal, unless otherwise indicated by the appellant in writing to the clerk of this court. The clerk shall serve such notice on all parties for reply or rebuttal.

### REFERENCES IN TEXT

The Economic Stabilization Act of 1970, as amended, referred to in subsec. (a), is title II of Pub. L. 91-379, Aug. 15, 1970, 84 Stat. 799, as amended, which is set out as a note under section 1904 of Title 12, Banks and Banking.

### Rule 16. Question certified by District Court—constitutional issues

(a) When a district court certifies to this court a question involving a substantial constitutional issue, the certificate shall contain a statement of the nature of the cause and of the facts on which such issue arises. The certificate shall constitute (be in lieu of) a notice of appeal.

(b) When a constitutional issue is certified by a district court the clerk will upon receipt thereof from the district court notify the plaintiff in the district court, who shall promptly pay the docket fee, after which the case will be placed on the docket. If the plaintiff fails to pay the fee within 7 days, unless exempt or relieved from its payment, the proceeding will be dismissed.

(c) After docketing, the certificate shall be submitted to the Chief Judge for disposition pursuant to Rule 24 and § 211(c) of P.L. 92-210 for a preliminary examination to determine whether the certificate will be dismissed, or whether other disposition shall be made.

(d) The brief of the party who was plaintiff below shall be filed within 20 days after the certificate has been filed in this court.

(e) Briefs on the merits in proceedings on certificates shall comply with Rule 21 herein.

### Rule 17. Docketing the appeal

Upon receipt of the notice of appeal the clerk shall enter the appeal upon the docket. Except in those cases where the party seeking review is exempt or relieved from prepayment of the fees the appellant shall pay at the time of filing the notice of appeal or no later than 7 days after the filing of the notice of appeal a docket fee of $50.00.

### Rule 18. Record on appeal

(a) The composition of the record on appeal shall be as provided by Rule 10(a), Federal Rules of Appellate Procedure.

(b) The original record on appeal shall be retained in the district court, subject to the right of any party to request, or a judge or the clerk to direct that all or designated parts of the record be transmitted.

(c) The clerk shall request that a certified copy of the docket entries be transmitted within 20 days after the notice of appeal is filed.

(d) Within 3 days after filing the notice of appeal, the appellant shall order from the reporter a transcript of such parts of the proceedings not already on file as he deems necessary for inclusion in the record and make satisfactory arrangements with the reporter for payment of the cost of the transcript.

In appeals taken pursuant to 28 U.S.C. § 1915 and 18 U.S.C. § 3006A the appellant shall take appropriate action to obtain authorization to have the necessary parts of the reporter's transcript prepared at the expense of the United States within the time allowed for filing the notice of appeal.

### Rule 19. Transmission of record—Duty of appellant

(a) The appellant shall file 7 copies of the record or stipulated record as may be designated or agreed upon within the time allowed for filing, the appellant's brief. An index shall be provided for all records filed.

(b) It shall be the responsibility of the parties, within the time periods incorporated in these rules and Rule 30(b), Federal Rules of Appellate Procedure, to agree upon and provide for the submission of the agreed parts of the record.

### Rule 20. Disqualification of judges

If, based upon any information available to him, counsel for any party is of the opinion that any member of the panel of this court to which his case is assigned is disqualified pursuant to 28 U.S.C. § 455 (P.L. 93-512, 88 Stat. 1609, December 5, 1974), he shall, prior to the calendaring of the case for oral argument, advise the clerk in writing of the facts and circumstances supporting such opinion.

### Rule 21. Briefs and certificate of counsel

(a) Briefs, except as herein provided, shall be prepared in accordance with the provisions of Rule 28, Federal Rules of Appellate Procedure.

(b) The procedure described in Rule 30(f), Federal Rules of Appellate Procedure, for hearing appeals on the original record without the necessity of an appendix is authorized in all appeals.

(c) A certificate will be furnished by counsel for all private (non-governmental) parties, both appellants and appellees, which shall be incorporated on the *first* page(s) of each brief before the table of contents or index, and which shall certify a full and complete list of all parties; officers, directors, or trustees of parties; and of all other persons, associations of persons, firms, partnerships, corporations, or organizations which have a financial interest in, or another interest which could be substantially affected by, the outcome of the particular case.

This certificate shall be furnished in order that the judges of this court may evaluate possible disqualification or recusal. It shall be in form as follows:

[Number and Title of Case]

Certificate Required by TECA Rule 21(c):

The undersigned, Counsel of record for ——, certifies that the following is a full and complete list of the parties in this action:

Name Identification & Relationship

The undersigned further certifies that the following is a full and complete list of officers, directors, or trustees of the above-identified parties:

Name Identification & Relationship

The undersigned further certifies that the following is a full and complete list of other persons, associations of persons, firms, partnerships, corporations, or organizations that have a financial interest in, or another interest which could be substantially affected by, the outcome of this case (including a relationship as a parent or holding company, or similar relationship):

Name Identification, Relationship and Interests

(d) A certificate will be furnished by counsel for all parties, governmental and non-governmental, both appellants and appellees, which shall be incorporated on the first page(s) of each brief before the table of contents or index (and immediately following the certificate required by Rule 21(c), if one be required), and which shall certify a full and complete list of each person acting as a lawyer in the proceeding.

This certificate shall be furnished in order that the judges of this court may evaluate possible disqualification or recusal. It shall be in form as follows:

Certificate Required by TECA Rule 21(d):

The undersigned, counsel of record for —— certifies that the following is a full and complete list of each person acting as a lawyer in the proceeding:

Name Identification

(e) The appellant shall serve and file his brief within 20 days after the date on which the notice of appeal is filed. The appellee shall serve and file his brief within 15 days after service of the brief of the appellant. The appellant may serve and file a reply brief within 7 days after service of the brief of the appellee, but, except for good cause shown, a reply brief must be filed at least 3 days before argument.

(f) Seven copies of briefs shall be filed, but the court may require that additional copies be filed.

(g) Except by permission of the court or a division thereof, principal briefs, including those of intervenors, shall not exceed 25 pages, exclusive of pages containing the Certificate, Table of Contents, Tables of Citations and any Addenda or Appendices containing statutes, rules, regulations or exhibits.

(h) Motions for leave to file briefs in excess of 25 pages must be filed at least 3 days in advance of the due date of the brief.

(i) Reply briefs shall not exceed 15 pages.

(j) Briefs shall contain the relevant parts of statutes, treaties, regulations or rules involved. If lengthy, these may be set out in an Addendum to the brief. Unpublished orders including explanatory memoranda of this court are not to be cited in briefs or memoranda of counsel as precedents.

(k) When pertinent and significant authorities come to the attention of a party after his brief (or memorandum on a motion) has been filed, or after oral argument but before decision, a party shall, without obtaining special leave of court, supplement his brief by letter to the clerk of this court, three (3) extra copies to the clerk, and copy to adversary counsel, setting forth the citations. There shall be a reference either to a page of the brief or to a point orally argued to which the citations pertain, but the letter shall contain no argument or explanations.

### Rule 22. Reproduction of record, briefs and other written materials filed

Printing of the record, briefs or any other papers filed in the court is not required. Papers and briefs may be typewritten, on standard or legal size paper, with copies reproduced by any method resulting in clearly readable copy. All written material shall be double spaced. Briefs shall be bound in soft covers: blue for appellant; red for appellee; green for intervenor or amicus curiae; gray for reply briefs and fastened at the left side at three places.

### Rule 23. Filing, mailing and proof of service

(a) Papers required or permitted to be filed in this court shall be filed with the clerk of this court in his office in Washington, D.C. or as directed.

(b) Filing may be accomplished by mail addressed to the clerk, but filing shall not be timely, unless the papers are received by the clerk within the time fixed for filing, except that papers shall be deemed filed on the day of mailing if the most expeditious form of delivery by mail is utilized. Service by mail is complete on mailing.

(c) Papers presented for filing shall contain an acknowledgment or proof of service which shall be accomplished in the manner provided in Rule 25(d), Federal Rules of Appellate Procedure. Service shall be accomplished by the most expeditious method practicable.

### Rule 24. Docket control

In the interest of docket control, the Chief Judge or another judge or judges designated by him may from time to time review pending cases for appropriate assignment or disposition under Rules 25, 26, or 27 or any other Rules of this court.

### Rule 25. Dismissal

(a) If upon the hearing of an interlocutory motion or as a result of a review under Rule 24, it shall appear to the court, or a division thereof, that the appeal is frivolous and entirely without merit, the appeal will be dismissed.

(b) The court, *sua sponte* or on motion, may dismiss with prejudice, for undue delay, any case in which there has been a deliberate effort on the part of counsel to avoid prompt hearing and disposition on the merits.

(c) The court also may dismiss *sua sponte* and summarily any appeal of which the court's lack of jurisdiction clearly appears.

(d) When an appellant fails to comply with a requirement of the Federal Rules of Appellate Procedure or the Rules of this court, the clerk shall notify the appellant or his counsel that upon the expiration of 7 days from the date thereof the appeal will be dismissed for want of prosecution, unless prior to that date appellant remedies the default. If the appellant fails to comply within the 7 day period, the clerk shall then enter an order dismissing the appeal for want of prosecution and shall issue a certified copy thereof to the clerk of the district court as and for the mandate. In no case shall the appellant be entitled to remedy his default after dismissal under this rule, unless by order of the Chief Judge.

### Rule 26. Motion to dismiss or affirm

(a) Within a maximum of 10 days after the notice of appeal has been filed in this court, the appellee may file a motion to dismiss or a motion to affirm. Where appropriate, a motion to affirm may be united in the alternative with a motion to dismiss. The limitation of 10 days may be extended by the court, a division thereof, or the Chief Judge on proper showing of extraordinary reasons for delay in filing a motion to dismiss or affirm, upon such terms and conditions as may be prescribed, or such extension may be granted *sua sponte.*

(b) The motion to dismiss or affirm shall be filed with the clerk in conformity with Rule 27 of the Federal Rules of Appellate Procedure, except clause (d) thereof.

(c) The appellant shall have 7 days from the date of receipt of the motion to dismiss or affirm within which to file a response opposing the motion.

(d) The time for filing briefs pursuant to Rule 21 shall not be tolled or extended by the filing of a motion to dismiss or affirm.

### Rule 27. Calendars

(a) Whenever the Chief Judge concludes *sua sponte,* or on the recommendation of a judge acting under Rule 24 or of the assigned panel, that a case is so insubstantial as to justify only limited oral argument or as to justify no oral argument he may direct the clerk to place the case on a restricted oral argument calendar or a summary calendar.

(b) The clerk shall give written notice to the parties or their counsel of the transfer of a case to the summary or restricted oral argument calendar.

(c) Motions for restoration to the argument calendar will not ordinarily be entertained by the court.

### Rule 28. Oral argument

(a) Not more than two counsel shall be heard for each side in the argument of a case, except by special leave of the court or a division thereof, upon sufficient reason shown.

Not more than one counsel shall be heard for each side in cases placed on the restricted oral argument calendar.

(b) Counsel in all cases scheduled for argument on the merits shall be allotted 30 minutes to a side, except that only 15 minutes to a side shall be allotted to cases placed on the restricted oral argument calendar and to motions scheduled for argument.

(c) A motion or request for the allowance of additional time pursuant to Rule 34(b), Federal Rules of Appellate Procedure, shall be filed or made not later than 7 days after appellee's brief has been filed.

Where two or more cases are consolidated they shall be considered as one case for the allotment of time for argument.

(d) Counsel for the parties, including counsel for any intervenor, on each side may agree on the apportionment of the side's time; otherwise the court will apportion it. Counsel for an intervenor ordinarily shall be permitted to argue only to the extent that counsel for the party on whose side he intervenes is willing to share his allotted time. If the apportionment is agreed upon, counsel who opens the argument on his side shall announce the apportionment. The time so apportioned to each party shall not be exceeded unless the court permits, in which event the time apportioned to the other parties on that side will not be reduced.

(e) A party who fails to file a brief shall not be heard at the time of oral argument except by permission of the court.

(f) Amicus curiae will not be permitted to argue except on motion in writing filed within the time allowed for filing the brief of the appellee.

(g) Counsel may assume there will be no oral argument unless advised by the clerk to appear at a time and place fixed by the court.

### Rule 29. Opinions and rulings of the court

(a) Opinions shall be filed in the Office of the Clerk who shall promptly reproduce them and distribute one copy to each party.

(b) In accordance with recommendations for improvement of judicial administration, this court may, while according full consideration of the issues, dispense with opinions where the issues occasion no need therefor, and confine its action to such abbreviated disposition as it may deem appropriate, e.g., affirmance by order of a decision or judgment of a court or administrative agency; a judgment, or affirmance or reversal, containing a notation of precedents, or accompanied by a brief memorandum.

(c) If the *record* in any case is remanded to a court or agency, this court retains jurisdiction over the case.

If the *case* is remanded, this court does not retain jurisdiction, and a new notice of appeal will be necessary if a party seeks review of the remand proceedings.

### Rule 30. En banc proceedings

(a) A majority of the judges of the court may order that an appeal or other proceeding be heard or reheard by this court *en banc*. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

(b) A party, pursuant to Rule 35(b), Federal Rules of Appellate Procedure, who suggests the appropriateness of a hearing or rehearing, *en banc*, where the suggestion is not contained in a petition for rehearing, shall file an original and 10 copies of said suggestion on or before the date on which appellee's brief is due to be filed if the suggestion is for hearing *en banc*, or within the time prescribed by Rule 40, Federal Rules of Appellate Procedure, for the filing of a petition for rehearing if the suggestion is for rehearing *en banc*. The suggestion shall not exceed 10 pages in length and shall be served in compliance with TECA Rule 23 and Rule 25, Federal Rules of Appellate Procedure.

(c) If a party desires to suggest a rehearing *en banc*, the suggestion must be made within the time prescribed by Rule 40, Federal Rules of Appellate Procedure, for filing a petition for rehearing, whether the suggestion is made in such petition or otherwise. The pendency of such a suggestion, whether or not included in a petition for rehearing, shall not affect the finality of the judgment of the court of appeals or stay the issuance of the mandate.

(d) The clerk shall transmit a suggestion for hearing or rehearing *en banc* to the judges of the court but a vote will not be taken to determine whether the cause shall be heard or reheard *en banc* unless a judge of the court requests a vote on such a suggestion made by a party.

(e) An original and eighteen copies of all *en banc* papers will be filed with the court.

### Rule 31. Mandate

The mandate of the court shall issue 21 days after the entry of judgment unless the time is shortened or enlarged by order of a judge or the court. The issuance and stay of mandates shall be governed by Rules 35(c) and 41, Federal Rules of Appellate Procedure.

### Rule 32. Writ of Certiorari

Section 211(G) of the Economic Stabilization Act, as amended, provides "Within 30 days after entry of any judgment or order by the Temporary Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States."

#### REFERENCES IN TEXT

Section 211(G) of the Economic Stabilization Act, as amended, referred to in text, is section 211(g) of Pub. L. 91-379, title II, Aug. 15, 1970, 84 Stat. 799, as amended, which is set out as a note under section 1904 of Title 12, Banks and Banking.

### Rule 33. Motions

(a) Motions will ordinarily be considered on motion papers and briefs filed with the clerk. An original and 6 copies of all motions shall be filed, but a judge or the clerk may require additional copies. No oral argument will be heard unless ordered by the court, a division thereof, or a judge thereof. Motions for oral argument will not be entertained.

(b) A motion for a stay of the judgment or order of a district court pending appeal, pursuant to Rule 8(a), Federal Rules of Appellate Procedure, or for approval of a supersedeas bond, or for an order suspending, modifying, restoring, or granting an injunction during the pendency of an appeal shall include a copy of the judgment decision or order involved and the opinion thereon, if any.

(c) If there is failure to comply with the provisions of subdivision (b) of this Rule, the court will not consider the motion in question until there is either full compliance, or a satisfactory explanation of the failure so to comply.

(d) A motion is affirmatively opposed only when a document is filed (within the time limitations of Rule 27, Federal Rules of Appellate Procedure) which clearly sets forth opposition to the relief sought in the motion with points and authorities incorporated therein.

(e) The clerk is authorized in his discretion and subject to review by the court to act for the court upon the following when uncontested:

(1) Any motion for extension of time to file a pleading or perform an act required by Rules 11, 12, 24, 27, 29 and 30, Federal Rules of Appellate Procedure, and Rules 17, 19, 21, and 26 of these Rules.

(2) Motions to make corrections on briefs or pleadings.

(3) Motions to supplement or correct records or to incorporate records on former appeals.

(4) Motions to consolidate appeals.

(5) Motions for leave to file briefs or petitions for rehearing in excess of the number of pages usually permitted.

(6) Motions for leave to file *amicus curiae* briefs.

(7) Motions to substitute parties.

(8) Orders for the dismissal of an appeal under Rule 42(b), Federal Rules of Appellate Procedure or pursuant to an order of the court or a judge.

(9) Orders on mandate from the Supreme Court of the United States.

(10) Orders and judgments on decisions by the court on motions and appeals. (See Rule 36 of the Federal Rules of Appellate Procedure.)

(f) All correspondence directed to the court, a judge or the clerk's office requesting any type of judicial action shall be in the form of a motion unless otherwise provided.

## APPENDIX

### Notice of Appeal to the Temporary Emergency Court of Appeals From a Judgment or Order of a District Court

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

TECA DOCKET NO. ——
(To be assigned)
DISTRICT COURT NO. ——

A. B., Plaintiff
*v.*
C. D., Defendant

### Notice of Appeal

Notice is hereby given that C. D., defendant above named, hereby appeals to the Temporary Emergency Court of Appeals of the United States [from the final judgment or order (describing it)] entered in this action on the ——— day of ————, by Judge ———— in the District Court for the ——— District of ————, 19—.

(s) ______________
Attorney for C.D.

______________
(Address)

### TECA Rule Citation Sources

Federal Rules—Practice and Procedure, 1975 Edition
United States Code Annotated, Title 28
Federal Rules Decisions
Federal Reporter—(F.2d Advance Sheet)
Code of Federal Regulations—Title 6
Federal Energy Reporter—CCH
Economic Stabilization Reporter—CCH
United States Supreme Court Digest—Lawyers Edition
United States Code Service, Federal Court Rules

### TECA Statutory Authority

Economic Stabilization Act Amendments of 1971, 85 Stat. 743 (12 USCA § 1904 notes).

Emergency Petroleum Allocation Act, 15 U.S.C. §§ 751, 754 (1973).

Energy Policy and Conservation Act, Pub. L. No. 94-163, §§ 452, 523 (Dec. 22, 1975).

### TECA Flow Chart-Check List

Temporary Emergency
Court of Appeals
Flow Chart — Check List

Docket No.
Caption
______________

| DATE | ☐ ACTION | RULE |
|---|---|---|
| | ☐ District Court Judgment/appealable order | See statutes |
| | ☐ NOTICE OF APPEAL | TECA 15, 23(a) |
| | ☐ CONSTITUTIONAL QUESTION | TECA 16 |
| | ☐ Docketing Appeal | TECA 17 |
| | ☐ Informational Statement | TECA 15(c) |
| | ☐ Docket Fee ($50.00) | TECA 14(a), 17 |
| | ☐ Admission to TECA Bar ($10.00) | TECA 13 |
| | ☐ Filing, Mailing and Proof of Service | TECA 23 |
| | ☐ RECORD on Appeal | TECA 18 |
| | ☐ Transcript | TECA 18(d), 15(c)(5) |
| | ☐ Transmission of Record | TECA 19 |
| | ☐ Reproduction of Record | TECA 22 |
| | ☐ Motion to Dismiss | TECA 26 |
| | ☐ Disqualification of Judges | TECA 20, 21 |
| | BRIEFS | TECA 21 |
| | ☐ Reproduction | TECA 22 |
| | ☐ Attorney Certificate | TECA 21(c), (d) |
| | FILING TIME | |
| | ☐ APPELLANT [20 days after filing notice of appeal] | |
| | ☐ APPELLEE [15 days after service by Appellant] | |
| | ☐ REPLY [7 days after service by Appellee] | |
| | ☐ New Material | TECA 21(k) |
| | ☐ Oral Argument | TECA 28 |
| | or | |
| | ☐ Submission on Briefs | TECA 27 |
| | ☐ OPINION/Judgment of Court | TECA 29 |
| | ☐ MANDATE | TECA 31 |
| | ☐ Stay of Mandate | TECA 31 |
| | ☐ Rehearing Petition | FRAP 40 |
| | ☐ En Banc Suggestion | TECA 30 |
| | ☐ CERTIORARI [30 days after TECA final judgment] | TECA 32 |
| | MOTIONS | TECA 33 |
| | Amicus Curia | TECA 28(f), 33(e)(6) |

# RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS

*As amended to January 1, 1977*

### AUTHORITY

The Rules of Civil Procedure hereinafter set out were promulgated by the Supreme Court of the United States under authority of former sections 723b, 723c (now § 2072) of this title.

### EFFECTIVE DATE

The original Rules of Civil Procedure for the District Courts were transmitted to the Congress by the Attorney General on Jan. 3, 1938 and became effective on Sept. 16, 1938.

### RULES OF THE SUPREME COURT OF THE UNITED STATES

Procedure in original actions in Supreme Court of the United States, Federal Rules of Civil Procedure as guide, see rule 9, this Appendix.

### ANALYSIS OF RULES

Title I. Scope of Rules—One Form of Action

- Rule 1. Scope of Rules
- Rule 2. One Form of Action

Title II. Commencement of Action; Service of Process, Pleadings, Motions, and Orders

- Rule 3. Commencement of Action
- Rule 4. Process
  - (a) Summons: issuance.
  - (b) Same: form.
  - (c) By whom served.
  - (d) Summons: personal service.
  - (e) Same; service upon party not inhabitant of or found within State.
  - (f) Territorial limits of effective service.
  - (g) Return.
  - (h) Amendment.
  - (i) Alternative provisions for service in a foreign country.
- Rule 5. Service and Filing of Pleadings and Other Papers
  - (a) Service: when required.
  - (b) Same: how made.
  - (c) Same: numerous defendants.
  - (d) Filing.
  - (e) Filing with the court defined.
- Rule 6. Time
  - (a) Computation.
  - (b) Enlargement.
  - (c) Rescinded.
  - (d) For motions—affidavits.
  - (e) Additional time after service by mail.

Title III. Pleadings and Motions

- Rule 7. Pleadings Allowed; Form of Motions
  - (a) Pleadings.
  - (b) Motions and other papers.
  - (c) Demurrers, pleas, etc., abolished.
- Rule 8. General Rules of Pleading
  - (a) Claims for relief.
  - (b) Defenses; form of denials.
  - (c) Affirmative defenses.
  - (d) Effect of failure to deny.
  - (e) Pleading to be concise and direct; consistency.
  - (f) Construction of pleadings.
- Rule 9. Pleading Special Matters
  - (a) Capacity.
  - (b) Fraud, mistake, condition of the mind.
  - (c) Conditions precedent.
  - (d) Official document or act.
  - (e) Judgment.
  - (f) Time and place.
  - (g) Special damage.
  - (h) Admiralty and maritime claims.
- Rule 10. Form of Pleadings
  - (a) Caption; names of parties.
  - (b) Paragraphs; separate statements.
  - (c) Adoption by reference; exhibits.
- Rule 11. Signing of Pleadings
- Rule 12. Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on the Pleadings
  - (a) When presented.
  - (b) How presented.
  - (c) Motion for judgment on the pleadings.
  - (d) Preliminary hearings.
  - (e) Motion for more definite statement.
  - (f) Motion to strike.
  - (g) Consolidation of defense in motion
  - (h) Waiver or preservation of certain defenses.
- Rule 13. Counterclaim and Cross-Claim
  - (a) Compulsory counterclaims.
  - (b) Permissive counterclaims.
  - (c) Counterclaim exceeding opposing claim.
  - (d) Counterclaim against the United States.
  - (e) Counterclaim maturing or acquired after pleading.
  - (f) Omitted counterclaim.
  - (g) Cross-claim against co-party.
  - (h) Joinder of additional parties.
  - (i) Separate trials; separate judgments.
- Rule 14. Third-Party Practice
  - (a) When defendant may bring in third party.
  - (b) When plaintiff may bring in third party.
  - (c) Admiralty and maritime claims.
- Rule 15. Amended and Supplemental Pleadings
  - (a) Amendments.
  - (b) Amendments to conform to the evidence.
  - (c) Relation back of amendments.
  - (d) Supplemental pleadings.
- Rule 16. Pre-Trial Procedure; Formulating Issues

Title IV. Parties

- Rule 17. Parties Plaintiff and Defendant; Capacity
  - (a) Real party in interest.
  - (b) Capacity to sue or be sued.
  - (c) Infants or incompetent persons.
- Rule 18. Joinder of Claims and Remedies
  - (a) Joinder of claims.
  - (b) Joinder of remedies; fraudulent conveyances.

Rule 19. Joinder of Persons Needed for Just Adjudication
  - (a) Persons to be joined if feasible.
  - (b) Determination by court whenever joinder not feasible.
  - (c) Pleading reasons for nonjoinder.
  - (d) Exception of class actions.

Rule 20. Permissive Joinder of Parties
  - (a) Permissive joinder.
  - (b) Separate trials.

Rule 21. Misjoinder and Non-Joinder of Parties

Rule 22. Interpleader

Rule 23. Class Actions
  - (a) Prerequisites to a class action.
  - (b) Class actions maintainable.
  - (c) Determination by order whether class action to be maintained; notice; judgment; actions conducted partially as class actions.
  - (d) Orders in conduct of actions.
  - (e) Dismissal or compromise.

Rule 23.1. Derivative Actions by Shareholders

Rule 23.2. Actions Relating to Unincorporated Associations

Rule 24. Intervention
  - (a) Intervention of right.
  - (b) Permissive intervention.
  - (c) Procedure.

Rule 25. Substitution of Parties
  - (a) Death.
  - (b) Incompetency.
  - (c) Transfer of interest.
  - (d) Public officers; death or separation from office.

Title V. Depositions and Discovery

Rule 26. General Provisions Governing Discovery
  - (a) Discovery methods.
  - (b) Scope of discovery.
    - (1) In general.
    - (2) Insurance agreements.
    - (3) Trial preparation: materials.
    - (4) Trials preparation: experts.
  - (c) Protective orders.
  - (d) Sequence and timing of discovery.
  - (e) Supplementation of responses.

Rule 27. Depositions Before Action or Pending Appeal
  - (a) Before action.
    - (1) Petition.
    - (2) Notice and service.
    - (3) Order and examination.
    - (4) Use of deposition.
  - (b) Pending appeal.
  - (c) Perpetuation by action.

Rule 28. Persons Before Whom Depositions May Be Taken
  - (a) Within the United States.
  - (b) In foreign countries.
  - (c) Disqualification for interest.

Rule 29. Stipulations Regarding Discovery Procedure

Rule 30. Depositions Upon Oral Examination
  - (a) When depositions may be taken.
  - (b) Notice of examination: general requirements; special notice; nonstenographic recording; production of documents and things; deposition of organization.
  - (c) Examination and cross-examination; record of examination; oath; objections.
  - (d) Motion to terminate or limit examination.
  - (e) Submission to witness; changes; signing.
  - (f) Certification and filing by officer; exhibits; copies; notice of filing.
  - (g) Failure to attend or to serve subpoena; expenses.

Rule 31. Depositions Upon Written Questions
  - (a) Serving questions; notice.
  - (b) Officer to take responses and prepare record.
  - (c) Notice of filing.

Rule 32. Use of Depositions in Court Proceedings
  - (a) Use of depositions.
  - (b) Objections to admissibility.
  - [(c) Abrogated.]
  - (d) Effect of errors and irregularities in depositions
    - (1) As to notice.
    - (2) As to disqualification of officer.
    - (3) As to taking of deposition.
    - (4) As to completion and return of deposition.

Rule 33. Interrogatories to Parties
  - (a) Availability; procedures for use.
  - (b) Scope; use at trial.
  - (c) Option to produce business records.

Rule. 34. Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes
  - (a) Scope.
  - (b) Procedure.
  - (c) Persons not parties.

Rule 35. Physical and Mental Examination of Persons
  - (a) Order for examination.
  - (b) Report of examining physician.

Rule 36. Requests for Admission of Documents
  - (a) Request for admission.
  - (b) Effect of admission.

Rule. 37. Failure to Make Discovery: Sanctions
  - (a) Motion for order compelling discovery.
    - (1) Appropriate court.
    - (2) Motion.
    - (3) Evasive or incomplete answer.
    - (4) Award of expenses of motion.
  - (b) Failure to comply with order.
    - (1) Sanctions by court in district where deposition is taken.
    - (2) Sanctions by court in which action is pending.
  - (c) Expenses on failure to admit.
  - (d) Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection.
  - (e) Subpoena of person in foreign country.
  - (f) Expenses against United States.

Title VI. Trials

Rule 38. Jury Trial of Right
  - (a) Right preserved.
  - (b) Demand.
  - (c) Same: specification of issues.
  - (d) Waiver.
  - (e) Admiralty and maritime claims.

Rule 39. Trial by Jury or by the Court
  - (a) By jury.
  - (b) By the court.
  - (c) Advisory jury and trial by consent.

Rule 40. Assignment of Cases for Trial

Rule 41. Dismissal of Actions
  - (a) Voluntary dismissal: effect thereof.
    - (1) By plaintiff: by stipulation.
    - (2) By order of court.

- (b) Involuntary dismissal: effect thereof.
- (c) Dismissal of counterclaim, cross-claim, or third-party claim.
- (d) Costs of previously-dismissed action

Rule 42. Consolidation; Separate Trials
- (a) Consolidation.
- (b) Separate trials.

Rule 43. Taking of Testimony.
- (a) Form.
- [(b), (c) Abrogated.]
- (d) Affirmation in lieu of oath.
- (e) Evidence on motions.
- (f) Interpreters.

Rule 44. Proof of Official Record
- (a) Authentication.
  - (1) Domestic.
  - (2) Foreign.
- (b) Lack of record.
- (c) Other proof.

Rule 44.1. Determination of Foreign Law

Rule 45. Subpoena
- (a) For attendance of witnesses; form; issuance.
- (b) For production of documentary evidence.
- (c) Service.
- (d) Subpoena for taking depositions; place of examination.
- (e) Subpoena for a hearing or trial.
- (f) Contempt.

Rule 46. Exceptions Unnecessary

Rule 47. Jurors
- (a) Examination of jurors.
- (b) Alternate jurors.

Rule 48. Juries of Less than Twelve—Majority Verdict

Rule 49. Special Verdicts and Interrogatories
- (a) Special verdicts.
- (b) General verdict accompanied by answer to interrogatories.

Rule 50. Motion for a Directed Verdict and for Judgment Notwithstanding the Verdict
- (a) Motion for directed verdict: when made; effect.
- (b) Motion for judgment notwithstanding the verdict.
- (c) Same: conditional rulings on grant of motion.
- (d) Same: denial of motion.

Rule 51. Instructions to Jury: Objection

Rule 52. Findings by the Court
- (a) Effect.
- (b) Amendment.

Rule 53. Masters
- (a) Appointment and compensation.
- (b) Reference.
- (c) Powers.
- (d) Proceedings.
  - (1) Meetings.
  - (2) Witnesses.
  - (3) Statements of accounts.
- (e) Report.
  - (1) Contents and filing.
  - (2) In non-jury actions.
  - (3) In jury actions.
  - (4) Stipulation as to findings.
  - (5) Draft report.

Title VII. Judgment

Rule 54. Judgments; Costs
- (a) Definition; Form.
- (b) Judgment upon multiple claims or involving multiple parties.
- (c) Demand for judgment.
- (d) Costs.

Rule 55. Default
- (a) Entry.
- (b) Judgment.
  - (1) By the clerk.
  - (2) By the court.
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**The Federal Rules of Civil Procedure supplant the Equity Rules since in general they cover the field now covered by the Equity Rules and the Conformity Act (former section 724 of this title).**

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# RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS

## TITLE I—SCOPE OF RULES—ONE FORM OF ACTION

### Rule 1. Scope of Rules

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity, or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

(As amended Dec. 29, 1948, eff. Oct. 20, 1949; Feb. 28, 1966, eff. July 1, 1966.)

#### Notes of Advisory Committee on Rules

1. Rule 81 states certain limitations in the application of these rules to enumerated special proceedings.

2. The expression "district courts of the United States" appearing in the statute authorizing the Supreme Court of the United States to promulgate rules of civil procedure does not include the district courts held in the Territories and insular possessions. See *Mookini et al.* v. *United States*, 303 U. S. 201, 58 S. Ct. 543, 82 L. Ed. 748 (1938).

3. These rules are drawn under the authority of the act of June 19, 1934, U.S.C., Title 28, formerly § 723b (now § 2072) (Rules in actions at law; Supreme Court authorized to make), and formerly § 723c (now § 2072) (Union of equity and action at law rules; power of Supreme Court) and also other grants of rule making power to the Court. See Clark and Moore, A New Federal Civil Procedure—I. The Background, 44 Yale L.J. 387, 391 (1935). Under former § 723b (now § 2072) after the rules have taken effect all laws in conflict therewith are of no further force or effect. In accordance with formerly § 723c (now § 2072) the Court has united the general rules prescribed for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both. See Rule 2 (One Form of Action). For the former practice in equity and at law see U.S.C., Title 28, formerly §§ 723 and 730 (now §§ 2071-2073) (conferring power on the Supreme Court to make rules of practice in equity) and the former Equity Rules promulgated thereunder; U.S.C., Title 28, former § 724 (Conformity act); former Equity Rule 22 (Action at Law Erroneously Begun as Suit in Equity—Transfer); former Equity Rule 23 (Matters Ordinarily Determinable at Law When Arising in Suit in Equity to be Disposed of Therein); U.S.C., Title 28, former §§ 397 (Amendments to pleadings when case brought to wrong side of court), and 398 (Equitable defenses and equitable relief in actions at law).

4. With the second sentence compare U.S.C., Title 28, former §§ 777 (Defects of form; amendments), 767 (Amendment of process); former Equity Rule 19 (Amendments Generally).

#### Notes of Advisory Committee on 1966 Amendment to Rules

This is the fundamental change necessary to effect unification of the civil and admiralty procedure. Just as the 1938 rules abolished the distinction between actions at law and suits in equity, this change would abolish the distinction between civil actions and suits in admiralty. See also Rule 81.

#### Amendments

1948—The amendment effective Oct. 20, 1949, substituted the words "United States district courts" for the words "district courts of the United States".

#### Cross References

Jurisdiction and venue as unaffected by these rules, see rule 82.

Puerto Rico, district court governed by the rules, see section 119 of this title.

Virgin Islands, district court governed by the rules, see section 1615 of Title 48, Territories and Insular Possessions.

### Rule 2. One Form of Action

There shall be one form of action to be known as "civil action."

#### Notes of Advisory Committee on Rules

1. This rule modifies U.S.C., Title 28, former § 384 (Suits in equity, when not sustainable). U.S.C., Title 28, formerly §§ 723 and 730 (now §§ 2071-2073) (conferring power on the Supreme Court to make rules of practice in equity), are unaffected insofar as they relate to the rule making power in admiralty. These sections, together with former § 723b (now § 2072) (Rules in actions at law; Supreme Court authorized to make) are continued insofar as they are not inconsistent with former § 723c (now § 2072) (Union of equity and action at law rules; power of Supreme Court). See Note 3 to Rule 1. U.S.C., Title 28, former §§ 724 (Conformity act), 397 (Amendments to pleadings when case brought to wrong side of court) and 398 (Equitable defenses and equitable relief in actions at law) are superseded.

2. Reference to actions at law or suits in equity in all statutes should now be treated as referring to the civil action prescribed in these rules.

3. This rule follows in substance the usual introductory statements to code practices which provide for a single action and mode of procedure, with abolition of forms of action and procedural distinctions. Representative statutes are N.Y. Code 1848 (Laws 1848, ch. 379) § 62; N.Y.C.P.A. (1937) § 8; Calif. Code Civ. Proc. (Deering, 1937) § 307; 2 Minn. Stat. (Mason, 1927) § 9164; 2 Wash. Rev. Stat. Ann. (Remington, 1932) §§ 153, 255.

#### Cross References

Injunctions, see rule 65.
Joinder of claims and remedies, see rule 18.
Receivers, see rule 66.

## TITLE II—COMMENCEMENT OF ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS

### Rule 3. Commencement of Action

A civil action is commenced by filing a complaint with the court.

#### Notes of Advisory Committee on Rules

1. Rule 5(e) defines what constitutes filing with the court.

2. This rule governs the commencement of all actions, including those brought by or against the United States or an officer or agency thereof, regardless of whether service is to be made personally pursuant to Rule 4(d), or otherwise pursuant to Rule 4(e).

3. With this rule compare former Equity Rule 12 (Issue of Subpoena—Time for Answer) and the following statutes (and other similar statutes) which provide a similar method for commencing an action:

U.S.C., Title 28 former:
- § 45 (District courts; practice and procedure in certain cases under interstate commerce laws).
- § 762 (Petition in suit against United States).
- § 766 (Partition suits where United States is tenant in common or joint tenant).

4. This rule provides that the first step in an action is the filing of the complaint. Under Rule 4(a) this is to be followed forthwith by issuance of a summons and its delivery to an officer for service. Other rules providing for dismissal for failure to prosecute suggest a method available to attack unreasonable delay in prosecuting an action after it has been commenced. When a Federal or State statute of limitations is pleaded as a defense, a question may arise under this

rule whether the mere filing of the complaint stops the running of the statute, or whether any further step is required, such as, service of the summons and complaint or their delivery to the marshal for service. The answer to this question may depend on whether it is competent for the Supreme Court, exercising the power to make rules of procedure without affecting substantive rights, to vary the operation of statutes of limitations. The requirement of Rule 4(a) that the clerk shall forthwith issue the summons and deliver it to the marshal for service will reduce the chances of such a question arising.

#### CROSS REFERENCES

Filing with the court defined, see rule 5.

### Rule 4. Process

**(a) Summons: issuance**

Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver it for service to the marshal or to a person specially appointed to serve it. Upon request of the plaintiff separate or additional summons shall issue against any defendants.

**(b) Same: form**

The summons shall be signed by the clerk, be under the seal of the court, contain the name of the court and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these rules require the defendant to appear and defend, and shall notify him that in case of his failure to do so judgment by default will be rendered against him for the relief demanded in the complaint. When, under Rule 4(e), service is made pursuant to a statute or rule of court of a state, the summons, or notice, or order in lieu of summons shall correspond as nearly as may be to that required by the statute or rule.

**(c) By whom served**

Service of all process shall be made by a United States marshal, by his deputy, or by some person specially appointed by the court for that purpose, except that a subpoena may be served as provided in Rule 45. Special appointments to serve process shall be made freely when substantial savings in travel fees will result.

**(d) Summons: personal service**

The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

(1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

(2) Upon an infant or an incompetent person, by serving the summons and complaint in the manner prescribed by the law of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state.

(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

(4) Upon the United States, by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court and by sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia, and in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered or certified mail to such officer or agency.

(5) Upon an officer or agency of the United States, by serving the United States and by delivering a copy of the summons and of the complaint to such officer or agency. If the agency is a corporation the copy shall be delivered as provided in paragraph (3) of this subdivision of this rule.

(6) Upon a state or municipal corporation or other governmental organization thereof subject to suit, by delivering a copy of the summons and of the complaint to the chief executive officer thereof or by serving the summons and complaint in the manner prescribed by the law of that state for the service of summons or other like process upon any such defendant.

(7) Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if the summons and complaint are served in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the state in which the district court is held for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state.

**(e) Same: service upon party not inhabitant of or found within the State**

Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to him to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of his property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule.

### (f) Territorial limits of effective service

All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and, when authorized by a statute of the United States or by these rules, beyond the territorial limits of that state. In addition, persons who are brought in as parties pursuant to Rule 14, or as additional parties to a pending action or a counterclaim or cross-claim therein pursuant to Rule 19, may be served in the manner stated in paragraphs (1)–(6) of subdivision (d) of this rule at all places outside the state but within the United States that are not more than 100 miles from the place in which the action is commenced, or to which it is assigned or transferred for trial; and persons required to respond to an order of commitment for civil contempt may be served at the same places. A subpoena may be served within the territorial limits provided in Rule 45.

### (g) Return

The person serving the process shall make proof of service thereof to the court promptly and in any event within the time during which the person served must respond to the process. If service is made by a person other than a United States marshal or his deputy, he shall make affidavit thereof. Failure to make proof of service does not affect the validity of the service.

### (h) Amendment

At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.

### (i) Alternative provisions for service in a foreign country

#### (1) Manner

When the federal or state law referred to in subdivision (e) of this rule authorizes service upon a party not an inhabitant of or found within the state in which the district court is held, and service is to be effected upon the party in a foreign country, it is also sufficient if service of the summons and complaint is made: (A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or (B) as directed by the foreign authority in response to a letter rogatory, when service in either case is reasonably calculated to give actual notice; or (C) upon an individual, by delivery to him personally, and upon a corporation or partnership or association, by delivery to an officer, a managing or general agent; or (D) by any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or (E) as directed by order of the court. Service under (C) or (E) above may be made by any person who is not a party and is not less than 18 years of age or who is designated by order of the district court or by the foreign court. On request, the clerk shall deliver the summons to the plaintiff for transmission to the person or the foreign court or officer who will make the service.

#### (2) Return

Proof of service may be made as prescribed by subdivision (g) of this rule, or by the law of the foreign country, or by order of the court. When service is made pursuant to subparagraph (1)(D) of this subdivision, proof of service shall include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court.

(As amended Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966.)

## NOTES OF ADVISORY COMMITTEE ON RULES

*Note to Subdivision (a).* With the provision permitting additional summons upon request of the plaintiff compare former Equity Rule 14 (Alias Subpoena) and the last sentence of former Equity Rule 12 (Issue of Subpoena—Time for Answer).

*Note to Subdivision (b).* This rule prescribes a form of summons which follows substantially the requirements stated in former Equity Rules 12 (Issue of Subpoena—Time for Answer) and 7 (Process, Mesne and Final).

U.S.C., Title 28, former § 721 (now § 1691) (Sealing and testing of writs) is substantially continued insofar as it applies to a summons, but its requirements as to teste of process are superseded. U.S.C., Title 28, former § 722 (Teste of process, day of), is superseded.

See Rule 12(a) for a statement of the time within which the defendant is required to appear and defend.

*Note to Subdivision (c).* This rule does not affect U.S.C., Title 28, former § 503 (now § 547), as amended June 15, 1935 (Marshals; duties) and such statutes as the following insofar as they provide for service of process by a marshal, but modifies them insofar as they may imply service by a marshal only:

U.S.C., Title 15:
  § 5 (Bringing in additional parties) (Sherman Act)
  § 10 (Bringing in additional parties)
  § 25 (Restraining violations; procedure)
U.S.C., Title 28, former:
  § 45 (Practice and procedure in certain cases under the interstate commerce laws)

Compare former Equity Rule 15 (Process, by Whom Served).

*Note to Subdivision (d).* Under this rule the complaint must always be served with the summons.

Paragraph (1). For an example of a statute providing for service upon an agent of an individual see U.S.C., Title 28, former § 109 (now §§ 1400, 1694) (Patent cases).

Paragraph (3). This enumerates the officers and agents of a corporation or of a partnership or other unincorporated association upon whom service of process may be made, and permits service of process only upon the officers, managing or general agents, or agents authorized by appointment or by law, of the corporation, partnership or unincorporated association against which the action is brought. See *Christian* v. *International Ass'n of Machinists*, 7 F.(2d) 481 (D.C.Ky., 1925) and *Singleton* v. *Order of Railway Conductors of America*, 9 F.Supp. 417 (D.C.Ill., 1935). Compare *Operative Plasterers' and Cement Finishers' International Ass'n of the United States and Canada* v. *Case*, 93 F.(2d) 56 (App.D.C., 1937).

For a statute authorizing service upon a specified agent and requiring mailing ,to the defendant, see U.S.C., Title 6, § 7 (Surety companies as sureties; appointment of agents; service of process).

Paragraphs (4) and (5) provide a uniform and comprehensive method of service for all actions against the United States or an officer or agency thereof. For statutes providing for such service, see U.S.C., Title 7,

§§ 217 (Proceedings for suspension of orders), 499k (Injunctions; application of injunction laws governing orders of Interstate Commerce Commission), 608c(15)(B) (Court review of ruling of Secretary of Agriculture), and 855 (making § 608c(15)(B) applicable to orders of the Secretary of Agriculture as to handlers of anti-hog-cholera serum and hog-cholera virus); U.S.C., Title 26, § 3679 (Bill in chancery to clear title to realty on which the United States has a lien for taxes); U.S.C., Title 28, former § 45 (District Courts; practice and procedure in certain cases under the interstate commerce laws), former § 763 (Petition in suit against the United States; service; appearance by district attorney), former § 766 (now § 2409) (Partition suits where United States is tenant in common or joint tenant), former § 902 (now § 2410) (Foreclosure of mortgages or other liens on property in which the United States has an interest). These and similar statutes are modified insofar as they prescribe a different method of service or dispense with the service of a summons.

For the former Equity Rule on service, see former Equity Rule 13 (Manner of Serving Subpoena).

*Note to Subdivision (e).* The provisions for the service of a summons or of notice or of an order in lieu of summons contained in U.S.C., Title 8, former § 465 (now § 1451) (Cancellation of certificates of citizenship fraudulently or illegally procured) (service by publication in accordance with State law); U.S.C., Title 28, former § 118 (now § 1655) (Absent defendants in suits to enforce liens); U.S.C., Title 35, former § 72a (Jurisdiction of District Court of United States for the District of Columbia in certain equity suits where adverse parties reside elsewhere) (service by publication against parties residing in foreign countries); U.S.C., Title 38, § 445 (Action against the United States on a veteran's contract of insurance) (parties not inhabitants of or not found within the District may be served with an order of the court, personally or by publication) and similar statutes are continued by this rule. Title 24, § 378 of the Code of the District of Columbia (Publication against nonresident; those absent for six months; unknown heirs or devisees; for divorce or in rem; actual service beyond District) is continued by this rule.

*Note to Subdivision (f).* This rule enlarges to some extent the present rule as to where service may be made. It does not, however, enlarge the jurisdiction of the district courts.

U.S.C., Title 28, former § 113 (now § 1392) (Suits in States containing more than one district) (where there are two or more defendants residing in different districts), former § 115 (Suits of a local nature), former § 116 (now § 1392) (Property in different districts in same State), former § 838 (Executions run in all districts of State); U.S.C., Title 47, § 13 (Action for damages against a railroad or telegraph company whose officer or agent in control of a telegraph line refuses or fails to operate such line in a certain manner—"upon any agent of the company found in such state"); U.S.C., Title 49, § 321(c) (Requiring designation of a process agent by interstate motor carriers and in case of failure so to do, service may be made upon any agent in the State) and similar statutes, allowing the running of process throughout a State, are substantially continued.

U.S.C., Title 15, §§ 5 (Bringing in additional parties) (Sherman Act), 25 (Restraining violations; procedure); U.S.C., Title 28, former § 44 (now § 2321) (Procedure in certain cases under interstate commerce laws; service of processes of court), former § 117 (now §§ 754, 1692) (Property in different States in same circuit; jurisdiction of receiver), former § 839 (now § 2413) (Executions; run in every State and Territory) and similar statutes, providing for the running of process beyond the territorial limits of a State, are expressly continued.

*Note to Subdivision (g).* With the second sentence compare former Equity Rule 15 (Process, by Whom Served).

*Note to Subdivision (h).* This rule substantially continues U.S.C., Title 28, former § 767 (Amendment of process).

### Notes of Advisory Committee on 1963 Amendment to Rules

Subdivision (b). Under amended subdivision (e) of this rule, an action may be commenced against a nonresident of the State in which the district court is held by complying with State procedures. Frequently the form of the summons or notice required in these cases by State law differs from the Federal form of summons described in present subdivision (b) and exemplified in Form 1. To avoid confusion, the amendment of subdivision (b) states that a form of summons or notice, corresponding "as nearly as many be" to the State form, shall be employed. See also a corresponding amendment of Rule 12(a) with regard to the time to answer.

Subdivision (d)(4). This paragraph, governing service upon the United States, is amended to allow the use of certified mail as an alternative to registered mail for sending copies of the papers to the Attorney General or to a United States officer or agency. Cf. N.J. Rule 4:5-2. See also the amendment of Rule 30(f)(1).

Subdivision (d)(7). Formerly a question was raised whether this paragraph, in the context of the rule as a whole, authorized service in original Federal actions pursuant to State statutes permitting service on a State official as a means of bringing a nonresident motorist defendant into court. It was argued in *McCoy* v. *Siler*, 205 F.2d 498, 501-2 (3d Cir.) (concurring opinion), cert. denied, 346 U.S. 872, 74 S.Ct. 120, 98 L.Ed. 380 (1953), that the effective service in those cases occurred not when the State official was served but when notice was given to the defendant outside the State, and that subdivision (f) (Territorial limits of effective service), as then worded, did not authorize out-of-State service. This contention found little support. A considerable number of cases held the service to be good, either by fixing upon the service on the official within the State as the effective service, thus satisfying the wording of subdivision (f) as it then stood, see *Holbrook* v. *Cafiero*, 18 F.R.D. 218 (D. Md. 1955); *Pasternack* v. *Dalo*, 17 F.R.D. 420; (W.D. Pa. 1955); cf. *Super Prods. Corp.* v. *Parkin*, 20 F.R.D. 377 (S.D.N.Y. 1957), or by reading paragraph (7) as not limited by subdivision (f). See *Griffin* v. *Ensign*, 234 F.2d 307 (3d Cir. 1956); 2 Moore's Federal Practice, ¶ 4.19 (2d ed. 1948); 1 Barron & Holtzoff, Federal Practice & Procedure § 182.1 (Wright ed. 1960); Comment, 27 U. of Chi.L.Rev. 751 (1960). See also *Olberding* v. *Illinois Central R.R.*, 201 F.2d 582 (6th Cir.), rev'd on other grounds, 346 U.S. 338, 74 S.Ct. 83, 98 L.Ed. 39 (1953); *Feinsinger* v. *Bard*, 195 F.2d 45 (7th Cir. 1952).

An important and growing class of State statutes base personal jurisdiction over nonresidents on the doing of acts or on other contacts within the State, and permit notice to be given the defendant outside the State without any requirement of service on a local State official. See, e.g., Ill.Ann.Stat. ch. 110, §§ 16, 17 (Smith-Hurd 1956); Wis.Stat. § 262.06 (1959). This service, employed in original Federal actions pursuant to paragraph (7), has also been held proper. See *Farr & Co.* v. *Cia. Intercontinental de Nav. de Cuba*, 243 F.2d 342 (2d Cir. 1957); *Kappus* v. *Western Hills Oil, Inc.*, 24 F.R.D. 123 (E.D.Wis. 1959); *Star* v. *Rogalny*, 162 F.Supp. 181 (E.D.Ill. 1957). It has also been held that the clause of paragraph (7) which permits service "in the manner prescribed by the law of the state," etc., is not limited by subdivision (c) requiring that service of all process be made by certain designated persons. See *Farr & Co.* v. *Cia. Intercontinental de Nav. de Cuba*, supra. But cf. *Sappia* v. *Lauro Lines*, 130 F.Supp. 810 (S.D.N.Y. 1955).

The salutary results of these cases are intended to be preserved. See paragraph (7), with a clarified reference to State law, and amended subdivisions (e) and (f).

Subdivision (e). For the general relation between subdivisions (d) and (e), see 2 Moore, supra, ¶ 4.32.

The amendment of the first sentence inserting the word "thereunder" supports the original intention that the "order of court" must be authorized by a specific United States statute. See 1 Barron & Holtzoff, supra, at 731. The clause added at the end of the first sentence expressly adopts the view taken by commentators that, if no manner of service is prescribed in the statute or order, the service may be made in a manner stated in Rule 4. See 2 Moore, supra, ¶ 4.32, at 1004; Smit, International Aspects of Federal Civil Procedure, 61 Colum. L. Rev. 1031, 1036-39 (1961). But see Commentary, 5 Fed. Rules Serv. 791 (1942).

Examples of the statutes to which the first sentence relates are 28 U.S.C. § 2361 (Interpleader; process and procedure); 28 U.S.C. § 1655 (Lien enforcement; absent defendants).

The second sentence, added by amendment, expressly allows resort in original Federal actions to the procedures provided by State law for effecting service on nonresident parties (as well as on domiciliaries not found within the State). See, as illustrative, the discussion under amended subdivision (d)(7) of service pursuant to State nonresident motorist statutes and other comparable State statutes. Of particular interest is the change brought about by the reference in this sentence to State procedures for commencing actions against nonresidents by attachment and the like, accompanied by notice. Although an action commenced in a State court by attachment may be removed to the Federal court if ordinary conditions for removal are satisfied, see 28 U.S.C. § 1450; *Rorick* v. *Devon Syndicate, Ltd.*, 307 U.S. 299, 59 S.Ct. 877, 83 L.Ed. 1303 (1939); *Clark* v. *Wells*, 203 U.S. 164, 27 S.Ct. 43, 51 L.Ed. 138 (1906), there has heretofore been no provision recognized by the courts for commencing an original Federal civil action by attachment. See Currie, Attachment and Garnishment in the Federal Courts, 59 Mich.L.Rev. 337 (1961), arguing that this result came about through historical anomaly. Rule 64, which refers to attachment, garnishment, and similar procedures under State law, furnishes only provisional remedies in actions otherwise validly commenced. See *Big Vein Coal Co.* v. *Read*, 229 U.S. 31, 33 S.Ct. 694, 57 L.Ed. 1053 (1913); *Davis* v. *Ensign-Bickford Co.*, 139 F.2d 624 (8th Cir. 1944); 7 Moore's Federal Practice ¶ 64.05 (2d ed. 1954); 3 Barron & Holtzoff, Federal Practice & Procedure § 1423 (Wright ed. 1958); but cf. Note, 13 So.Calif.L.Rev. 361 (1940). The amendment will now permit the institution of original Federal actions against nonresidents through the use of familiar State procedures by which property of these defendants is brought within the custody of the court and some appropriate service is made up them.

The necessity of satisfying subject-matter jurisdictional requirements and requirements of venue will limit the practical utilization of these methods of effecting service. Within those limits, however, there appears to be no reason for denying plaintiffs means of commencing actions in Federal courts which are generally available in the State courts. See 1 Barron & Holtzoff, supra, at 374-80; Nordbye, Comments on Proposed Amendments to Rules of Civil Procedure for the United States District Courts, 18 F.R.D. 105, 106 (1956); Note, 34 Corn. L.Q. 103 (1948); Note, 13 So. Calif. L. Rev. 361 (1940).

If the circumstances of a particular case satisfy the applicable Federal law (first sentence of Rule 4(e), as amended) and the applicable State law (second sentence), the party seeking to make the service may proceed under the Federal or the State law, at his option.

See also amended Rule 13(a), and the Advisory Committee's Note thereto.

Subdivision (f). The first sentence is amended to assure the effectiveness of service outside the territorial limits of the State in all the cases in which any of the rules authorize service beyond those boundaries. Besides the preceding provisions of Rule 4, see Rule 71A(d)(3). In addition, the new second sentence of the subdivision permits effective service within a limited area outside the State in certain special situations, namely, to bring in additional parties to a counterclaim or cross-claim (Rule 13(h)), impleaded parties (Rule 14), and indispensable or conditionally necessary parties to a pending action (Rule 19); and to secure compliance with an order of commitment for civil contempt. In those situations effective service can be made at points not more than 100 miles distant from the courthouse in which the action is commenced, or to which it is assigned or transferred for trial.

The bringing in of parties under the 100-mile provision in the limited situations enumerated is designed to promote the objective of enabling the court to determine entire controversies. In the light of present-day facilities for communication and travel, the territorial range of the service allowed, analogous to that which applies to the service of a subpoena under Rule 45(e)(1), can hardly work hardship on the parties summoned. The provision will be especially useful in metropolitan areas spanning more than one State. Any requirements of subject-matter jurisdiction and venue will still have to be satisfied as to the parties brought in, although these requirements will be eased in some instances when the parties can be regarded as "ancillary." See *Pennsylvania R.R.* v. *Erie Avenue Warehouse Co.*, 5 F.R.Serv.2d 14a.62, Case 2 (3d Cir. 1962); *Dery* v. *Wyer*, 265 F.2d 804 (2d Cir. 1959); *United Artists Corp.* v. *Masterpiece Productions, Inc.*, 221 F.2d 213 (2d Cir. 1955); *Lesnik* v. *Public Industrials Corp.*, 144 F.2d 968 (2d Cir. 1944); *Vaughn* v. *Terminal Transp. Co.*, 162 F.Supp. 647 (E.D. Tenn. 1957); and compare the fifth paragraph of the Advisory Committee's Note to Rule 4(e), as amended. The amendment is but a moderate extension of the territorial reach of Federal process and has ample practical justification. See 2 Moore, supra, § 4.01[13] (Supp. 1960); 1 Barron & Holtzoff, supra, § 184; Note, 51 Nw.U.L.Rev. 354 (1956). But cf. Nordbye, Comments on Proposed Amendments to Rules of Civil Procedure for the United States District Courts, 18 F.R.D. 105, 106 (1956).

As to the need for enlarging the territorial area in which orders of commitment for civil contempt may be served, see *Graber* v. *Graber*, 93 F.Supp. 281 (D.D.C. 1950); *Teele Soap Mfg. Co.* v. *Pine Tree Products Co., Inc.*, 8 F.Supp. 546 (D.N.H. 1934); *Mitchell* v. *Dexter*, 244 Fed. 926 (1st Cir. 1917); *in re Graves*, 29 Fed. 60 (N.D. Iowa 1886).

As to the Court's power to amend subdivisions (e) and (f) as here set forth, see *Mississippi Pub. Corp.* v. *Murphree*, 326 U.S. 438, 66 S.Ct. 242, 90 L.Ed. 185 (1946).

Subdivision (i). The continual increase of civil litigation having international elements makes it advisable to consolidate, amplify, and clarify the provisions governing service upon parties in foreign countries. See generally Jones, International Judicial Assistance: Procedural Chaos and a Program for Reform, 62 Yale L.J. 515 (1953); Longley, Serving Process, Subpoenas and Other Documents in Foreign Territory, Proc. A.B.A., Sec. Int'l & Comp. L. 34 (1959); Smit International Aspects of Federal Civil Procedure, 61 Colum. L. Rev. 1031 (1961).

As indicated in the opening lines of new subdivision (i), referring to the provisions of subdivision (e), the authority for effecting foreign service must be found in a statute of the United States or a statute or rule of court of the State in which the district court is held providing in terms or upon proper interpretation for service abroad upon persons not inhabitants of or found within the State. See the Advisory Committee's Note to amended Rule 4(d)(7) and Rule 4(e). For examples of Federal and State statutes expressly authorizing such service, see 8 U.S.C. § 1451(b); 35 U.S.C. §§ 146, 293; Me.Rev.Stat., ch. 22, § 70 (Supp. 1961); Minn.Stat.Ann. § 303.13 (1947); N.Y. Veh. & Tfc. Law § 253. Several decisions have construed statutes to permit service in foreign countries, although the matter is not expressly mentioned in the statutes. See, e.g., *Chapman* v. *Superior Court*, 162 Cal.App.2d 421, 328 P.2d 23 (Dist.Ct.App. 1958); *Sperry* v. *Fliegers*, 194 Misc. 438, 86 N.Y.S.2d 830 (Sup.Ct. 1949); *Ewing* v. *Thompson*, 233 N.C. 564, 65 S.E.2d 17 (1951); *Rushing*

v. *Bush*, 260 S.W.2d 900 (Tex.Ct.Civ.App. 1953). Federal and State statutes authorizing service on nonresidents in such terms as to warrant the interpretation that service abroad is permissible include 15 U.S.C. §§ 77v(a), 78aa, 79y; 28 U.S.C. § 1655; 38 U.S.C. § 784(a); Ill.Ann.Stat. ch. 110, §§ 16, 17 (Smith-Hurd 1956); Wis.Stat. § 262.06 (1959).

Under subdivisions (e) and (i), when authority to make foreign service is found in a Federal statute or statute or rule of court of a State, it is always sufficient to carry out the service in the manner indicated therein. Subdivision (i) introduces considerable further flexibility by permitting the foreign service and return thereof to be carried out in any of a number of other alternative ways that are also declared to be sufficient. Other aspects of foreign service continue to be governed by the other provisions of Rule 4. Thus, for example, subdivision (i) effects no change in the form of the summons, or the issuance of separate or additional summons, or the amendment of service.

Service of process beyond the territorial limits of the United States may involve difficulties not encountered in the case of domestic service. Service abroad may be considered by a foreign country to require the performance of judicial, and therefore "sovereign," acts within its territory, which that country may conceive to be offensive to its policy or contrary to its law. See Jones, supra, at 537. For example, a person not qualified to serve process according to the law of the foreign country may find himself subject to sanctions if he attempts service therein. See Inter-American Juridicial Committee, Report on Uniformity of Legislation on International Cooperation in Judicial Procedures 20 (1952). The enforcement of a judgment in the foreign country in which the service was made may be embarrassed or prevented if the service did not comport with the law of that country. See ibid.

One of the purposes of subdivision (i) is to allow accommodation to the policies and procedures of the foreign country. It is emphasized, however, that the attitudes of foreign countries vary considerably and that the question of recognition of United States judgments abroad is complex. Accordingly, if enforcement is to be sought in the country of service, the foreign law should be examined before a choice is made among the methods of service allowed by subdivision (i).

Subdivision (i)(1). Subparagraph (a) of paragraph (1), permitting service by the method prescribed by the law of the foreign country for service on a person in that country in a civil action in any of its courts of general jurisdiction, provides an alternative that is likely to create least objection in the place of service and also is likely to enhance the possibilities of securing ultimate enforcement of the judgment abroad. See Report on Uniformity of Legislation on International Cooperation in Judicial Procedures, supra.

In certain foreign countries service in aid of litigation pending in other countries can lawfully be accomplished only upon request to the foreign court, which in turn directs the service to be made. In many countries this has long been a customary way of accomplishing the service. See In re Letters Rogatory out of First Civil Court of City of Mexico, 261 Fed. 652 (S.D.N.Y. 1919); Jones, supra, at 543; Comment, 44 Colum. L. Rev. 72 (1944); Note, 58 Yale L.J. 1193 (1949). Subparagraph (B) of paragraph (1), referring to a letter rogatory, validates this method. A proviso, applicable to this subparagraph and the preceding one, requires, as a safeguard, that the service made shall be reasonably calculated to give actual notice of the proceedings to the party. See Milliken v. Meyer, 311 U.S. 457, 61 S. Ct. 339, 85 L. Ed. 278 (1940).

Subparagraph (C) of paragraph (1), permitting foreign service by personal delivery on individuals and corporations, partnerships, and associations, provides for a manner of service that is not only traditionally preferred, but also is most likely to lead to actual notice. Explicit provision for this manner of service was thought desirable because a number of Federal and State statutes permitting foreign service do not specifically provide for service by personal delivery abroad, see e.g., 35 U.S.C. §§ 146, 293; 46 U.S.C. § 1292; Calif. Ins. Code § 1612; N.Y. Veh. & Tfc. Law § 253, and it also may be unavailable under the law of the country in which the service is made.

Subparagraph (D) of paragraph (1), permitting service by certain types of mail, affords a manner of service that is inexpensive and expeditious, and requires a minimum of activity within the foreign country. Several statutes specifically provide for service in a foreign country by mail, e.g., Hawaii Rev.Laws §§ 230-31, 230-32 (1955); Minn.Stat.Ann. § 303.13 (1947); N.Y.Civ.Prac.Act, § 229-b; N.Y.Veh. & Tfc.Law § 253, and it has been sanctioned by the courts even in the absence of statutory provision specifying that form of service. *Zurini* v. *United States*, 189 F.2d 722 (8th Cir. 1951); *United States* v. *Cardillo*, 135 F.Supp. 798 (W.D.Pa. 1955); *Autogiro Co.* v. *Kay Gyroplanes, Ltd.*, 55 F.Supp. 919 (D.D.C. 1944). Since the reliability of postal service may vary from country to country, service by mail is proper only when it is addressed to the party to be served and a form of mail requiring a signed receipt is used. An additional safeguard is provided by the requirement that the mailing be attended to be the clerk of the court. See also the provisions of paragraph (2) of this subdivision (i) regarding proof of service by mail.

Under the applicable law it may be necessary, when the defendant is an infant or incompetent person, to deliver the summons and complaint to a guardian, committee, or similar fiduciary. In such a case it would be advisable to make service under subparagraph (A), (B), or (E).

Subparagraph (E) of paragraph (1) adds flexibility by permitting the court by order to tailor the manner of service to fit the necessities of a particular case or the peculiar requirements of the law of the country in which the service is to be made. A similar provision appears in a number of statutes, e.g., 35 U.S.C. §§ 146, 293; 38 U.S.C. § 784(a); 46 U.S.C. § 1292.

The next-to-last sentence of paragraph (1) permits service under (C) and (E) to be made by any person who is not a party and is not less than 18 years of age or who is designated by court order or by the foreign court. Cf. Rule 45(c); N.Y. Civ. Prac. Act §§ 233, 235. This alternative increases the possibility that the plaintiff will be able to find a process server who can proceed unimpeded in the foreign country; it also may improve the chances of enforcing the judgment in the country of service. Especially is the alternative valuable when authority for the foreign service is found in a statute or rule of court that limits the group of eligible process servers to designated officials or special appointees who, because directly connected with another "sovereign," may be particularly offensive to the foreign country. See generally Smit, supra, at 1040-41. When recourse is had to subparagraph (A) or (B) the identity of the process server always will be determined by the law of the foreign country in which the service is made.

The last sentence of paragraph (1) sets forth an alternative manner for the issuance and transmission of the summons for service. After obtaining the summons from the clerk, the plaintiff must ascertain the best manner of delivering the summons and complaint to the person, court, or officer who will make the service. Thus the clerk is not burdened with the task of determining who is permitted to serve process under the law of a particular country or the appropriate governmental or nongovernmental channel for forwarding a letter rogatory. Under (D), however, the papers must always be posted by the clerk.

Subdivision (i)(2). When service is made in a foreign country, paragraph (2) permits methods for proof of service in addition to those prescribed by subdivision (g). Proof of service in accordance with the law of the foreign country is permitted because foreign process servers, unaccustomed to the form or the requirement of return of service prevalent in the United States, have on occasion been unwilling to execute the affidavit required by Rule 4(g). See *Jones, supra*, at 537;

*Longley, supra*, at 35. As a corollary of the alternate manner of service in subdivision (i)(1)(E), proof of service as directed by order of the court is permitted. The special provision for proof of service by mail is intended as an additional safeguard when that method is used. On the type of evidence of delivery that may be satisfactory to a court in lieu of a signed receipt, see *Aero Associates, Inc.* v. *La Metropolitana*, 183 F.Supp. 357 (S.D.N.Y. 1960).

### NOTES OF ADVISORY COMMITTEE ON 1966 AMENDMENT TO RULES

The wording of Rule 4(f) is changed to accord with the amendment of Rule 13(h) referring to Rule 19 as amended.

### CROSS REFERENCES

Actions on war risk insurance claims, see section 1292 of Title 46, Shipping.

Executions in favor of United States, see section 2413 of this title.

Motions to dismiss or quash for lack of jurisdiction over the person, insufficiency of process or service of process, see rule 12.

Process generally, see chapter 113 of this title.

Process in bankruptcy proceedings, see Rules of Bankruptcy Procedure, Appendix to Title 11, Bankruptcy.

Process to run outside state—
  Actions under Security Act of 1933, see section 77v of Title 15, Commerce and Trade.
  Actions under Security Exchange Act of 1934, see section 78aa of Title 15.
  Veterans' actions against United States on life insurance contracts, see section 784 of Title 38, Veterans' Benefits.

Service of notice of application for leave to perpetuate testimony by taking deposition, see rule 27.

Venue of civil actions, see chapter 87 of this title.

### FORMS

Motion to quash the return of service of summons, see form 19, Appendix of Forms.

Summons, see form 1.

## Rule 5. Service and Filing of Pleadings and Other Papers

**(a) Service: When required**

Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.

In an action begun by seizure of property, in which no person need be or is named as defendant, any service required to be made prior to the filing of an answer, claim, or appearance shall be made upon the person having custody or possession of the property at the time of its seizure.

**(b) Same: How made**

Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.

**(c) Same: Numerous defendants**

In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

**(d) Filing**

All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter.

**(e) Filing with the court defined**

The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk.

(As amended Jan. 21, 1963, eff. July 1, 1963; Mar. 30, 1970, eff. July 1, 1970.)

### NOTES OF ADVISORY COMMITTEE ON RULES

*Note to Subdivisions* (*a*) *and* (*b*). Compare 2 Minn.Stat. (Mason, 1927) §§ 9240, 9241, 9242; N.Y.C.P.A. (1937) §§ 163, 164, and N.Y.R.C.P. (1937) Rules 20, 21; 2 Wash.Rev.Stat.Ann. (Remington, 1932) §§ 244–249.

*Note to Subdivision* (*d*). Compare the present practice under former Equity Rule 12 (Issue of Subpoena—Time for Answer).

### NOTES OF ADVISORY COMMITTEE ON 1963 AMENDMENT TO RULES

The words "affected thereby," stricken out by the amendment, introduced a problem of interpretation. See 1 Barron & Holtzoff, Federal Practice & Procedure 760–61 (Wright ed. 1960). The amendment eliminates this difficulty and promotes full exchange of information among the parties by requiring service of papers on all the parties to the action, except as otherwise provided in the rules. See also subdivision (c) of Rule 5. So, for example, a third-party defendant is required to serve his answer to the third-party complaint not only upon the defendant but also upon the plaintiff. See amended Form 22-A and the Advisory Committee's Note thereto.

As to the method of serving papers upon a party whose address is unknown, see Rule 5(b).

NOTES OF ADVISORY COMMITTEE ON 1970 AMENDMENT TO RULES

The amendment makes clear that all papers relating to discovery which are required to be served on any party must be served on all parties, unless the court orders otherwise. The present language expressly includes notices and demands, but it is not explicit as to answers or responses as provided in Rules 33, 34, and 36. Discovery papers may be voluminous or the parties numerous, and the court is empowered to vary the requirement if in a given case it proves needlessly onerous.

In actions begun by seizure of property, service will at times have to be made before the absent owner of the property has filed an appearance. For example, a prompt deposition may be needed in a maritime action in rem. See Rules 30(a) and 30(b)(2) and the related notes. A provision is added authorizing service on the person having custody or possession of the property at the time of its seizure.

CROSS REFERENCES

Additional time for service by mail, see rule 6.

Jury trial, waiver by failing to file demand, see rule 38.

**Rule 6. Time**

**(a) Computation**

In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule and in Rule 77(c), "legal holiday" includes New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the district court is held.

**(b) Enlargement**

When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(b), (d) and (e), and 60(b), except to the extent and under the conditions stated in them.

**[(c) Rescinded. Feb. 28, 1966, eff. July 1, 1966]**

**(d) For motions—Affidavits**

A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time.

**(e) Additional time after service by mail**

Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Dec. 4, 1967, eff. July 1, 1968; Mar. 1, 1971, eff. July 1, 1971.)

NOTES OF ADVISORY COMMITTEE ON RULES

*Note to Subdivisions (a) and (b).* These are amplifications along lines common in state practices, of former Equity Rule 80 (Computation of Time—Sundays and Holidays) and of the provisions for enlargement of time found in former Equity Rules 8 (Enforcement of Final Decrees) and 16 (Defendant to Answer—Default—Decree Pro Confesso). See also Rule XIII, Rules and Forms in Criminal Cases, 292 U.S. 661, 666 (1934). Compare Ala.Code Ann. (Michie, 1928) § 13 and former Law Rule 8 of the Rules of the Supreme Court of the District of Columbia (1924), superseded in 1929 by Law Rule 8, Rules of the District Court of the United States for the District of Columbia (1937).

*Note to Subdivision (c).* This eliminates the difficulties caused by the expiration of terms of court. Such statutes as U.S.C. Title 28, former § 12 (Trials not discontinued by new term) are not affected. Compare Rules of the United States District Court of Minnesota, Rule 25 (Minn.Stat. (Mason, Supp. 1936), p. 1089).

*Note to Subdivision (d).* Compare 2 Minn.Stat. (Mason, 1927) § 9246; N.Y.R.C.P. (1937) Rules 60 and 64.

NOTES OF ADVISORY COMMITTEE ON 1946 AMENDMENT TO RULES

*Note. Subdivision (b).* The purpose of the amendment is to clarify the finality of judgments. Prior to the advent of the Federal Rules of Civil Procedure, the general rule that a court loses jurisdiction to disturb its judgments, upon the expiration of the term at which they were entered, had long been the classic device which (together with the statutory limits on the time for appeal) gave finality to judgments. See Note to Rule 73(a). Rule 6(c) abrogates that limit on judicial power. That limit was open to many objections, one of them being inequality of operation because, under it, the time for vacating a judgment rendered early in a term was much longer than for a judgment rendered near the end of the term.

The question to be met under Rule 6(b) is: how far should the desire to allow correction of judgments be allowed to postpone their finality? The rules contain a number of provisions permitting the vacation or modification of judgments on various grounds. Each of these rules contains express time limits on the motions for granting of relief. Rule 6(b) is a rule of general application giving wide discretion to the court to enlarge these time limits or revive them after they have expired, the only exceptions stated in the original rule being a prohibition against enlarging the time specified in Rule 59(b) and (d) for making motions for or granting new trials, and a prohibition against enlarging the time fixed by law for taking an appeal. It should also be noted that Rule 6(b) itself contains no limitation of time within which the court may exercise its discretion, and since the expiration of the term does not end its power, there is now no time limit on the exercise of its discretion under Rule 6(b).

Decisions of lower federal courts suggest that some of the rules containing time limits which may be set aside under Rule 6(b) are Rules 25, 50(b), 52(b), 60(b), and 73(g).

In a number of cases the effect of Rule 6(b) on the time limitations of these rules has been considered. Certainly the rule is susceptible of the interpretation that the court is given the power in its discretion to relieve a party from failure to act within the times specified in any of these other rules, with only the exceptions stated in Rule 6(b), and in some cases the rule has been so construed.

With regard to Rule 25(a) for substitution, it was held in *Anderson* v. *Brady*, E.D.Ky. 1941, 1 F.R.D. 589, 4 Fed.Rules Service 25a.1, Case 1, and in *Anderson* v. *Yungkau*, C.C.A. 6th, 1946, 153 F.2d 685, cert. granted, 1946, 66 S.Ct. 1025, that under Rule 6(b) the court had no authority to allow substitution of parties after the expiration of the limit fixed in Rule 25(a).

As to Rules 50(b) for judgments notwithstanding the verdict and 52(b) for amendment of findings and vacation of judgment, it was recognized in *Leishman* v. *Associated Wholesale Electric Co.*, 1943, 318 U.S. 203, 63 S.Ct. 543, that Rule 6(b) allowed the district court to enlarge the time to make a motion for amended findings and judgment beyond the limit expressly fixed in Rule 52(b). See *Coca-Cola* v. *Busch*, E.D.Pa. 1943, 7 Fed.Rules Service 59b.2, Case 4. Obviously, if the time limit in Rule 52(b) could be set aside under Rule 6(b), the time limit in Rule 50(b) for granting judgment notwithstanding the verdict (and thus vacating the judgment entered "forthwith" on the verdict) likewise could be set aside.

As to Rule 59 on motions for a new trial, it has been settled that the time limits in Rule 59(b) and (d) for making motions for or granting new trial could not be set aside under Rule 6(b), because Rule 6(b) expressly refers to Rule 59, and forbids it. See *Safeway Stores, Inc.* v. *Coe*, App.D.C. 1943, 78 U.S.App.D.C. 19, 136 F.2d 771; *Jusino* v. *Morales & Tio*, C.C.A. 1st, 1944, 139 F.2d 946; *Coca-Cola Co.* v. *Busch*, E.D.Pa. 1943, 7 Fed.Rules Service 59b.2, Case 4; *Peterson* v. *Chicago Great Western Ry. Co.*, D.Neb. 1943, 3 F.R.D. 346, 7 Fed.Rules Service 59b.2, Case 1; *Leishman* v. *Associated Wholesale Electric Co.*, 1943, 318 U.S. 203, 63 S.Ct. 543.

As to Rule 60(b) for relief from a judgment, it was held in *Schram* v. *O'Connor*, E.D.Mich. 1941, 5 Fed.Rules Serv. 6b.31, Case 1, 2, F.R.D. 192, s. c. 5 Fed.Rules Serv. 6b.31, Case 2, 2 F.R.D. 192, that the six-months time limit in original Rule 60(b) for making a motion for relief from a judgment for surprise, mistake, or excusable neglect could be set aside under Rule 6(b). The contrary result was reached in *Wallace* v. *United States*, C.C.A.2d, 1944, 142 F.2d 240, cert. den., 1944, 323 U.S. 712, 65 S.Ct. 37; *Reed* v. *South Atlantic Steamship Co. of Del.*, D.Del. 1942, 2 F.R.D. 475, 6 Fed.Rules Serv. 60b.31, Case 1.

As to Rule 73(g), fixing the time for docketing an appeal, it was held in *Ainsworth* v. *Gill Glass & Fixture Co.*, C.C.A.3d, 1939, 104 F.2d 83, that under Rule 6(b) the district court, upon motion made after the expiration of the forty-day period, stated in Rule 73(g), but before the expiration of the ninety-day period therein specified, could permit the docketing of the appeal on a showing of excusable neglect. The contrary was held in *Mutual Benefit Health & Accident Ass'n* v. *Snyder*, C.C.A. 6th, 1940, 109 F.2d 469 and in *Burke* v. *Canfield*, App.D.C. 1940, 72 App.D.C. 127, 111 F.2d 526.

The amendment of Rule 6(b) now proposed is based on the view that there should be a definite point where it can be said a judgment is final; that the right method of dealing with the problem is to list in Rule 6(b) the various other rules whose time limits may not be set aside, and then, if the time limit in any of those other rules is too short, to amend that other rule to give a longer time. The further argument is that Rule 6(c) abolished the long standing device to produce finality in judgments through expiration of the term, and since that limitation on the jurisdiction of courts to set aside their own judgments has been removed by Rule 6(c), some other limitation must be substituted or judgments never can be said to be final.

In this connection reference is made to the established rule that if a motion for new trial is seasonably made, the mere making or pendency of the motion destroys the finality of the judgment, and even though the motion is ultimately denied, the full time for appeal starts anew from the date of denial. Also, a motion to amend the findings under Rule 52(b) has the same effect on the time for appeal. *Leishman* v. *Associated Wholesale Electric Co.*, 1943, 318 U.S. 203, 63 S.Ct. 543. By the same reasoning a motion for judgment under Rule 50(b), involving as it does the vacation of a judgment entered "forthwith" on the verdict (Rule 58), operates to postpone, until an order is made, the running of the time for appeal. The Committee believes that the abolition by Rule 6(c) of the old rule that a court's power over its judgments ends with the term, requires a substitute limitation, and that unless Rule 6(b) is amended to prevent enlargement of the times specified in Rules 50(b), 52(b) and 60(b), and the limitation as to Rule 59(b) and (d) is retained, no one can say when a judgment is final. This is also true with regard to proposed Rule 59(e), which authorizes a motion to alter or amend a judgment, hence that rule is also included in the enumeration in amended Rule 6(b). In consideration of the amendment, however, it should be noted that Rule 60(b) is also to be amended so as to lengthen the six-months period originally prescribed in that rule to one year.

As to Rule 25 on substitution, while finality is not involved, the limit there fixed should be controlling. That rule, as amended, gives the court power, upon showing of a reasonable excuse, to permit substitution after the expiration of the two-year period.

As to Rule 73(g), it is believed that the conflict in decisions should be resolved and not left to further litigation, and that the rule should be listed as one whose limitation may not be set aside under Rule 6(b).

As to Rule 59(c), fixing the time for serving affidavits on motion for new trial, it is believed that the court should have authority under Rule 6(b) to enlarge the time, because, once the motion for new trial is made, the judgment no longer has finality, and the extension of time for affidavits thus does not of itself disturb finality.

Other changes proposed in Rule 6(b) are merely clarifying and conforming. Thus "request" is substituted for "application" in clause (1) because an application is defined as a motion under Rule 7(b). The phrase "extend the time" is substituted for "enlarge the period" because the former is a more suitable expression and relates more clearly to both clauses (1) and (2). The final phrase in Rule 6(b), "or the period for taking an appeal as provided by law", is deleted and a reference to Rule 73(a) inserted, since it is proposed to state in that rule the time for appeal to a circuit court of appeals, which is the only appeal governed by the Federal Rules, and allows an extension of time. See Rule 72.

*Subdivision* (c). The purpose of this amendment is to prevent reliance upon the continued existence of a term as a source of power to disturb the finality of a judgment upon grounds other than those stated in these rules. See *Hill* v. *Hawes*, 1944, 320 U.S. 520, 64 S.Ct. 334; *Boaz* v. *Mutual Life Ins. Co. of New York*, C.C.A. 8th, 1944, 146 F.2d 321; *Bucy* v. *Nevada Construction Co.*, C.C.A. 9th, 1942, 125 F.2d 213.

### Notes of Advisory Committee on 1963 Amendment to Rules

Subdivision (a). This amendment is related to the amendment of Rule 77(c) changing the regulation of the days on which the clerk's office shall be open.

The wording of the first sentence of Rule 6(a) is clarified and the subdivision is made expressly applicable to computing periods of time set forth in local rules.

Saturday is to be treated in the same way as Sunday or a "legal holiday" in that it is not to be included when it falls on the last day of a computed period, nor counted as an intermediate day when the period is less than 7 days. "Legal holiday" is defined for purposes of this subdivision and amended Rule 77(c). Compare the definition of "holiday" in 11 U.S.C. § 1(18); also 5 U.S.C. § 86a; Executive Order No. 10358, "Observance of Holidays," June 9, 1952, 17 Fed. Reg. 5269. In the light of these changes the last sentence of the present subdivision, dealing with half holidays, is eliminated.

With Saturdays and State holidays made "dies non" in certain cases by the amended subdivision, computation of the usual 5-day notice of motion or the 2-day notice to dissolve or modify a temporary restraining order may work out so as to cause embarrassing delay in urgent cases. The delay can be obviated by applying to the court to shorten the time, see Rules 6(d) and 65(b).

Subdivision (b). The prohibition against extending the time for taking action under Rule 25 (Substitution of parties) is eliminated. The only limitation of time provided for in amended Rule 25 is the 90-day period following a suggestion upon the record of the death of a party within which to make a motion to substitute the proper parties for the deceased party. See Rule 25(a)(1), as amended, and the Advisory Committee's Note thereto. It is intended that the court shall have discretion to enlarge that period.

### Notes of Advisory Committee on 1968 Amendment to Rules

The amendment eliminates the references to Rule 73, which is to be abrogated.

P. L. 88-139, § 1, 77 Stat. 248, approved on October 16, 1963, amended 28 U.S.C. § 138 to read as follows: "The district court shall not hold formal terms." Thus Rule 6(c) is rendered unnecessary, and it is rescinded.

### Notes of Advisory Committee on 1971 Amendment to Rules

The amendment adds Columbus Day to the list of legal holidays to conform the subdivision to the Act of June 28, 1968, 82 Stat. 250, which constituted Columbus Day a legal holiday effective after January 1, 1971.

The Act, which amended Title 5, U.S.C., § 6103(a), changes the day on which certain holidays are to be observed. Washington's Birthday, Memorial Day and Veterans Day are to be observed on the third Monday in February, the last Monday in May and the fourth Monday in October, respectively, rather than, as heretofore, on February 22, May 30, and November 11, respectively. Columbus Day is to be observed on the second Monday in October. New Year's Day, Independence Day, Thanksgiving Day and Christmas continue to be observed on the traditional days.

### Cross References

Answers and objections to admissions, see rule 36.
Answer to—
  Complaint, see rule 12.
  Cross-claim, see rule 12.
  Interrogatories, see rule 33.
Demand for jury trial, see rule 38.
Motion for—
  Amendment of findings, see rule 52.
  New trial, see rule 59.
  Relief from judgment or order, see rule 60.
Motion to—
  Alter or amend judgment, see rule 59.
  Set aside verdict and enter judgment, see rule 50.
Notice of appeal, see section 2107 of this title.
Objections to interrogatories, see rule 33.
Reply to counterclaim, see rule 12.
Service by mail complete upon mailing, see rule 5.
Substitution of parties, see rule 25.

## TITLE III—PLEADINGS AND MOTIONS

### Rule 7. Pleadings Allowed; Form of Motions

#### (a) Pleadings

There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

#### (b) Motions and other papers

(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

(2) The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

#### (c) Demurrers, pleas, etc., abolished

Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963.)

### Notes of Advisory Committee on Rules

1. A provision designating pleadings and defining a motion is common in the State practice acts. See Ill. Rev. Stat. (1937), ch. 110, § 156 (Designation and order of pleadings); 2 Minn. Stat. (Mason, 1927) § 9246 (Definition of motion); and N.Y.C.P.A. (1937) § 113 (Definition of motion). Former Equity Rules 18 (Pleadings—Technical Forms Abrogated), 29 (Defenses—How Presented), and 33 (Testing Sufficiency of Defense) abolished technical forms of pleading, demurrers, and pleas, and exceptions for insufficiency of an answer.

2. *Note to Subdivision (a).* This preserves the substance of former Equity Rule 31 (Reply—When Required—When Cause at Issue). Compare the English practice, English Rules Under the Judicature Act (The Annual Practice, 1937) O. 23, r.r. 1, 2 (Reply to counterclaim; amended, 1933, to be subject to the rules applicable to defenses, O. 21). See O. 21, r.r. 1–14; O. 27, r. 13 (When pleadings deemed denied and put in issue). Under the codes the pleadings are generally limited. A reply is sometimes required to an affirmative defense in the answer. 1 Colo.Stat.Ann. (1935) § 66; Ore.Code Ann. (1930) §§ 1-614, 1-616. In other jurisdictions no reply is necessary to an affirmative defense in the answer, but a reply may be ordered by the court. N.C.Code Ann. (1935) § 525; 1 S.D.Comp.Laws (1929) § 2357. A reply to a counterclaim is usually required. Ark.Civ.Code (Crawford, 1934) §§ 123–125; Wis.Stat. (1935) §§ 263.20, 263.21. U.S.C., Title 28, former § 45 (District courts; practice and procedure in certain cases) is modified insofar as it may dispense with a reply to a counterclaim.

For amendment of pleadings, see Rule 15 dealing with amended and supplemental pleadings.

3. All statutes which use the words "petition", "bill of complaint", "plea", "demurrer", and other such terminology are modified in form by this rule.

#### Notes of Advisory Committee on 1946 Amendment to Rules

*Note.* This amendment [to subdivision (a)] eliminates any question as to whether the compulsory reply, where a counterclaim is pleaded, is a reply only to the counterclaim or is a general reply to the answer containing the counterclaim. The Commentary, Scope of Reply Where Defendant Has Pleaded Counterclaim, 1939, 1 Fed.Rules Serv. 672; *Fort Chartres and Ivy Landing Drainage and Levee District No. Five* v. *Thompson*, E.D.Ill. 1945, 8 Fed.Rules Serv. 13.32, Case 1.

#### Notes of Advisory Committee on 1963 Amendments to Rules

Certain redundant words are eliminated and the subdivision is modified to reflect the amendment of Rule 14(a) which in certain cases eliminates the requirement of obtaining leave to bring in a third-party defendant.

#### Cross References

Procedure for motions in local practice, see rule 83.
Service and filing of pleadings and other papers, see rule 5.
Third party practice generally, see rule 14.
Time for service of—
  Answer or reply, see rule 12.
  Motions and affidavits, see rule 6.
Treating defenses as counterclaims, see rule 8.

#### Rules of the Supreme Court of the United States

Form of motions in original actions in Supreme Court of the United States as governed by Federal Rules of Civil Procedure, see rule 9, this Appendix.

### Rule 8. General Rules of Pleading

**(a) Claims for relief**

A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

**(b) Defenses; form of denials**

A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part of a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, he may do so by general denial subject to the obligations set forth in Rule 11.

**(c) Affirmative defenses**

In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

**(d) Effect of failure to deny**

Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

**(e) Pleading to be concise and direct; consistency**

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal, equitable, or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11.

**(f) Construction of pleadings**

All pleadings shall be so construed as to do substantial justice.

(As amended Feb. 28, 1966, eff. July 1, 1966.)

#### Notes of Advisory Committee on Rules

*Note to Subdivision (a).* See former Equity Rules 25 (Bill of Complaint—Contents), and 30 (Answer—Contents—Counterclaim). Compare 2 Ind.Stat.Ann. (Burns, 1933) §§ 2-1004, 2-1015; 2 Ohio Gen.Code Ann. (Page, 1926) §§ 11305, 11314; Utah Rev.Stat.Ann. (1933), §§ 104-7-2, 104-9-1.

See Rule 19(c) for the requirement of a statement in a claim for relief of the names of persons who ought to be parties and the reason for their omission.

See Rule 23(b) for particular requirements as to the complaint in a secondary action by shareholders.

*Note to Subdivision (b).* 1. This rule supersedes the methods of pleading prescribed in U.S.C., Title 19, § 508 (Persons making seizures pleading general issue and providing special matter); U.S.C., Title 35, former § 40d (Providing under general issue, upon notice, that a statement in application for an extended patent is not true), former § 69 (now § 282) (Pleading and proof in actions for infringement) and similar statutes.

2. This rule is, in part, former Equity Rule 30 (Answer—Contents—Counterclaim), with the matter on denials largely from the Connecticut practice. See Conn.Practice Book (1934) §§ 107, 108, and 122; Conn.Gen.Stat. (1930) §§ 5508–5514. Compare the English practice, English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r.r. 17–20.

*Note to Subdivision* (c). This follows substantially English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r. 15 and N.Y.C.P.A. (1937) § 242, with "surprise" omitted in this rule.

*Note to Subdivision* (d). The first sentence is similar to former Equity Rule 30 (Answer—Contents—Counterclaim). For the second sentence see former Equity Rule 31 (Reply—When Required—When Cause at Issue). This is similar to English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r.r. 13, 18; and to the practice in the States.

*Note to Subdivision* (e). This rule is an elaboration upon former Equity Rule 30 (Answer—Contents—Counterclaim), plus a statement of the actual practice under some codes. Compare also former Equity Rule 18 (Pleadings—Technical Forms Abrogated). See Clark, Code Pleading (1928), pp. 171–4, 432–5; Hankin, Alternative and Hypothetical Pleading (1924), 33 Yale L.J. 365.

*Note to Subdivision* (f). A provision of like import is of frequent occurrence in the codes. Ill.Rev.Stat. (1937) ch. 110, § 157(3); 2 Minn.Stat. (Mason, 1927) § 9266; N.Y.C.P.A. (1937) § 275; 2 N.D.Comp.Laws Ann. (1913) § 7458.

### Notes of Advisory Committee on 1966 Amendment to Rules

The change here is consistent with the broad purposes of unification.

### Cross References

Amendment of pleadings generally, see rule 15.

Defenses in law or fact, how presented, see rule 12.

Joinder of claims, see rule 18.

Relief granted in judgment even if not demanded, see rule 54.

Reply to counterclaims denominated as such, see rule 7.

### Forms

See Appendix of Forms.

## Rule 9. Pleading Special Matters

**(a) Capacity**

It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party, except to the extent required to show the jurisdiction of the court. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

**(b) Fraud, mistake, condition of the mind**

In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

**(c) Conditions precedent**

In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

**(d) Official document or act**

In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law.

**(e) Judgment**

In pleading a judgment or decision of a domestic or foreign court, judicial or quasijudicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.

**(f) Time and place**

For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

**(g) Special damage**

When items of special damage are claimed, they shall be specifically stated.

**(h) Admiralty and maritime claims**

A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims. If the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes whether so identified or not. The amendment of a pleading to add or withdraw an identifying statement is governed by the principles of Rule 15. The reference in Title 28, U.S.C. § 1292(a)(3), to admiralty cases shall be construed to mean admiralty and maritime claims within the meaning of this subdivision (h).

(As amended Feb. 28, 1966, eff. July 1, 1966; Dec. 4, 1967, eff. July 1, 1968; Mar. 30, 1970, eff. July 1, 1970.)

### Notes of Advisory Committee on Rules

*Note to Subdivision* (a). Compare former Equity Rule 25 (Bill of Complaint—Contents) requiring disability to be stated; Utah Rev.Stat.Ann. (1933) § 104–13–15, enumerating a number of situations where a general averment of capacity is sufficient. For provisions governing averment of incorporation, see 2 Minn.Stat. (Mason, 1927) § 9271; N.Y.R.C.P. (1937) Rule 93; 2 N.D.Comp.Laws Ann. (1913) § 7981 et seq.

*Note to Subdivision* (b). See English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r. 22.

*Note to Subdivision* (c). The codes generally have this or a similar provision. See English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r. 14; 2 Minn.Stat. (Mason, 1927) § 9273; N.Y.R.C.P. (1937) Rule 92; 2 N.D.Comp.Laws Ann. (1913) § 7461; 2 Wash.Rev.Stat.Ann. (Remington, 1932) § 288.

*Note to Subdivision* (e). The rule expands the usual code provisions on pleading a judgment by including judgments or decisions of administrative tribunals and foreign courts. Compare Ark.Civ.Code (Crawford, 1934) § 141; 2 Minn.Stat. (Mason, 1927) § 9269; N.Y.R.C.P. (1937) Rule 95; 2 Wash.Rev.Stat.Ann. (Remington, 1932) § 287.

### NOTES OF ADVISORY COMMITTEE ON 1966 AMENDMENT TO RULES

Certain distinctive features of the admiralty practice must be preserved for what are now suits in admiralty. This raises the question: After unification, when a single form of action is established, how will the counterpart of the present suit in admiralty be identifiable? In part the question is easily answered. Some claims for relief can only be suits in admiralty, either because the admiralty jurisdiction is exclusive or because no nonmaritime ground of federal jurisdiction exists. Many claims, however, are cognizable by the district courts whether asserted in admiralty or in a civil action, assuming the existence of a nonmaritime ground of jurisdiction. Thus at present the pleader has power to determine procedural consequences by the way in which he exercises the classic privilege given by the saving-to-suitors clause (28 U.S.C. § 1333) or by equivalent statutory provisions. For example, a longshoreman's claim for personal injuries suffered by reason of the unseaworthiness of a vessel may be asserted in a suit in admiralty or, if diversity of citizenship exists, in a civil action. One of the important procedural consequences is that in the civil action either party may demand a jury trial, while in the suit in admiralty there is no right to jury trial except as provided by statute.

It is no part of the purpose of unification to inject a right to jury trial into those admiralty cases in which that right is not provided by statute. Similarly as will be more specifically noted below, there is no disposition to change the present law as to interlocutory appeals in admiralty, or as to the venue of suits in admiralty; and, of course, there is no disposition to inject into the civil practice as it now is the distinctively maritime remedies (maritime attachment and garnishment, actions in rem, possessory, petitory and partition actions and limitation of liability). The unified rules must therefore provide some device for preserving the present power of the pleader to determine whether these historically maritime procedures shall be applicable to his claim or not; the pleader must be afforded some means of designating his claim as the counterpart of the present suit in admiralty, where its character as such is not clear.

The problem is different from the similar one concerning the identification of claims that were formerly suits in equity. While that problem is not free from complexities, it is broadly true that the modern counterpart of the suit in equity is distinguishable from the former action at law by the character of the relief sought. This mode of identification is possible in only a limited category of admiralty cases. In large numbers of cases the relief sought in admiralty is simple money damages, indistinguishable from the remedy afforded by the common law. This is true, for example, in the case of the longshoreman's action for personal injuries stated above. After unification has abolished the distinction between civil actions and suits in admiralty, the complaint in such an action would be almost completely ambiguous as to the pleader's intentions regarding the procedure invoked. The allegation of diversity of citizenship might be regarded as a clue indicating an intention to proceed as at present under the saving-to-suitors clause; but this, too, would be ambiguous if there were also reference to the admiralty jurisdiction, and the pleader ought not be required to forego mention of all available jurisdictional grounds.

Other methods of solving the problem were carefully explored, but the Advisory Committee concluded that the preferable solution is to allow the pleader who now has power to determine procedural consequences by filing a suit in admiralty to exercise that power under unification, for the limited instances in which procedural differences will remain, by a simple statement in his pleading to the effect that the claim is an admiralty or maritime claim.

The choice made by the pleader in identifying or in failing to identify his claim as an admiralty or maritime claim is not an irrevocable election. The rule provides that the amendment of a pleading to add or withdraw an identifying statement is subject to the principles of Rule 15.

### NOTES OF ADVISORY COMMITTEE ON 1968 AMENDMENT TO RULES

The amendment eliminates the reference to Rule 73 which is to be abrogated and transfers to Rule 9(h) the substance of Subsection (h) of Rule 73 which preserved the right to an interlocutory appeal in admiralty cases which is provided by 28 U.S.C. § 1292(a)(3).

### NOTES OF ADVISORY COMMITTEE ON 1970 AMENDMENT TO RULES

The reference to Rule 26(a) is deleted, in light of the transfer of that subdivision to Rule 30(a) and the elimination of the de bene esse procedure therefrom. See the Advisory Committee's note to Rule 30(a).

### CROSS REFERENCES

Capacity to sue or be sued, see rule 17.

Pleading affirmative defenses, see rule 8.

Proof of official record, see rule 44.

## Rule 10. Form of Pleadings

### (a) Caption; names of parties

Every pleading shall contain a caption setting forth the name of the court, the title of the action, the file number, and a designation as in Rule 7(a). In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

### (b) Paragraphs; separate statements

All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

### (c) Adoption by reference; exhibits

Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.

### NOTES OF ADVISORY COMMITTEE ON RULES

The first sentence is derived in part from the opening statement of former Equity Rule 25 (Bill of Complaint—Contents). The remainder of the rule is an expansion in conformity with usual state provisions. For numbered paragraphs and separate statements, see Conn.Gen.Stat. (1930) § 5513; Ill.Rev.Stat. (1937) ch. 110, § 157 (2); N.Y.R.C.P. (1937) Rule 90. For incorporation by reference, see N.Y.R.C.P. (1937) Rule 90. For written instruments as exhibits, see Ill.Rev.Stat. (1937) ch. 110, § 160.

### CROSS REFERENCES

Captions in motions and other papers, see rule 7.

### FORMS

See Appendix of Forms.

#### RULES OF THE SUPREME COURT OF THE UNITED STATES

Form of pleadings in original actions in Supreme Court of the United States as governed by Federal Rules of Civil Procedure, see rule 9, this Appendix.

### Rule 11. Signing of Pleadings

Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilfull violation of this rule an attorney may be subjected to appropriate disciplinary action. Similarly action may be taken if scandalous or indecent matter is inserted.

#### NOTES OF ADVISORY COMMITTEE ON RULES

This is substantially the content of former Equity Rules 24 (Signature of Counsel) and 21 (Scandal and Impertinence) consolidated and unified. Compare former Equity Rule 36 (Officers Before Whom Pleadings Verified). Compare to similar purposes, English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r. 4, and *Great Australian Gold Mining Co.* v. *Martin, L. R.*, 5 Ch.Div. 1, 10 (1877). Subscription of pleadings is required in many codes. 2 Minn.Stat. (Mason, 1927) § 9265; N.Y.R.C.P. (1937) Rule 91; 2 N.D.Comp.Laws Ann. (1913) § 7455.

This rule expressly continues any statute which requires a pleading to be verified or accompanied by an affidavit, such as:

U.S.C., Title 28 former:

§ 381 (Preliminary injunctions and temporary restraining orders)

§ 762 (Suit against the United States).

U.S.C., Title 28, former § 829 (now § 1927) (Costs; attorney liable for, when) is unaffected by this rule.

For complaints which must be verified under these rules, see Rules 23(b) (Secondary Action by Shareholders) and 65 (Injunctions).

For abolition of the rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances, see Pa.Stat.Ann. (Purdon, 1931) see 12 P.S.Pa., § 1222; for the rule in equity itself, see *Greenfield* v. *Blumenthal*, 69 F.2d 294 (C.C.A. 3d, 1934).

#### CROSS REFERENCES

Notary public and other persons authorized to administer oaths required by laws of the United States, see section 2903 of Title 5, Government Organization and Employees.

Signing of motions and other papers, see rule 7.

### Rule 12. Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on the Pleadings

**(a) When presented**

A defendant shall serve his answer within 20 days after the service of the summons and complaint upon him, except when service is made under Rule 4(e) and a different time is prescribed in the order of court under the statute of the United States or in the statute or rule of court of the state. A party served with a pleading stating a cross-claim against him shall serve an answer thereto within 20 days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within 20 days after service of the answer, or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs. The United States or an officer or agency thereof shall serve an answer to the complaint or to a cross-claim, or a reply to a counterclaim, within 60 days after the service upon the United States attorney of the pleading in which the claim is asserted. The service of a motion permitted under this rule alters these periods to time as follows, unless a different time is fixed by order of the court: (1) If the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; (2) if the court grants a motion for a more definite statement the responsive pleading shall be served within 10 days after the service of the more definite statement.

**(b) How presented**

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

**(c) Motion for judgment on the pleadings**

After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

**(d) Preliminary hearings**

The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

**(e) Motion for more definite statement**

If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

**(f) Motion to strike**

Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days, after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

**(g) Consolidation of defense in motion**

A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him. If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.

**(h) Waiver or preservation of certain defenses**

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966.)

NOTES OF ADVISORY COMMITTEE ON RULES

*Note to Subdivision (a).* 1. Compare former Equity Rules 12 (Issue of Subpoena—Time for Answer) and 31 (Reply—When Required—When Cause at Issue); 4 Mont.Rev.Codes Ann. (1935) §§ 9107, 9158; N.Y.C.P.A. (1937) § 263; N.Y.R.C.P. (1937) Rules 109-111.

2. U.S.C., Title 28, former § 763 (now § 507) (Petition in action against United States; service; appearance by district attorney) provides that the United States as a defendant shall have 60 days within which to answer or otherwise defend. This and other statutes which provide 60 days for the United States or an officer or agency thereof to answer or otherwise defend are continued by this rule. Insofar as any statutes not excepted in Rule 81 provide a different time for a defendant to defend, such statutes are modified. See U.S.C., Title 28, former § 45 (District courts; practice and procedure in certain cases under the interstate commerce laws) (30 days).

3. Compare the last sentence of former Equity Rule 29 (Defenses—How Presented) and N.Y.C.P.A. (1937) § 283. See Rule 15(a) for time within which to plead to an amended pleading.

*Note to Subdivisions (b) and (d).* 1. See generally former Equity Rules 29 (Defenses—How Presented), 33 (Testing Sufficiency of Defense), 43 (Defect of Parties—Resisting Objection), and 44 (Defect of Parties—Tardy Objection); N.Y.C.P.A. (1937) §§ 277-280; N.Y.R.C.P. (1937) Rules 106-112; English Rules Under the Judicature Act (The Annual Practice, 1937) O. 25, r.r. 1-4; Clark, Code Pleading (1928) pp. 371-381.

2. For provisions authorizing defenses to be made in the answer or reply see English Rules Under the Judicature Act (The Annual Practice, 1937) O. 25, r.r. 1-4; 1 Miss.Code Ann. (1930) §§ 378, 379. Compare former Equity Rule 29 (Defenses—How Presented); U.S.C., Title 28, former § 45 (District Courts; practice and procedure in certain cases under the interstate commerce laws). U.S.C., Title 28, former § 45, substantially continued by this rule, provides: "No replication need be filed to the answer, and objections to the sufficiency of the petition or answer as not setting forth a cause of action or defense must be taken at the final hearing or by motion to dismiss the petition based on said grounds, which motion may be made at any time before answer is filed." Compare Calif.Code Civ.Proc. (Deering, 1937) § 433; 4 Nev.Comp.Laws (Hillyer, 1929) § 8600. For provisions that the defendant may demur and answer at the same time, see Calif.Code Civ.Proc. (Deering, 1937) § 431; 4 Nev.Comp.Laws (Hillyer, 1929) § 8598.

3. Former Equity Rule 29 (Defenses—How Presented) abolished demurrers and provided that defenses in point of law arising on the face of the bill should be made by motion to dismiss or in the answer, with further provision that every such point of law going to the whole or material part of the cause or causes stated might be called up and disposed of before final hearing "at the discretion of the court." Likewise many state practices have abolished the demurrer, or retain it only to attack substantial and not formal defects. See 6 Tenn.Code Ann. (Williams, 1934) § 8784; Ala.Code Ann. (Michie, 1928) § 9479; 2 Mass.Gen.Laws (Ter.Ed., 1932) ch. 231, §§ 15-18; Kansas Gen.Stat.Ann. (1935) §§ 60-705, 60-706.

*Note to Subdivision (c).* Compare former Equity Rule 33 (Testing Sufficiency of Defense); N.Y.R.C.P. (1937) Rules 111 and 112.

*Note to Subdivisions (e) and (f).* Compare former Equity Rules 20 (Further and Particular Statement in

Pleading May Be Required) and 21 (Scandal and Impertinence); English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r.r. 7, 7a, 7b, 8; 4 Mont.Rev.Codes Ann. (1935) §§ 9166, 9167; N.Y.C.P.A. (1937) § 247; N.Y.R.C.P. (1937) Rules 103, 115, 116, 117; Wyo.Rev.Stat.Ann. (Courtright, 1931) §§ 89-1033, 89-1034.

*Note to Subdivision (g).* Compare Rules of the District Court of the United States for the District of Columbia (1937), Equity Rule 11; N.M. Rules of Pleading, Practice and Procedure, 38 N.M.Rep. vii [105–408] (1934); Wash.Gen.Rules of the Superior Courts, 1 Wash.Rev.Stat.Ann. (Remington, 1932) p. 160, Rule VI (e) and (f).

*Note to Subdivision (h).* Compare Calif.Code Civ.Proc. (Deering, 1937) § 434; 2 Minn.Stat. (Mason, 1927) § 9252; N.Y.C.P.A. (1937) §§ 278 and 279; Wash.Gen.Rules of the Superior Courts, 1 Wash.Rev.Stat.Ann. (Remington, 1932) p. 160, Rule VI (e). This rule continues U.S.C., Title 28, former § 80 (Dismissal or remand) (of action over which district court lacks jurisdiction), while U.S.C., Title 28, former § 399 (Amendments to show diverse citizenship) is continued by Rule 15.

### NOTES OF ADVISORY COMMITTEE ON 1946 AMENDMENT TO RULES

*Note. Subdivision (a).* Various minor alterations in language have been made to improve the statement of the rule. All references to bills of particulars have been stricken in accordance with changes made in subdivision (e).

*Subdivision (b).* The addition of defense (7), "failure to join an indispensable party," cures an omission in the rules, which are silent as to the mode of raising such failure. See Commentary, Manner of Raising Objection of Non-Joinder of Indispensable Party, 1940, 2 Fed.Rules Serv. 658 and, 1942, 5 Fed.Rules Serv. 820. In one case, *United States* v. *Metropolitan Life Ins. Co.*, E.D.Pa. 1941, 36 F.Supp. 399, the failure to join an indispensable party was raised under Rule 12(c).

Rule 12(b)(6), permitting a motion to dismiss for failure of the complaint to state a claim on which relief can be granted, is substantially the same as the old demurrer for failure of a pleading to state a cause of action. Some courts have held that as the rule by its terms refers to statements in the complaint, extraneous matter on affidavits, depositions or otherwise, may not be introduced in support of the motion, or to resist it. On the other hand, in many cases the district courts have permitted the introduction of such material. When these cases have reached circuit courts of appeals in situations where the extraneous material so received shows that there is no genuine issue as to any material question of fact and that on the undisputed facts as disclosed by the affidavits or depositions, one party or the other is entitled to judgment as a matter of law, the circuit courts, properly enough, have been reluctant to dispose of the case merely on the face of the pleading, and in the interest of prompt disposition of the action have made a final disposition of it. In dealing with such situations the Second Circuit has made the sound suggestion that whatever its label or original basis, the motion may be treated as a motion for summary judgment and disposed of as such. *Samara* v. *United States*, C.C.A.2d, 1942, 129 F.2d 594, cert. den., 1942, 317 U.S. 686, 63 S.Ct. 258; *Boro Hall Corp.* v. *General Motors Corp.*, C.C.A.2d, 1942, 124 F.2d 822, cert. den., 1943, 317 U.S. 695, 63 S.Ct. 436. See also *Kithcart* v. *Metropolitan Life Ins. Co.*, C.C.A.8th, 1945, 150 F.2d 997, aff'g 62 F.Supp. 93.

It has also been suggested that this practice could be justified on the ground that the federal rules permit "speaking" motions. The Committee entertains the view that on motion under Rule 12(b)(6) to dismiss for failure of the complaint to state a good claim, the trial court should have authority to permit the introduction of extraneous matter, such as may be offered on a motion for summary judgment, and if it does not exclude such matter the motion should then be treated as a motion for summary judgment and disposed of in the manner and on the conditions stated in Rule 56 relating to summary judgments, and, of course, in such a situation, when the case reaches the circuit court of appeals, that court should treat the motion in the same way. The Committee believes that such practice, however, should be tied to the summary judgment rule. The term "speaking motion" is not mentioned in the rules, and if there is such a thing its limitations are undefined. Where extraneous matter is received, by tying further proceedings to the summary judgment rule the courts have a definite basis in the rules for disposing of the motion.

The Committee emphasizes particularly the fact that the summary judgment rule does not permit a case to be disposed of by judgment on the merits on affidavits, which disclose a conflict on a material issue of fact, and unless this practice is tied to the summary judgment rule, the extent to which a court, on the introduction of such extraneous matter, may resolve questions of fact, on conflicting proof would be left uncertain.

The decisions dealing with this general situation may be generally grouped as follows: (1) cases dealing with the use of affidavits and other extraneous material on motions; (2) cases reversing judgments to prevent final determination on mere pleading allegations alone.

Under group (1) are: *Boro Hall Corp.* v. *General Motors Corp.*, C.C.A.2d, 1942, 124 F.2d 822, cert. den., 1943, 317 U.S. 695, 63 S.Ct. 436; *Gallup* v. *Caldwell*, C.C.A.3d, 1941, 120 F.2d 90; *Central Mexico Light & Power Co.* v. *Munch*, C.C.A.2d, 1940, 116 F.2d 85; *National Labor Relations Board* v. *Montgomery Ward & Co.*, App.D.C. 1944, 79 U.S.App.D.C. 200, 144 F.2d 528, cert. den., 1944, 65 S.Ct. 134; *Urquhart* v. *American-La France Foamite Corp.*, App.D.C. 1944, 79 U.S.App.D.C. 219, 144 F.2d 542; *Samara* v. *United States*, C.C.A.2d, 1942, 129 F.2d 594; *Cohen* v. *American Window Glass Co.*, C.C.A.2d, 1942, 126 F.2d 111; *Sperry Products Inc.* v. *Association of American Railroads*, C.C.A.2d, 1942, 132 F.2d 408; *Joint Council Dining Car Employees Local 370* v. *Delaware, Lackawanna and Western R. Co.*, C.C.A.2d, 1946, 157 F.2d 417; *Weeks* v. *Bareco Oil Co.*, C.C.A.7th, 1941, 125 F.2d 84; *Carroll* v. *Morrison Hotel Corp.*, C.C.A.7th, 1945, 149 F.2d 404; *Victory v. Manning*, C.C.A.3rd, 1942, 128 F.2d 415; *Locals No. 1470, No. 1469, and 1512 of International Longshoremen's Association v. Southern Pacific Co.*, C.C.A.5th, 1942, 131 F.2d 605; *Lucking* v. *Delano*, C.C.A.6th, 1942, 129 F.2d 283; *San Francisco Lodge No. 68 of International Association of Machinists* v. *Forrestal*, N.D.Cal. 1944, 58 F.Supp. 466; *Benson* v. *Export Equipment Corp.*, N. Mex. 1945, 164 P.2d 380, construing New Mexico rule identical with Rule 12(b)(6); *F. E. Myers & Bros. Co.* v. *Gould Pumps, Inc.*, W.D.N.Y. 1946, 9 Fed.Rules Serv. 12b, 33 Case 2, 5 F.R.D. 132. Cf. *Kohler* v. *Jacobs*, C.C.A.5th, 1943, 138 F.2d 440; *Cohen* v. *United States*, C.C.A.8th, 1942, 129 F.2d 733.

Under group (2) are: *Sparks* v. *England*, C.C.A.8th, 1940, 113 F.2d 579; *Continental Collieries, Inc.* v. *Shober*, C.C.A.3d, 1942, 130 F.2d 631; *Downey* v. *Palmier*, C.C.A.2d 1940, 114 F.2d 116; *DeLoach* v. *Crowley's Inc.*, C.C.A.5th, 1942, 128 F.2d 378; *Leimer* v. *State Mutual Life Assurance Co. of Worcester, Mass.*, C.C.A.8th, 1940, 108 F.2d 302; *Rossiter* v. *Vogel*, C.C.A.2d, 1943, 134 F.2d 908, compare s. c., C.C.A.2d, 1945, 148 F.2d 292; *Karl Kiefer Machine Co.* v. *United States Bottlers Machinery Co.*, C.C.A.7th, 1940, 113 F.2d 356; *Chicago Metallic Mfg. Co.* v. *Edward Katzinger Co.*, C.C.A.7th, 1941, 123 F.2d 518; *Louisiana Farmers' Protective Union, Inc.* v. *Great Atlantic & Pacific Tea Co. of America, Inc.*, C.C.A.8th, 1942, 131 F.2d 419; *Publicity Bldg. Realty Corp.* v. *Hannegan*, C.C.A.8th, 1943, 139 F.2d 583; *Dioguardi* v. *Durning*, C.C.A.2d, 1944, 139 F.2d 774; *Package Closure Corp.* v. *Sealright Co., Inc.*, C.C.A.2d, 1944, 141 F.2d 972; *Tahir Erk* v. *Glenn L. Martin Co.*, C.C.A.4th, 1941, 116 F.2d 865; *Bell* v. *Preferred Life Assurance Society of Montgomery, Ala.*, 1943, 320 U.S. 238, 64 S.Ct. 5.

The addition at the end of subdivision (b) makes it clear that on a motion under Rule 12(b)(6) extraneous material may not be considered if the court excludes it, but that if the court does not exclude such material the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56. It will also be observed that if a motion under Rule 12(b)(6) is thus converted into a summary judgment motion, the amendment insures that both parties shall be given a reasonable opportunity to submit affidavits and extraneous proofs to avoid taking a party by surprise through the conversion of the motion into a motion for summary judgment. In this manner and to this extent the amendment regularizes the practice above described. As the courts are already dealing with cases in this way, the effect of this amendment is really only to define the practice carefully and apply the requirements of the summary judgment rule in the disposition of the motion.

*Subdivision* (c). The sentence appended to subdivision (c) performs the same function and is grounded on the same reasons as the corresponding sentence added in subdivision (b).

*Subdivision* (*d*). The change here was made necessary because of the addition of defense (7) in subdivision (b).

*Subdivision* (*e*). References in this subdivision to a bill of particulars have been deleted, and the motion provided for is confined to one for a more definite statement, to be obtained only in cases where the movant cannot reasonably be required to frame an answer or other responsive pleading to the pleading in question. With respect to preparations for trial, the party is properly relegated to the various methods of examination and discovery provided in the rules for that purpose. *Slusher* v. *Jones*, E.D.Ky. 1943, 7 Fed.Rules Serv. 12e.231, Case 5, 3 F.R.D. 168; *Best Foods, Inc.* v. *General Mills, Inc.*, D.Del. 1943, 7 Fed.Rules Serv. 12e.231, Case 7, 3 F.R.D. 275; *Braden* v. *Callaway*, E.D.Tenn. 1943, 8 Fed.Rules Serv. 12e.231, Case 1 (". . . most courts . . . conclude that the definiteness required is only such as will be sufficient for the party to prepare responsive pleadings"). Accordingly, the reference to the 20 day time limit has also been eliminated, since the purpose of this present provision is to state a time period where the motion for a bill is made for the purpose of preparing for trial.

Rule 12(e) as originally drawn has been the subject of more judicial rulings than any other part of the rules, and has been much criticized by commentators, judges and members of the bar. See general discussion and cases cited in 1 Moore's Federal Practice, 1938, Cum.Supplement, § 12.07, under "Page 657"; also, Holtzoff, New Federal Procedure and the Courts, 1940, 35–41. And compare vote of Second Circuit Conference of Circuit and District Judges, June 1940, recommending the abolition of the bill of particulars; *Sun Valley Mfg. Co.* v. *Mylish*, E.D.Pa. 1944, 8 Fed.Rules Serv. 12e.231, Case 6 ("Our experience . . . has demonstrated not only that 'the office of the bill of particulars is fast becoming obsolete' . . . but that in view of the adequate discovery procedure available under the Rules, motions for bills of particulars should be abolished altogether."); *Walling* v. *American Steamship Co.*, W.D.N.Y. 1945, 4 F.R.D. 355, 8 Fed.Rules Serv. 12e.244, Case 8 (". . . the adoption of the rule was ill advised. It has led to confusion, duplication and delay.") The tendency of some courts freely to grant extended bills of particulars has served to neutralize any helpful benefits derived from Rule 8, and has overlooked the intended use of the rules on depositions and discovery. The words "or to prepare for trial"—eliminated by the proposed amendment—have sometimes been seized upon as grounds for compulsory statement in the opposing pleading of all the details which the movant would have to meet at the trial. On the other hand, many courts have in effect read these words out of the rule. See *Walling* v. *Alabama Pipe Co.*, W.D.Mo. 1942, 3 F.R.D. 159, 6 Fed.Rules Serv. 12e.244, Case 7; *Fleming* v. *Mason & Dixon Lines, Inc.*, E.D.Tenn. 1941, 42 F.Supp. 230; *Kellogg Co.* v. *National Biscuit Co.*, D.N.J. 1941, 38 F.Supp. 643; *Brown* v. *H. L. Green Co.*, S.D.N.Y. 1943, 7 Fed.Rules Serv. 12e.231, Case 6; *Pedersen* v. *Standard Accident Ins. Co.*, W.D.Mo. 1945, 8 Fed.Rules Serv. 12e.231, Case 8; *Bowles* v. *Ohse*, D.Neb. 1945, 4 F.R.D. 403, 9 Fed.Rules Serv. 12e.231, Case 1; *Klages* v. *Cohen*, E.D.N.Y. 1945, 9 Fed.Rules Serv. 8a.25, Case 4; *Bowles* v. *Lawrence*, D.Mass. 1945, 8 Fed.Rules Serv. 12e.231, Case 19; *McKinney Tool & Mfg. Co.* v. *Hoyt*, N.D.Ohio 1945, 9 Fed.Rules Serv. 12e.235, Case 1; *Bowles* v. *Jack*, D.Minn. 1945, 5 F.R.D. 1, 9 Fed.Rules Serv. 12e.244, Case 9. And it has been urged from the bench that the phrase be stricken. *Poole* v . *White*, N.D.W.Va. 1941, 5 Fed.Rules Serv. 12e.231, Case 4, 2 F.R.D. 40. See also *Bowles* v. *Gabel*, W.D.Mo. 1946, 9 Fed.Rules Serv. 12e.244, Case 10 ("The courts have never favored that portion of the rules which undertook to justify a motion of this kind for the purpose of aiding counsel in preparing his case for trial.").

*Subdivision* (*f*). This amendment affords a specific method of raising the insufficiency of a defense, a matter which has troubled some courts, although attack has been permitted in one way or another. See *Dysart* v. *Remington-Rand*, Inc., D.Conn. 1939, 31 F.Supp. 296; *Eastman Kodak Co.* v. *McAuley*, S.D.N.Y. 1941, 4 Fed.Rules Serv. 12f.21, Case 8, 2 F.R.D. 21; *Schenley Distillers Corp.* v. *Renken*, E.D.S.C. 1940, 34 F.Supp. 678; *Yale Transport Corp.* v. *Yellow Truck & Coach Mfg. Co.*, S.D.N.Y. 1944, 3 F.R.D. 440; *United States* v. *Turner Milk Co.*, N.D.Ill. 1941, 4 Fed.Rules Serv. 12b.51, Case 3, 1 F.R.D. 643; *Teiger* v. *Stephan Oderwald, Inc.*, S.D.N.Y. 1940, 31 F.Supp. 626; *Teplitsky* v. *Pennsylvania R. Co.*, N.D.Ill. 1941, 38 F.Supp. 535; *Gallagher* v. *Carroll*, E.D.N.Y. 1939, 27 F.Supp. 568; *United States* v. *Palmer*, S.D.N.Y. 1939, 28 F.Supp. 936. And see *Indemnity Ins. Co. of North America* v. *Pan American Airways, Inc.*, S.D.N.Y. 1944, 58 F.Supp. 338; Commentary, Modes of Attacking Insufficient Defenses in the Answer, 1939, 1 Fed.Rules Serv. 669, 1940, 2 Fed.Rules Serv. 640.

*Subdivision* (*g*). The change in title conforms with the companion provision in subdivision (h).

The alteration of the "except" clause requires that other than provided in subdivision (h) a party who resorts to a motion to raise defenses specified in the rule, must include in one motion all that are then available to him. Under the original rule defenses which could be raised by motion were divided into two groups which could be the subjects of two successive motions.

*Subdivision* (*h*). The addition of the phrase relating to indispensable parties is one of necessity.

### NOTES OF ADVISORY COMMITTEE ON 1963 AMENDMENT TO RULES

This amendment conforms to the amendment of Rule 4(e). See also the Advisory Committee's Note to amended Rule 4(b).

### NOTES OF ADVISORY COMMITTEE ON 1966 AMENDMENT TO RULES

Subdivision (b)(7). The terminology of this subdivision is changed to accord with the amendment of Rule 19. See the Advisory Committee's Note to Rule 19, as amended, especially the third paragraph therein before the caption "Subdivision (c)."

Subdivision (g). Subdivision (g) has forbidden a defendant who makes a preanswer motion under this rule from making a further motion presenting any defense or objection which was available to him at the time he made the first motion and which he could have included, but did not in fact include therein. Thus if the defendant moves before answer to dismiss the complaint for failure to state a claim, he is barred from making a further motion presenting the defense of improper venue, if that defense was available to him when he made his original motion. Amended subdivision (*g*) is to the same effect. This required consolidation of defenses and objections in a Rule 12 motion is salutary in that it works against piecemeal consideration of a case. For exceptions to the requirement of consolidation, see the last clause of subdivision (g), referring to new subdivision (h)(2).

Subdivision (*h*). The question has arisen whether an omitted defense which cannot be made the basis of a second motion may nevertheless be pleaded in the answer. Subdivision (h) called for waiver of "* * * defenses and objections which he [defendant] does not present * * * by motion * * * or, if he has made no motion, in his answer * * *." If the clause "if he has made no motion," was read literally, it seemed that the omitted defense was waived and could not be pleaded in the answer. On the other hand, the clause might be read as adding nothing of substance to the preceding words; in that event it appeared that a defense was not waived by reason of being omitted from the motion and might be set up in the answer. The decisions were divided. Favoring waiver, see *Keefe* v. *Derounian*, 6 F.R.D. 11 (N.D.Ill. 1946); *Elbinger* v. *Precision Metal Workers Corp.*, 18 F.R.D. 467 (E.D.Wis. 1956); see also *Rensing* v. *Turner Aviation Corp.*, 166 F.Supp. 790 (N.D.Ill. 1958); *P. Beiersdorf & Co.* v. *Duke Laboratories, Inc.*, 10 F.R.D. 282 (S.D.N.Y. 1950); *Neset* v. *Christensen*, 92 F.Supp. 78 (E.D.N.Y. 1950). Opposing waiver, see *Phillips* v. *Baker*, 121 F.2d 752 (9th Cir. 1941); *Crum* v. *Graham*, 32 F.R.D. 173 (D.Mont. 1963) (regretfully following the Phillips case); see also *Birnbaum* v. *Birrell*, 9 F.R.D. 72 (S.D.N.Y. 1948); *Johnson* v. *Joseph Schlitz Brewing Co.*, 33 F.Supp. 176 (E.D.Tenn. 1940); cf. *Carter* v. *American Bus Lines, Inc.*, 22 F.R.D. 323 (D.Neb. 1958).

Amended subdivision (h)(1)(A) eliminates the ambiguity and states that certain specified defenses which were available to a party when he made a preanswer motion, but which he omitted from the motion, are waived. The specified defenses are lack of jurisdiction over the person, improper venue, insufficiency of process, and insufficiency of service of process (see Rule 12(b)(2)-(5)). A party who by motion invites the court to pass upon a threshold defense should bring forward all the specified defenses he then has and thus allow the court to do a reasonably complete job. The waiver reinforces the policy of subdivision (g) forbidding successive motions.

By amended subdivision (h)(1)(B), the specified defenses, even if not waived by the operation of (A), are waived by the failure to raise them by a motion under Rule 12 or in the responsive pleading or any amendment thereof to which the party is entitled as a matter of course. The specified defenses are of such a character that they should not be delayed and brought up for the first time by means of an application to the court to amend the responsive pleading.

Since the language of the subdivisions is made clear, the party is put on fair notice of the effect of his actions and omissions and can guard himself against unintended waiver. It is to be noted that while the defenses specified in subdivision (h)(1) are subject to waiver as there provided, the more substantial defenses of failure to state a claim upon which relief can be granted, failure to join a party indispensable under Rule 19, and failure to state a legal defense to a claim (see Rule 12(b)(6), (7), (f)), as well as the defense of lack of jurisdiction over the subject matter (see Rule 12(b)(1)), are expressly preserved against waiver by amended subdivision (h)(2) and (3).

### CROSS REFERENCES

Demurrers abolished, see rule 7.
Dismissal of actions—
  Claims of opposing party, judgment on counterclaim or cross-claim, see rule 13.
  Class actions, see rule 23(c).
  Costs of previously-dismissed action, see rule 41.
  Depositions, right to use depositions in former action, see rule 26.
  Failure to serve answers to interrogatories, see rule 37.
  Findings of fact and conclusions of law, necessity, see rule 52.
  Voluntary and involuntary dismissal, see rule 41.
District courts—
  Jurisdiction, see chapter 85 of this title.
  Trials, hearings, and orders in chambers, see rule 77.
  Venue, see chapter 87 of this title.
Evidence on motions, see rule 43.
Findings of fact and conclusions of law unnecessary, see rule 52.
Indication of simplicity and brevity of statement, see rule 84.
Judgment, definition of, see rule 54.
Motions—
  Adoption of statement by reference, see rule 10.
  Courts always open for making, see section 452 of this title.
  Evidence on, see rule 43.
  Extension of time, see rule 6.
  Form of, see rule 7.
  Motion day and oral hearings, see rule 78.
  Technical forms not required, see rule 8.
  Time for motions generally, see rule 6.
Parties—
  Necessary joinder, see rule 19.
  Third-party defendant, defenses to third-party plaintiff and plaintiff's claims, see rule 14.
Pleadings—
  Affirmative defenses, see rule 8.
  Form of, see rule 10.
  Pleadings allowed, see rule 7.
  Striking for failure to serve answer to interrogatory, see rule 37.
Waiver, objections to venue, see section 1406 of this title.

### FEDERAL RULES OF CRIMINAL PROCEDURE

Bill of particulars, see rule 7, Title 18, Appendix, Crimes and Criminal Procedure.
Demurrers as abolished, see rule 12.
Motion raising defenses and objections, see rule 12 and note of Advisory Committee under the rule.

### FORMS

Answer presenting defenses under subd. (b) of this rule, see form 20, Appendix of Forms.
Motion to dismiss, presenting defenses of failure to state a claim, of lack of service of process, of improper venue, and of lack of jurisdiction under subd. (b) of this rule, see form 19.

## Rule 13. Counterclaim and Cross Claim

### (a) Compulsory counterclaims

A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

### (b) Permissive counterclaims

A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

### (c) Counterclaim exceeding opposing claim

A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

**(d) Counterclaim against the United States**

These rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against the United States or an officer or agency thereof.

**(e) Counterclaim maturing or acquired after pleading**

A claim which either matured or was acquired by the pleader after serving his pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.

**(f) Omitted counterclaim**

When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment.

**(g) Cross-claim against co-party**

A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

**(h) Joinder of additional parties**

Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rules 19 and 20.

**(i) Separate trials; separate judgments**

If the court orders separate trials as provided in Rule 42(b), judgment on a counterclaim or cross-claim may be rendered in accordance with the terms of Rule 54(b) when the court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966.)

### NOTES OF ADVISORY COMMITTEE ON RULES

1. This is substantially former Equity Rule 30 (Answer—Contents—Counterclaim), broadened to include legal as well as equitable counterclaims.

2. Compare the English practice, English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r.r. 2 and 3, and O. 21, r.r. 10—17; *Beddall* v. *Maitland*, L.R. 17 Ch.Div. 174, 181, 182 (1881).

3. Certain States have also adopted almost unrestricted provisions concerning both the subject matter of and the parties to a counterclaim. This seems to be the modern tendency. Ark.Civ.Code (Crawford, 1934) §§ 117 (as amended) and 118; N.J.Comp.Stat. (2 Cum.Supp. 1911-1924), N.Y.C.P.A. (1937) §§ 262, 266, 267 (all as amended, Laws of 1936, ch. 324), 268, 269, and 271; Wis.Stat. (1935) § 263.14 (1)(c).

4. Most codes do not expressly provide for a counterclaim in the reply. Clark, Code Pleading (1928), p. 486. Ky.Codes (Carroll, 1932) Civ.Pract. § 98 does provide, however, for such counterclaim.

5. The provisions of this rule respecting counterclaims are subject to Rule 82 (Jurisdiction and Venue Unaffected). For a discussion of Federal jurisdiction and venue in regard to counterclaims and cross-claims, see Shulman and Jaegerman, Some Jurisdictional Limitations in Federal Procedure (1936), 45 Yale L.J. 393, 410 et seq.

6. This rule does not affect such statutes of the United States as U.S.C., Title 28, former § 41(1) (now §§ 1332, 1345, 1359) (United States as plaintiff; civil suits at common law and in equity), relating to assigned claims in actions based on diversity of citizenship.

7. If the action proceeds to judgment without the interposition of a counterclaim as required by subdivision (a) of this rule, the counterclaim is barred. See *American Mills Co.* v. *American Surety Co.*, 260 U.S. 360, 43 S.Ct. 149, 67 L.Ed. 306 (1922); *Marconi Wireless Telegraph Co.* v. *National Electric Signalling Co.*, 206 Fed. 295 (E.D.N.Y., 1913); Hopkins, Federal Equity Rules (8th ed., 1933), p. 213; Simkins, Federal Practice (1934), p. 663

8. For allowance of credits against the United States see U.S.C., Title 26, § 3772(a)(1)(2)(b) (Suits for refunds of internal revenue taxes—limitations); U.S.C., Title 28, former § 774 (now § 2406) (Suits by United States against individuals; credits), former § 775 (Suits under postal laws; credits); U.S.C., Title 31, § 227 (Offsets against judgments and claims against United States).

### NOTES OF ADVISORY COMMITTEE ON 1946 AMENDMENTS TO RULES

*Note. Subdivision (a).* The use of the word "filing" was inadvertent. The word "serving" conforms with subdivision (e) and with usage generally througout the rules.

The removal of the phrase "not the subject of a pending action" and the addition of the new clause at the end of the subdivision is designed to eliminate the ambiguity noted in *Prudential Insurance Co. of America* v. *Saxe*, App.D.C. 1943, 77 U.S.App.D.C. 144, 134 F.2d 16, 33-34, cert. den., 1943, 319 U.S. 745, 63 S.Ct. 1033. The rewording of the subdivision in this respect insures against an undesirable possibility presented under the original rule whereby a party having a claim which would be the subject of a compulsory counterclaim could avoid stating it as such by bringing an independent action in another court after the commencement of the federal action but before serving his pleading in the federal action.

*Subdivision (g).* The amendment is to care for a situation such as where a second mortgagee is made defendant in a foreclosure proceeding and wishes to file a cross-complaint against the mortgagor in order to secure a personal judgment for the indebtedness and foreclose his lien. A claim of this sort by the second mortgagee may not necessarily arise out of the transaction or occurrence that is the subject matter of the original action under the terms of Rule 13(g).

*Subdivision (h).* The change clarifies the interdependence of Rules 13(i) and 54(b).

### NOTES OF ADVISORY COMMITTEE ON 1963 AMENDMENTS TO RULES

When a defendant, if he desires to defend his interest in property, is obliged to come in and litigate in a court to whose jurisdiction he could not ordinarily be subjected, fairness suggests that he should not be required to assert counterclaims, but should rather be permitted to do so at his election. If, however, he does elect to assert a counterclaim, it seems fair to require him to assert any other which is compulsory within the meaning of Rule 13(a). Clause (2), added by amendment to Rule 13(a), carries out this idea. It will apply to various cases described in Rule 4(e), as amended, where service is effected through attachment or other process by which the court does not acquire jurisdiction to render a personal judgment against the defendant. Clause (2) will also apply to actions commenced in State courts jurisdictionally grounded on attachment or the like, and removed to the Federal courts.

### NOTES OF ADVISORY COMMITTEE ON 1966 AMENDMENTS TO RULES

Rule 13(h), dealing with the joinder of additional parties to a counterclaim or cross-claim, has partaken of some of the textual difficulties of Rule 19 on necessary joinder of parties. See Advisory Committee's Note to Rule 19, as amended; cf. 3 Moore's Federal Practice, Par. 13.39 (2d ed. 1963), and Supp. thereto; 1A Barron & Holtzoff, Federal Practice and Procedure § 399 (Wright ed. 1960). Rule 13(h) has also been inadequate in failing to call attention to the fact that a party pleading a counterclaim or cross-claim may join additional persons when the conditions for permissive joinder of parties under Rule 20 are satisfied.

The amendment of Rule 13(h) supplies the latter omission by expressly referring to Rule 20, as amended, and also incorporates by direct reference the revised criteria and procedures of Rule 19, as amended. Hereafter, for the purpose of determining who must or may be joined as additional parties to a counterclaim or cross-claim, the party pleading the claim is to be regarded as a plaintiff and the additional parties as plaintiffs or defendants as the case may be, and amended Rules 19 and 20 are to be applied in the usual fashion. See also Rules 13(a) (compulsory counterclaims) and 22 (interpleader).

The amendment of Rule 13(h), like the amendment of Rule 19, does not attempt to regulate Federal jurisdiction or venue. See Rule 82. It should be noted, however, that in some situations the decisional law has recognized "ancillary" Federal jurisdiction over counterclaims and cross-claims and "ancillary" venue as to parties to these claims.

### CROSS REFERENCES

Counterclaim—
  Default judgment against counter-claimants, see rule 55.
  Dismissal, see rule 41.
  Mistake in designation of defense, see rule 8.
  Reply, see rule 7.
  Requisites of pleading, see rule 8.
  Service of pleadings, numerous defendants, see rule 5.
  Summary judgment, see rule 56.
  Third party practice, see rule 14.
  Time for reply by United States, see rule 12.
  Time of service of reply, see rule 12.
  Voluntary dismissal, see rule 41.
Cross-claim—
  Answer to, if answer contains a cross-claim, see rule 7.
  Default judgment against, see rule 55.
  Dismissal, see rule 41.
  Joinder, see rule 18.
  Requisites of pleading, see rule 8.
  Service of pleadings, numerous defendants, see rule 5.
  Summary judgment, see rule 56.
  Third party practice, see rule 14.
  Time for answer by United States, see rule 12.

### FORMS

Counterclaim, see forms 20 and 21, Appendix of Forms.

Cross-claim, see form 20.

## Rule 14. Third Party Practice

### (a) When defendant may bring in third party

At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party complaint not later than 10 days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counter-claims and cross-claims as provided in Rule 13. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant. The third-party complaint, if within the admiralty and maritime jurisdiction, may be in rem against a vessel, cargo, or other property subject to admiralty or maritime process in rem, in which case references in this rule to the summons include the warrant of arrest, and references to the third-party plaintiff or defendant include, where appropriate, the claimant of the property arrested.

### (b) When plaintiff may bring in third party

When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.

### (c) Admiralty and maritime claims

When a plaintiff asserts an admiralty or maritime claim within the meaning of Rule 9(h), the defendant or claimant, as a third-party plaintiff, may bring in a third-party defendant who may be wholly or partly liable, either to the plaintiff or to the third-party plaintiff, by way of remedy over, contribution, or otherwise on account of the same transaction, occurrence, or series of transactions or occurrences. In such a case the third-party plaintiff may also demand judgment against the third-party defendant in favor of the plaintiff, in which event the third-party defendant shall make his defenses to the claim of the plaintiff as well as to that of the third-party plaintiff in the manner provided in Rule 12 and the action shall proceed as if the plaintiff had commenced it against the third-party defendant as well as the third-party plaintiff.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966.)

### NOTES OF ADVISORY COMMITTEE ON RULES

Third-party impleader is in some aspects a modern innovation in law and equity although well known in admiralty. Because of its many advantages a liberal procedure with respect to it has developed in England, in the Federal admiralty courts, and in some American State jurisdictions. See English Rules Under the Judicature Act (The Annual Practice, 1937) O. 16A, r.r. 1-13; United States Supreme Court Admiralty Rules (1920), Rule 56 (Right to Bring in Party Jointly Liable); Pa.Stat.Ann. (Purdon, 1936) Title 12, § 141; Wis.Stat. (1935) §§ 260.19, 260.20; N.Y.C.P.A. (1937) §§ 193 (2), 211(a). Compare La.Code Pract. (Dart, 1932) §§ 378—388. For the practice in Texas as developed by judicial decision, see *Lottman* v. *Cuilla*, 288 S.W. 123, 126 (Tex., 1926). For a treatment of this subject see Gregory, Legislative Loss Distribution in Negligence Actions (1936); Shulman and Jaegerman, Some Jurisdictional Limitations on Federal Procedure (1936), 45 Yale L.J. 393, 417, et seq.

Third-party impleader under the former conformity act has been applied in actions at law in the Federal courts. *Lowry and Co., Inc.*, v. *National City Bank of New York*, 28 F.2d 895 (S.D.N.Y., 1928); *Yellow Cab Co. of Philadelphia* v. *Rodgers*, 61 F.2d 729 (C.C.A.3d, 1932).

## Notes of Advisory Committee on 1946 Amendment to Rules

*Note.* The provisions in Rule 14(a) which relate to the impleading of a third party who is or may be liable to the plaintiff have been deleted by the proposed amendment. It has been held that under Rule 14(a) the plaintiff need not amend his complaint to state a claim against such third party if he does not wish to do so. *Satink* v. *Holland Township*, D.N.J. 1940, 31 F.Supp. 229, noted, 1940, 88 U.Pa.L.Rev. 751; *Connelly* v. *Bender*, E.D.Mich. 1941, 46 F.Supp. 368; *Whitmire* v. *Partin* (*Milton*), E.D.Tenn. 1941, 2 F.R.D. 83, 5 Fed.Rules Serv. 14a.513, Case 2; *Crim* v. *Lumbermen's Mutual Casualty Co.*, D.D.C. 1939, 26 F.Supp. 715; *Carbola Chemical Co., Inc.* v. *Trundle*, S.D.N.Y. 1943, 3 F.R.D. 502, 7 Fed.Rules Serv. 14a.224, Case 1; *Roadway Express, Inc.* v. *Automobile Ins. Co. of Hartford, Conn.* (Providence Washington Ins. Co.), N.D.Ohio 1945, 8 Fed.Rules Serv. 14a.513, Case 3. In *Delano* v. *Ives*, E.D.Pa. 1941, 40 F.Supp. 672, the court said: ". . . the weight of authority is to the effect that a defendant cannot compel the plaintiff, who has sued him, to sue also a third party whom he does not wish to sue, by tendering in a third party complaint the third party as an additional defendant directly liable to the plaintiff." Thus impleader here amounts to no more than a mere offer of a party to the plaintiff, and if he rejects it, the attempt is a time-consuming futility. See *Satink* v. *Holland Township, supra; Malkin* v. *Arundel Corp.*, D.Md. 1941, 36 F.Supp. 948; also Koenigsberger, Suggestions for Changes in the Federal Rules of Civil Procedure, 1941, 4 Fed.Rules Serv. 1010. But cf. *Atlantic Coast Line R. Co.* v. *United States Fidelity & Guaranty Co.*, M.D.Ga. 1943, 52 F.Supp. 177. Moreover, in any case where the plaintiff could not have joined the third party originally because of jurisdictional limitations such as lack of diversity of citizenship, the majority view is that any attempt by the plaintiff to amend his complaint and assert a claim against the impleaded third party would be unavailing. *Hoskie* v. *Prudential Ins. Co. of America* (*Lorrac Real Estate Corp.*), E.D.N.Y. 1941, 39 F.Supp. 305; *Johnson* v. *G. J. Sherrard Co.* (*New England Telephone & Telegraph Co.*), D.Mass. 1941, 5 Fed.Rules Serv. 14a.511, Case 1, 2 F.R.D. 164; *Thompson* v. *Cranston*, W.D.N.Y. 1942, 6 Fed.Rules Serv. 14a.511, Case 1, 2 F.R.D. 270, aff'd C.C.A.2d, 1942, 132 F.2d 631, cert. den., 1943, 319 U.S. 741, 63 S.Ct. 1028; *Friend* v. *Middle Atlantic Transportation* Co., C.C.A.2d, 1946, 153 F.2d 778, cert. den., 1946, 66 S.Ct. 1370; *Herrington* v. *Jones*, E.D.La. 1941, 5 Fed.Rules Serv. 14a.511, Case 2, 2 F.R.D. 108; *Banks* v. *Employers' Liability Assurance Corp.* (*Central Surety & Ins. Corp.*), W.D.Mo. 1943, 7 Fed.Rules Serv. 14a.11, Case 2; *Saunders* v. *Baltimore & Ohio R. Co.*, S.D.W.Va. 1945, 9 Fed.Rules Serv. 14a.62, Case 2; *Hull* v. *United States Rubber Co.* (*Johnson Larsen & Co.*), E.D.Mich. 1945, 9 Fed.Rules Serv. 14a.62, Case 3. See also concurring opinion of Circuit Judge Minton in *People of State of Illinois for use of Trust Co. of Chicago* v. *Maryland Casualty Co.*, C.C.A.7th, 1942, 132 F.2d 850, 853. Contra: *Sklar* v. *Hayes* (*Singer*), E.D.Pa. 1941, 4 Fed.Rules Serv. 14a.511, Case 2, 1 F.R.D. 594. Discussion of the problem will be found in Commentary, Amendment of Plaintiff's Pleading to Assert Claim Against Third-Party Defendant, 1942, 5 Fed.Rules Serv. 811; Commentary, Federal Jurisdiction in Third-Party Practice, 1943, 6 Fed.Rules Serv. 766; Holtzoff, Some Problems Under Federal Third-Party Practice, 1941, 3 La.L.Rev. 408, 419-420; 1. Moore's Federal Practice, 1938, Cum.Supplement § 14.08. For these reasons therefore, the words "or to the plaintiff" in the first sentence of subdivision (a) have been removed by the amendment; and in conformance therewith the words "the plaintiff" in the second sentence of the subdivision, and the words "or to the third-party plaintiff" in the concluding sentence thereof have likewise been eliminated.

The third sentence of Rule 14(a) has been expanded to clarify the right of the third-party defendant to assert any defenses which the third-party plaintiff may have to the plaintiff's claim. This protects the impleaded third-party defendant where the third-party plaintiff fails or neglects to assert a proper defense to the plaintiff's action. A new sentence has also been inserted giving the third-party defendant the right to assert directly against the original plaintiff any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. This permits all claims arising out of the same transaction or occurrence to be heard and determined in the same action. See *Atlantic Coast Line R. Co.* v. *United States Fidelity & Guaranty Co.*, M.D.Ga. 1943, 52 F.Supp. 177. Accordingly, the next to the last sentence of subdivision (a) has also been revised to make clear that the plaintiff may, if he desires, assert directly against the third-party defendant either by amendment or by a new pleading any claim he may have against him arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. In such a case, the third-party defendant then is entitled to assert the defenses, counter-claims and cross-claims provided in Rules 12 and 13.

The sentence reading "The third-party defendant is bound by the adjudication of the third-party plaintiff's liability to the plaintiff, as well as of his own to the plaintiff, or to the third-party plaintiff" has been stricken from Rule 14(a), not to change the law, but because the sentence states a rule of substantive law which is not within the scope of a procedural rule. It is not the purpose of the rules to state the effect of a judgment.

The elimination of the words "the third-party plaintiff, or any other party" from the second sentence of Rule 14(a), together with the insertion of the new phrases therein, are not changes of substance but are merely for the purpose of clarification.

## Notes of Advisory Committee on 1963 Amendment to Rules

Under the amendment of the initial sentences of the subdivision, a defendant as a third-party plaintiff may freely and without leave of court bring in a third-party defendant if he files the third-party complaint not later than 10 days after he serves his original answer. When the impleader comes so early in the case, there is little value in requiring a preliminary ruling by the court on the propriety of the impleader.

After the third-party defendant is brought in, the court has discretion to strike the third-party claim if it is obviously unmeritorious and can only delay or prejudice the disposition of the plaintiff's claim, or to sever the third-party claim or accord it separate trial if confusion or prejudice would otherwise result. This discretion, applicable not merely to the cases covered by the amendment where the third-party defendant is brought in without leave, but to all impleaders under the rule, is emphasized in the next-to-last sentence of the subdivision, added by amendment.

In dispensing with leave of court for an impleader filed not later than 10 days after serving the answer, but retaining the leave requirement for impleaders sought to be effected thereafter, the amended subdivision takes a moderate position on the lines urged by some commentators, see Note, 43 Minn.L.Rev. 115 (1958); cf. Pa.R.Civ.P. 2252-53 (60 days after service on the defendant); Minn.R.Civ.P. 14.01 (45 days). Other commentators would dispense with the requirement of leave regardless of the time when impleader is effected, and would rely on subsequent action by the court to dismiss the impleader if it would unduly delay or complicate the litigation or would be otherwise objectionable. See 1A Barron & Holtzoff, Federal Practice & Procedure 649-50 (Wright ed. 1960); Comment, 58 Colum.L.Rev. 532, 546 (1958); cf. N.Y.Civ.Prac. Act § 193-a; Me.R.Civ.P. 14. The amended subdivision preserves the value of a preliminary screening, through the leave procedure, of impleaders attempted after the 10-day period.

The amendment applies also when an impleader is initiated by a third-party defendant against a person who may be liable to him, as provided in the last sentence of the subdivision.

### NOTES OF ADVISORY COMMITTEE ON 1966 AMENDMENT TO RULES

Rule 14 was modeled on Admiralty Rule 56. An important feature of Admiralty Rule 56 was that it allowed impleader not only of a person who might be liable to the defendant by way of remedy over, but also of any person who might be liable to the plaintiff. The importance of this provision was that the defendant was entitled to insist that the plaintiff proceed to judgment against the third-party defendant. In certain cases this was a valuable implementation of a substantive right. For example, in a case of ship collision where a finding of mutual fault is possible, one shipowner, if sued alone, faces the prospect of an absolute judgment for the full amount of the damage suffered by an innocent third party; but if he can implead the owner of the other vessel, and if mutual fault is found, the judgment against the original defendant will be in the first instance only for a moiety of the damages; liability for the remainder will be conditioned on the plaintiff's inability to collect from the third-party defendant.

This feature was originally incorporated in Rule 14, but was eliminated by the amendment of 1946, so that under the amended rule a third party could not be impleaded on the basis that he might be liable to the plaintiff. One of the reasons for the amendment was that the Civil Rule, unlike the Admiralty Rule, did not require the plaintiff to go to judgment against the third-party defendant. Another reason was that where jurisdiction depended on diversity of citizenship the impleader of an adversary having the same citizenship as the plaintiff was not considered possible.

Retention of the admiralty practice in those cases that will be counterparts of a suit in admiralty is clearly desirable.

### CROSS REFERENCES

Third party answer, service of third party complaint, see rule 7.

Third party claim—
  Dismissal of, see rule 41.
  Joinder, see rule 18.
  Judgment on less than all claims, see rule 54.
  Requisites, see rule 8.
  Separate trial, see rule 42.

Third party complaint, leave to summon person not an original party, see rule 7.

Third party plaintiff, default judgment against, see rule 55.

Third party tort liability to United States for hospital and medical care, see section 2651 et. seq. of Title 42, The Public Health and Welfare.

## Rule 15. Amended and Supplemental Pleadings

### (a) Amendments

A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

### (b) Amendments to conform to the evidence

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

### (c) Relation back of amendments

Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

The delivery or mailing of process to the United States Attorney, or his designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

### (d) Supplemental pleadings

Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental plead-

**ing setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.**

**(As amended Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966.)**

### Notes of Advisory Committee on Rules

See generally for the present federal practice, former Equity Rules 19 (Amendments Generally), 28 (Amendment of Bill as of Course), 32 (Answer to Amended Bill), 34 (Supplemental Pleading), and 35 (Bills of Revivor and Supplemental Bills—Form); U.S.C., Title 28, former § 399 (now § 1653) (Amendments to show diverse citizenship) and former § 777 (Defects of Form; amendments). See English Rules Under the Judicature Act (The Annual Practice, 1937) O. 28, r.r. 1—13; O. 20, r. 4; O. 24, r.r. 1—3.

*Note to Subdivision (a).* The right to serve an amended pleading once as of course is common. 4 Mont.Rev.Codes Ann. (1935) § 9186; 1 Ore.Code Ann. (1930) § 1-904; 1 S.C.Code (Michie, 1932) § 493; English Rules Under the Judicature Act (The Annual Practice, 1937) O. 28, r. 2. Provision for amendment of pleading before trial, by leave of court, is in almost every code. If there is no statute the power of the court to grant leave is said to be inherent. Clark, Code Pleading, (1928) pp. 498, 509.

*Note to Subdivision (b).* Compare former Equity Rule 19 (Amendments Generally) and code provisions which allow an amendment "at any time in furtherance of justice," (e. g., Ark.Civ.Code (Crawford, 1934) § 155) and which allow an amendment of pleadings to conform to the evidence, where the adverse party has not been misled and prejudiced (e.g., N.M.Stat.Ann. (Courtright, 1929) §§ 105-601, 105-602).

*Note to Subdivision (c).* "Relation back" is a well recognized doctrine of recent and now more frequent application. Compare Ala.Code Ann. (Michie, 1928) § 9513; Ill.Rev.Stat. (1937) ch. 110, § 170(2); 2 Wash.Rev.Stat.Ann. (Remington, 1932) § 308-3(4). See U.S.C., Title 28, former § 399 (now § 1653) (Amendments to show diverse citizenship) for a provision for "relation back."

*Note to Subdivision (d).* This is an adaptation of Equity Rule 34 (Supplemental Pleading).

### Notes of Advisory Committee on 1963 Amendment to Rules

Rule 15(d) is intended to give the court broad discretion in allowing a supplemental pleading. However, some cases, opposed by other cases and criticized by the commentators, have taken the rigid and formalistic view that where the original complaint fails to state a claim upon which relief can be granted, leave to serve a supplemental complaint must be denied. See *Bonner* v. *Elizabeth Arden, Inc.*, 177 F.2d 703 (2d Cir. 1949); *Bowles* v. *Senderowitz*, 65 F.Supp. 548 (E.D.Pa.), rev'd on other grounds, 158 F.2d 435 (3d Cir. 1946), cert. denied, *Senderowitz* v. *Fleming*, 330 U.S. 848, 67 S.Ct. 1091, 91 L.Ed. 1292 (1947); cf. *LaSalle Nat. Bank* v. *222 East Chestnut St. Corp.*, 267 F.2d 247 (7th Cir.), cert. denied, 361 U.S. 836, 80 S.Ct. 88, 4 L.Ed.2d 77 (1959). But see *Camilla Cotton Oil Co.* v. *Spencer Kellogg & Sons*, 257 F.2d 162 (5th Cir. 1958); *Genuth* v. *National Biscuit Co.*, 81 F.Supp. 213 (S.D.N.Y. 1948), app. dism., 177 F.2d 962 (2d Cir. 1949); 3 Moore's Federal Practice ¶ 15.01 [5] (Supp. 1960); 1A Barron & Holtzoff, Federal Practice & Procedure 820-21 (Wright ed. 1960). Thus plaintiffs have sometimes been needlessly remitted to the difficulties of commencing a new action even though events occurring after the commencement of the original action have made clear the right to relief.

Under the amendment the court has discretion to permit a supplemental pleading despite the fact that the original pleading is defective. As in other situations where a supplemental pleading is offered, the court is to determine in the light of the particular circumstances whether filing should be permitted, and if so, upon what terms. The amendment does not attempt to deal with such questions as the relation of the statute of limitations to supplemental pleadings, the operation of the doctrine of laches, or the availability of other defenses. All these questions are for decision in accordance with the principles applicable to supplemental pleadings generally. Cf. *Blau* v. *Lamb*, 191 F.Supp. 906 (S.D.N.Y. 1961); *Lendonsol Amusement Corp.* v. *B. & Q. Assoc., Inc.*, 23 F.R.Serv. 15d. 3, Case 1 (D.Mass. 1957).

### Notes of Advisory Committee on 1966 Amendment to Rules

Rule 15(c) is amplified to state more clearly when an amendment of a pleading changing the party against whom a claim is asserted (including an amendment to correct a misnomer or misdescription of a defendant) shall "relate back" to the date of the original pleading.

The problem has arisen most acutely in certain actions by private parties against officers or agencies of the United States. Thus an individual denied social security benefits by the Secretary of Health, Education, and Welfare may secure review of the decision by bringing a civil action against that officer within sixty days. 42 U.S.C. § 405(g) (Supp. III, 1962). In several recent cases the claimants instituted timely action but mistakenly named as defendant the United States, the Department of HEW, the "Federal Security Administration" (a nonexistent agency), and a Secretary who had retired from the office nineteen days before. Discovering their mistakes, the claimants moved to amend their complaints to name the proper defendant; by this time the statutory sixty-day period had expired. The motions were denied on the ground that the amendment "would amount to the commencement of a new proceeding and would not relate back in time so as to avoid the statutory provision * * * that suit be brought within sixty days * * *" *Cohn* v. *Federal Security Adm.*, 199 F.Supp. 884, 885 (W.D.N.Y. 1961); see also *Cunningham* v. *United States*, 199 F.Supp. 541 (W.D.Mo. 1958); *Hall* v. *Department of HEW*, 199 F.Supp. 833 (S.D.Tex. 1960); *Sandridge* v. *Folsom, Secretary of HEW*, 200 F.Supp. 25 (M.D.Tenn. 1959). [The Secretary of Health, Education, and Welfare has approved certain ameliorative regulations under 42 U.S.C. § 405(g). See 29 Fed.Reg. 8209 (June 30, 1964); Jacoby, The Effect of Recent Changes in the Law of "Nonstatutory" Judicial Review, 53 Geo.L.J. 19, 42-43 (1964); see also *Simmons* v. *United States Dept. HEW*, 328 F.2d 86 (3d Cir. 1964).]

Analysis in terms of "new proceeding" is traceable to *Davis* v. *L. L. Cohen & Co.*, 268 U.S. 638 (1925), and *Mellon* v. *Arkansas Land & Lumber Co.*, 275 U.S. 460 (1928), but those cases antedate the adoption of the Rules which import different criteria for determining when an amendment is to "relate back". As lower courts have continued to rely on the Davis and Mellon cases despite the contrary intent of the Rules, clarification of Rule 15(c) is considered advisable.

Relation back is intimately connected with the policy of the statute of limitations. The policy of the statute limiting the time for suit against the Secretary of HEW would not have been offended by allowing relation back in the situations described above. For the government was put on notice of the claim within the stated period—in the particular instances, by means of the initial delivery of process to a responsible government official (see Rule 4(d)(4) and (5). In these circumstances, characterization of the amendment as a new proceeding is not responsive to the realty, but is merely question-begging; and to deny relation back is to defeat unjustly the claimant's opportunity to prove his case. See the full discussion by Byse, Suing the "Wrong" Defendant in Judicial Review of Federal Administrative Action: Proposals for Reform, 77 Harv.L.Rev. 40 (1963); see also Ill.Civ.P.Act § 46(4).

Much the same question arises in other types of actions against the government (see *Byse*, supra, at 45 n. 15). In actions between private parties, the problem of relation back of amendments changing defendants has generally been better handled by the courts, but incorrect criteria have sometimes been applied, leading sporadically to doubtful results. See 1A Barron & Holtzoff, Federal Practice & Procedure § 451 (Wright ed. 1960); 1 id. § 186 (1960); 2 id. § 543 (1961); 3 Moore's Federal Practice, par. 15.15 (Cum.Supp. 1962); Annot., Change in Party After Statute of Limitations Has Run, 8 A.L.R.2d 6 (1949). Rule 15(c) has been amplified to provide a general solution. An amendment changing the party against whom a claim is asserted relates back if the amendment satisfies the usual condition of Rule 15(c) of "arising out of the conduct * * * set forth * * * in the original pleading," and if, within the applicable limitations period, the party brought in by amendment, first, received such notice of the institution of the action—the notice need not be formal—that he would not be prejudiced in defending the action, and, second, knew or should have known that the action would have been brought against him initially had there not been a mistake concerning the identity of the proper party. Revised Rule 15(c) goes on to provide specifically in the government cases that the first and second requirements are satisfied when the government has been notified in the manner there described (see Rule 4(d)(4) and (5). As applied to the government cases, revised Rule 15(c) further advances the objectives of the 1961 amendment of Rule 25(d) (substitution of public officers).

The relation back of amendments changing plaintiffs is not expressly treated in revised Rule 15(c) since the problem is generally easier. Again the chief consideration of policy is that of the statute of limitations, and the attitude taken in revised Rule 15(c) toward change of defendants extends by analogy to amendments changing plaintiffs. Also relevant is the amendment of Rule 17(a) (real party in interest). To avoid forfeitures of just claims, revised Rule 17(a) would provide that no action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed for correction of the defect in the manner there stated.

### Cross References

Jurisdiction, amendment to show, see section 1653 of this title.

Recasting of pleadings on removal of cause, see section 1447 of this title.

Substitution of successor to public officer by supplemental pleading, see rule 25.

Time for service of pleadings, see rule 12.

## Rule 16. Pre-Trial Procedure; Formulating Issues

In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider

(1) The simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses;

(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

(6) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.

### Notes of Advisory Committee on Rules

1. Similar rules of pre-trial procedure are now in force in Boston, Cleveland, Detroit, and Los Angeles, and a rule substantially like this one has been proposed for the urban centers of New York state. For a discussion of the successful operation of pre-trial procedure in relieving the congested condition of trial calendars of the courts in such cities and for the proposed New York plan, see A Proposal for Minimizing Calendar Delay in Jury Cases (Dec. 1936—published by The New York Law Society); Pre-Trial Procedure and Administration, Third Annual Report of the Judicial Council of the State of New York (1937), pp. 207–243; Report of the Commission on the Administration of Justice in New York State (1934), pp. (288)-(290). See also Pre-Trial Procedure in the Wayne Circuit Court, Detroit, Michigan, Sixth Annual Report of the Judicial Council of Michigan (1936), pp. 63–75; and Sunderland, The Theory and Practice of Pre-Trial Procedure (Dec. 1937) 36 Mich.L.Rev. 215–226, 21 J.Am.Jud.Soc. 125. Compare the English procedure known as the "summons for directions," English Rules Under the Judicature Act (The Annual Practice, 1937) O. 38a; and a similar procedure in New Jersey, N.J.Comp.Stat. (2 Cum.Supp. 1911–1924); N.J. Supreme Court Rules, 2 N.J.Misc.Rep. (1924) 1230, Rules 94, 92, 93, 95 (the last three as amended 1933, 11 N.J.Misc.Rep. (1933) 955).

2. Compare the similar procedure under Rule 56(d) (Summary Judgment—Case Not Fully Adjudicated on Motion). Rule 12(g) (Consolidation of Motions), by requiring to some extent the consolidation of motions dealing with matters preliminary to trial, is a step in the same direction. In connection with clause (5) of this rule, see Rules 53(b) (Masters; Reference) and 53(e)(3) (Master's Report; In Jury Actions).

# TITLE IV—PARTIES

## Rule 17. Parties Plaintiff and Defendant; Capacity

### (a) Real party in interest

Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

**(b) Capacity to sue or be sued**

The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Title 28, U.S.C., §§ 754 and 959(a).

**(c) Infants or incompetent persons**

Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative he may sue by his next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Feb. 28, 1966, eff. July 1, 1966.)

### NOTES OF ADVISORY COMMITTEE ON RULES

*Note to Subdivision* (*a*). The real party in interest provision, except for the last clause which is new, is taken verbatim from former Equity Rule 37 (Parties Generally —Intervention), except that the word "expressly" has been omitted. For similar provisions see N.Y.C.P.A. (1937) § 210; Wyo.Rev.Stat.Ann. (1931) §§ 89-501, 89-502, 89-503; English Rules Under the Judicature Act (The Annual Practice, 1937) O. 16, r. 8. See also Equity Rule 41 (Suit to Execute Trusts of Will—Heir as Party). For examples of statutes of the United States providing particularly for an action for the use or benefit of another in the name of the United States, see U.S.C., Title 40, § 270b (Suit by persons furnishing labor and material for work on public building contracts * * * may sue on a payment bond, "in the name of the United States for the use of the person suing"); and U.S.C., Title 25, § 201 (Penalties under laws relating to Indians—how recovered). Compare U.S.C., Title 26, § 3745(c) (Suits for penalties, fines, and forfeitures, under this title, where not otherwise provided for, to be in name of United States).

*Note to Subdivision* (*b*). For capacity see generally Clark and Moore, New Federal Civil Procedure—II. Pleadings and Parties, 44 Yale L.J. 1291, 1312-1317 (1935) and specifically *Coppedge* v. *Clinton*, 72 F.2d 531 (C.C.A.10th, 1934) (natural person); *David Lupton's Sons Co.* v. *Automobile Club of America*, 225 U.S. 489, 32 S.Ct. 711, 56 L.Ed. 1177, Ann.Cas. 1914A, 699 (1912) (corporation); *Puerto Rico* v. *Russell & Co.*, 288 U.S. 476, 53 S.Ct. 447, 77 L.Ed. 903 (1933) (unincorporated assn.); *United Mine Workers of America* v. *Coronado Coal Co.*, 259 U.S. 344, 42 S.Ct. 570, 66 L.Ed. 975, 27 A.L.R. 762 (1922) (federal substantive right enforced against unincorporated association by suit against the association in its common name without naming all its members as parties). This rule follows the existing law as to such associations, as declared in the case last cited above. Compare *Moffat Tunnel League* v. *United States*, 289 U.S. 113, 53 S.Ct. 543, 77 L.Ed. 1069 (1933). See note to Rule 23, clause (1).

*Note to Subdivision* (*c*). The provision for infants and incompetent persons is substantially former Equity Rule 70 (Suits by or Against Incompetents) with slight additions. Compare the more detailed English provisions, English Rules Under the Judicature Act (The Annual Practice, 1937) O. 16, r.r. 16-21.

### NOTES OF ADVISORY COMMITTEE ON 1946 AMENDMENT TO RULES

*Note.* The new matter [in subdivision (b)] makes clear the controlling character of Rule 66 regarding suits by or against a federal receiver in a federal court.

### NOTES OF ADVISORY COMMITTEE ON 1966 AMENDMENT TO RULES

The minor change in the text of the rule is designed to make it clear that the specific instances enumerated are not exceptions to, but illustrations of, the rule. These illustrations, of course, carry no negative implication to the effect that there are not other instances of recognition as the real party in interest of one whose standing as such may be in doubt. The enumeration is simply of cases in which there might be substantial doubt as to the issue but for the specific enumeration. There are other potentially arguable cases that are not excluded by the enumeration. For example, the enumeration states that the promisee in a contract for the benefit of a third party may sue as real party in interest; it does not say, because it is obvious, that the third-party beneficiary may sue (when the applicable law gives him that right.)

The rule adds to the illustrative list of real parties in interest a bailee—meaning, of course, a bailee suing on behalf of the bailor with respect to the property bailed. (When the possessor of property other than the owner sues for an invasion of the possessory interest he is the real party in interest.) The word "bailee" is added primarily to preserve the admiralty practice whereby the owner of a vessel as bailee of the cargo, or the master of the vessel as bailee of both vessel and cargo, sues for damage to either property interest or both. But there is no reason to limit such a provision to maritime situations. The owner of a warehouse in which household furniture is stored is equally entitled to sue on behalf of the numerous owners of the furniture stored. Cf. *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 (1947).

The provision that no action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed, after the objection has been raised, for ratification, substitution, etc., is added simply in the interests of justice. In its origin the rule concerning the real party in interest was permissive in purpose: it was designed to allow an assignee to sue in his own name. That having been accomplished, the modern function of the rule in its negative aspect is simply to protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as res judicata.

This provision keeps pace with the law as it is actually developing. Modern decisions are inclined to be lenient when an honest mistake has been made in choosing the party in whose name the action is to be filed—in both maritime and nonmaritime cases. See *Levinson* v. *Deupree*, 345 U.S. 648 (1953); *Link Aviation, Inc.* v. *Downs*, 325 F.2d 613 (D.C.Cir. 1963). The provision should not be misunderstood or distorted. It is intended to prevent forfeiture when determination of the proper party to sue is difficult or when an understandable mistake has been made. It does not mean, for example, that, following an airplane crash in which all aboard were killed, an action may be filed in the name of John Doe (a fictitious person), as personal representative of Richard Roe (another fictitious person), in the hope that at a later time the attorney filing the action may substitute the real name of the real personal representative of a real victim, and have the benefit of suspension of the limitation period. It does not even mean, when an action is filed by the personal representative of John Smith, of Buffalo, in the good faith belief that he was aboard the flight, that upon discovery that Smith is alive and well, having missed the fatal flight, the representative of James Brown, of San Francisco, an actual victim, can be substituted to take advantage of the suspension of the limitation period. It is, in cases of this sort, intended to insure against forfeiture and injustice—in short, to codify in broad terms the salutary principle of *Levinson* v. *Deupree*, 345 U.S. 648 (1953), and *Link Aviation, Inc.* v. *Downs*, 325 F.2d 613 (D.C.Cir. 1963).

### AMENDMENTS

1948—The amendment effective October 20, 1949, deleted the words "Rule 66" at the end of subdivision (b) and substituted the words "Title 28, U.S. C., §§ 754 and 959(a)".

### CROSS REFERENCES

Action by—
- One or more on behalf of class, see rule 23.
- United States for use of materialmen on public building contracts, see section 270b of Title 40, Public Buildings, Property, and Works.

Perpetuation of testimony of minor or incompetent, see rule 27.

Secretary of the Treasury, capacity to sue or be sued under Housing Act of 1949, see section 1456 of Title 42, The Public Health and Welfare.

Perpetuation of testimony of minor or incompetent, see rule 27.

## Rule 18. Joinder of Claims and Remedies

### (a) Joinder of claims

A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as he has against an opposing party.

### (b) Joinder of remedies; fraudulent conveyances

Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to him, without first having obtained a judgment establishing the claim for money.

(As amended Feb. 28, 1966, eff. July 1, 1966.)

### NOTES OF ADVISORY COMMITTEE ON RULES

*Note to Subdivision (a).* 1. Recent development, both in code and common law states, has been toward unlimited joinder of actions. See Ill.Rev.Stat. (1937) ch. 110, § 168; N.J.S.A. 2:27-37, as modified by N.J.Sup.Ct.Rules, Rule 21, 2 N.J.Misc. 1208 (1924); N.Y.C.P.A. (1937) § 258 as amended by Laws of 1935, ch. 339.

2. This provision for joinder of actions has been patterned upon former Equity Rule 26 (Joinder of Causes of Action) and broadened to include multiple parties. Compare the English practice, English Rules Under the Judicature Act (The Annual Practice, 1937) O. 18, r.r. 1-9 (noting rules 1 and 6). The earlier American codes set forth classes of joinder, following the now abandoned New York rule. See N.Y.C.P.A. § 258 before amended in 1935; Compare Kan.Gen.Stat.Ann. (1935) § 60-601; Wis.Stat. (1935) § 263.04 for the more liberal practice.

3. The provisions of this rule for the joinder of claims are subject to Rule 82 (Jurisdiction and Venue Unaffected). For the jurisdictional aspects of joinder of claims, see Shulman and Jaegerman, Some Jurisdictional Limitations on Federal Procedure (1936), 45 Yale L.J. 393, 397—410. For separate trials of joined claims, see Rule 42(b).

*Note to Subdivision (b).* This rule is inserted to make it clear that in a single action a party should be accorded all the relief to which he is entitled regardless of whether it is legal or equitable or both. This necessarily includes a deficiency judgment in foreclosure actions formerly provided for in former Equity Rule 10 (Decree for Deficiency in Foreclosures, Etc.). In respect to fraudulent conveyances the rule changes the former rule requiring a prior judgment against the owner (*Braun* v. *American Laundry Mach. Co.*, 56 F.2d 197 (S.D.N.Y. 1932)) to conform to the provisions of the Uniform Fraudulent Conveyance Act, §§ 9 and 10. See McLaughlin, Application of the Uniform Fraudulent Conveyance Act, 46 Harv.L.Rev. 404, 444 (1933).

### NOTES OF ADVISORY COMMITTEE ON 1966 AMENDMENT TO RULES

The Rules "proceed upon the theory that no inconvenience can result from the joinder of any two or more matters in the pleadings, but only from trying two or more matters together which have little or nothing in common." Sunderland, The New Federal Rules, 45 W.Va.L.Q. 5, 13 (1938); see Clark, Code Pleading 58 (2d ed. 1947). Accordingly, Rule 18(a) has permitted a party to plead multiple claims of all types against an opposing party, subject to the court's power to direct an appropriate procedure for trying the claims. See Rules 42(b), 20(b), 21.

The liberal policy regarding joinder of claims in the pleadings extends to cases with multiple parties. However, the language used in the second sentence of Rule 18(a)—"if the requirements of Rules 19 [necessary joinder of parties], 20 [permissive joinder of parties], and 22 [interpleader] are satisfied"—has led some courts to infer that the rules regulating joinder of parties are intended to carry back to Rule 18(a) and to impose some special limits on joinder of claims in multiparty cases. In particular, Rule 20(a) has been read as restricting the operation of Rule 18(a) in certain situations in which a number of parties have been permissively joined in an action. In *Federal Housing Admr.* v. *Christianson*, 26 F.Supp. 419 (D.Conn. 1939), the indorsee of two notes sued the three comakers of one note, and sought to join in the action a count on a second note which had been made by two of the three defendants. There was no doubt about the propriety of the joinder of the three parties defendant, for a right to relief was being asserted against all three defendants which arose out of a single "transaction" (the first note) and a question of fact or law "common" to all three defendants would arise in the action. See the text of Rule 20(a). The court, however, refused to allow the joinder of the count on the second note, on the ground that this right to relief, assumed to arise from a distinct transaction, did not involve a question common to all the defendants but only two of them. For analysis of the Christianson case and other authorities, see 2 Barron & Holtzoff, Federal Practice & Procedure, § 533.1 (Wright ed. 1961); 3 Moore's Federal Practice, par. 18.04[3] (2d ed. 1963).

If the court's view is followed, it becomes necessary to enter at the pleading stage into speculations about the exact relation between the claim sought to be joined against fewer than all the defendants properly joined in the action, and the claims asserted against all the defendants. Cf. Wright, Joinder of Claims and Parties Under Modern Pleading Rules, 36 Minn.L.Rev. 580, 605-06 (1952). Thus if it could be found in the Christianson situation that the claim on the second note arose out of the same transaction as the claim on the first or out of a transaction forming part of a "series," and that any question of fact or law with respect to the second note also arose with regard to the first, it would be held that the claim on the second note could be joined in the complaint. See 2 Barron & Holtzoff, supra, at 199; see also id. at 198 n. 60.4; cf. 3 Moore's Federal Practice, supra, at 1811. Such pleading niceties provide a basis for delaying and wasteful maneuver. It is more compatible with the design of the Rules to allow the claim to be joined in the pleading, leaving the question of possible separate trial of that claim to be later decided. See 2 Barron & Holtzoff, supra, § 533.1; Wright, supra, 36 Minn.L.Rev. at 604-11; Developments in the Law—Multiparty Litigation in the Federal Courts, 71 Harv. 874, 970-71 (1958); Commentary, Relation Between Joinder of Parties and Joinder of Claims, 5 F.R.Serv. 822 (1942). It is instructive to note that the court in the Christianson case, while holding that the claim on the second note could not be joined as a matter of pleading, held open the possibility that both claims would later be consolidated for trial under Rule 42(a). See 26 F.Supp. 419.

Rule 18(a) is now amended not only to overcome the Christianson decision and similar authority, but also to state clearly as a comprehensive proposition, that a party asserting a claim (an original claim, counterclaim, cross-claim, or third-party claim) may join as many claims as he has against an opposing party. See *Noland Co., Inc.* v. *Graver Tank & Mfg. Co.*, 301 F.2d 43, 49-51 (4th Cir. 1962); but cf. *C. W. Humphrey Co.* v. *Security Alum. Co.*, 31 F.R.D. 41 (E.D.Mich. 1962) This permitted joinder of claims is not affected by the fact that there are multiple parties in the action. The joinder of parties is governed by other rules operating independently.

It is emphasized that amended Rule 18(a) deals only with pleading. As already indicated, a claim properly joined as a matter of pleading need not be proceeded with together with the other claim if fairness or convenience justifies separate treatment.

Amended Rule 18(a), like the rule prior to amendment, does not purport to deal with questions of jurisdiction or venue which may arise with respect to claims properly joined as a matter of pleading. See Rule 82.

See also the amendment of Rule 20(a) and the Advisory Committee's Note thereto.

Free joinder of claims and remedies is one of the basic purposes of unification of the admiralty and civil procedure. The amendment accordingly provides for the inclusion in the rule of maritime claims as well as those which are legal and equitable in character.

#### CROSS REFERENCES

Counterclaims, see rule 13.
General rules of pleading, see rule 8.
One form of action, see rule 2.
Separate trial of joined claims, see rule 42.
Severance of claim against party, see rule 21.

#### FORMS

Claim for debt and to set aside fraudulent conveyance, see form 13, Appendix of Forms.

## Rule 19. Joinder of Persons Needed for Just Adjudication

### (a) Persons to be joined if feasible

A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

### (b) Determination by court whenever joinder not feasible

If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

### (c) Pleading reasons for nonjoinder

A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

### (d) Exception of class actions

This rule is subject to the provisions of Rule 23.

(As amended Feb. 28, 1966, eff. July 1, 1966.)

#### NOTES OF ADVISORY COMMITTEE ON RULES

*Note to Subdivision (a).* The first sentence with verbal differences (e.g., "united" interest for "joint" interest) is to be found in former Equity Rule 37 (Parties Generally—Intervention). Such compulsory joinder provisions are common. Compare Alaska Comp. Laws (1933) § 3392 (containing in same sentence a "class suit" provision); Wyo.Rev.Stat.Ann. (Courtright, 1931) § 89-515 (immediately followed by "class suit" provisions, § 89-516). See also former Equity Rule 42 (Joint and Several Demands). For example of a proper case for involuntary plaintiff, see *Independent Wireless Telegraph Co.* v. *Radio Corp. of America*, 269 U.S. 459, 46 S.Ct. 166, 70 L.Ed. 357 (1926).

The joinder provisions of this rule are subject to Rule 82 (Jurisdiction and Venue Unaffected).

*Note to Subdivision (b).* For the substance of this rule see former Equity Rule 39 (Absence of Persons Who Would be Proper Parties) and U.S.C., Title 28, former § 111 (now § 1391) (When part of several defendants cannot be served); *Camp* v. *Gress*, 250 U.S. 308, 39 S.Ct. 478, 63 L.Ed. 997 (1919). See also the second and third sentences of former Equity Rule 37 (Parties Generally—Intervention).

*Note to Subdivision (c).* For the substance of this rule see the fourth subdivision of former Equity Rule 25 (Bill of Complaint—Contents).

#### NOTES OF ADVISORY COMMITTEE ON 1966 AMENDMENT TO RULES

##### General Considerations

Whenever feasible, the persons materially interested in the subject of an action—see the more detailed description of these persons in the discussion of new subdivision (a) below—should be joined as parties so that they may be heard and a complete disposition made. When this comprehensive joinder cannot be accomplished—a situation which may be encountered in Federal courts because of limitations on service of process, subject matter jurisdiction, and venue—the case should be examined pragmatically and a choice made between the alternatives of proceeding with the action in the absence of particular interested persons, and dismissing the action.

Even if the court is mistaken in its decision to proceed in the absence of an interested person, it does not by that token deprive itself of the power to adjudicate as between the parties already before it through proper service of process. But the court can make a legally binding adjudication only between the parties actually joined in the action. It is true that an adjudication between the parties before the court may on occasion adversely affect the absent person as a practical matter, or leave a party exposed to a later inconsistent recovery by the absent person. These are factors which should be considered in deciding whether the action should proceed, or should rather be dismissed; but they do not themselves negate the court's power to adjudicate as between the parties who have been joined.

### Defects in the Original Rule

The foregoing propositions were well understood in the older equity practice, see Hazard, Indispensable Party: The Historical Origin of a Procedural Phantom, 61 Colum.L.Rev. 1254 (1961), and Rule 19 could be and often was applied in consonance with them. But experience showed that the rule was defective in its phrasing and did not point clearly to the proper basis of decision.

Textual defects.—(1) The expression "persons * * * who ought to be parties if complete relief is to be accorded between those already parties," appearing in original subdivision (b), was apparently intended as a description of the persons whom it would be desirable to join in the action, all questions of feasibility of joinder being put to one side; but it was not adequately descriptive of those persons.

(2) The word "Indispensable," appearing in original subdivision (b), was apparently intended as an inclusive reference to the interested persons in whose absence it would be advisable, all factors having been considered, to dismiss the action. Yet the sentence implied that there might be interested persons, not "indispensable," in whose absence the action ought also to be dismissed. Further, it seemed at least superficially plausible to equate the word "indispensable" with the expression "having a joint interest," appearing in subdivision (a). See *United States* v. *Washington Inst. of Tech., Inc.*, 138 F.2d 25, 26 (3d Cir. 1943); cf. *Chidester* v. *City of Newark*, 162 F.2d 598 (3d Cir. 1947). But persons holding an interest technically "joint" are not always so related to an action that it would be unwise to proceed without joining all of them, whereas persons holding an interest not technically "joint" may have this relation to an action. See Reed, Compulsory Joinder of Parties in Civil Actions, 55 Mich.L.Rev. 327, 356 ff., 483 (1957).

(3) The use of "indispensable" and "joint interest" in the context of original Rule 19 directed attention to the technical or abstract character of the rights or obligations of the persons whose joinder was in question, and correspondingly distracted attention from the pragmatic considerations which should be controlling.

(4) The original rule, in dealing with the feasibility of joining a person as a party to the action, besides referring to whether the person was "subject to the jurisdiction of the court as to both service of process and venue," spoke of whether the person could be made a party "without depriving the court of jurisdiction of the parties before it." The second quoted expression used "jurisdiction" in the sense of the competence of the court over the subject matter of the action, and in this sense the expression was apt. However, by a familiar confusion, the expression seems to have suggested to some that the absence from the lawsuit of a person who was "indispensable" or "who ought to be [a] part[y]" itself deprived the court of the power to adjudicate as between the parties already joined. See *Samuel Goldwyn, Inc.* v. *United Artists Corp.*, 113 F.2d 703, 707 (3d Cir. 1940); *McArthur* v. *Rosenbaum Co. of Pittsburgh*, 180 F.2d 617, 621 (3d Cir. 1949); cf. *Calcote* v. *Texas Pac. Coal & Oil Co.*, 157 F.2d 216 (5th Cir. 1946), cert. denied, 329 U.S. 782 (1946), noted in 56 Yale L.J. 1088 (1947); Reed, supra, 55 Mich.L.Rev. at 332–34.

Failure to point to correct basis of decision. The original rule did not state affirmatively what factors were relevant in deciding whether the action should proceed or be dismissed when joinder of interested persons was infeasible. In some instances courts did not undertake the relevant inquiry or were misled by the "jurisdiction" fallacy. In other instances there was undue preoccupation with abstract classifications of rights or obligations, as against consideration of the particular consequences of proceeding with the action and the ways by which these consequences might be ameliorated by the shaping of final relief or other precautions.

Although these difficulties cannot be said to have been general analysis of the cases showed that there was good reason for attempting to strengthen the rule. The literature also indicated how the rule should be reformed. See Reed, supra (discussion of the important case of *Shields* v. *Barrow*, 17 How. (58 U.S.) 130 (1854), appears at 55 Mich.L.Rev., p. 340 ff.); Hazard, supra; N.Y. Temporary Comm. on Courts, First Preliminary Report, Legis. Doc. 1957, No. 6(b), pp. 28, 233; N.Y. Judicial Council, Twelfth Ann. Rep., Legis. Doc. 1946, No. 17, p. 163; Joint Comm. on Michigan Procedural Revision, Final Report, Pt. III, p. 69 (1960); Note, Indispensable Parties in the Federal Courts, 65 Harv.L.Rev. 1050 (1952); Developments in the Law—Multiparty Litigation in the Federal Courts, 71 Harv.L.Rev. 874, 879 (1958); Mich.Gen.Court Rules, R. 205 (effective Jan. 1, 1963); N.Y.Civ.Prac.Law & Rules, § 1001 (effective Sept. 1, 1963).

### The Amended Rule

New subdivision (a) defines the persons whose joinder in the action is desirable. Clause (1) stresses the desirability of joining those persons in whose absence the court would be obliged to grant partial or "hollow" rather than complete relief to the parties before the court. The interests that are being furthered here are not only those of the parties, but also that of the public in avoiding repeated lawsuits on the same essential subject matter. Clause (2)(i) recognizes the importance of protecting the person whose joinder is in question against the pratical prejudice to him which may arise through a disposition of the action in his absence. Clause (2)(ii) recognizes the need for considering whether a party may be left, after the adjudication, in a position where a person not joined can subject him to a double or otherwise inconsistent liability. See Reed, supra, 55 Mich.L.Rev. at 330, 338; Note, supra, 65 Harv.L.Rev. at 1052–57; Developments in the Law, supra, 71 Harv.L.Rev. at 881–85.

The subdivision (a) definition of persons to be joined is not couched in terms of the abstract nature of their interests—"joint," "united," "separable," or the like. See N.Y. Temporary Comm. on Courts, First Preliminary Report, supra; Developments in the Law, supra, at 880. It should be noted particularly, however, that the description is not at variance with the settled authorities holding that a tortfeasor with the usual "joint-and-several" liability is merely a permissive party to an action against another with like liability. See 3 Moore's Federal Practice 2153 (2d ed. 1963); 2 Barron & Holtzoff, Federal Practice & Procedure § 513.8 (Wright ed. 1961). Joinder of these tortfeasors continues to be regulated by Rule 20; compare Rule 14 on third-party practice.

If a person as described in subdivision (a)(1)(2) is amenable to service of process and his joinder would not deprive the court of jurisdiction in the sense of competence over the action, he should be joined as a party; and if he has not been joined, the court should order him to be brought into the action. If a party joined has a valid objection to the venue and chooses to assert it, he will be dismissed from the action.

Subdivision (b).—When a person as described in subdivision (a)(1)-(2) cannot be made a party, the court is to determine whether in equity and good conscience the action should proceed among the parties already before it, or should be dismissed. That this decision is to be made in the light of pragmatic considerations has often been acknowledged by the courts. See *Roos* v. *Texas Co.*, 23 F.2d 171 (2d Cir. 1927), cert. denied, 277 U.S. 587 (1928); *Niles-Bement-Pond Co.* v. *Iron Moulders, Union*, 254 U.S. 77, 80 (1920). The subdivision sets out four relevant considerations drawn from the experience revealed in the decided cases. The factors are to a certain extent overlapping, and they are not intended to exclude other considerations which may be applicable in particular situations.

The first factor brings in a consideration of what a judgment in the action would mean to the absentee. Would the absentee be adversely affected in a practical sense, and if so, would the prejudice be immediate and serious, or remote and minor? The possible collaterial consequences of the judgment upon the parties already joined are also to be appraised. Would any party be exposed to a fresh action by the absentee, and if so, how serious is the threat? See the elaborate discussion in Reed, supra; cf. *A. L. Smith Iron Co.* v. *Dickson*, 141 F.2d 3 (2d Cir. 1944); *Caldwell Mfg. Co.* v. *Unique Balance Co.*, 18 F.R.D. 258 (S.D.N.Y. 1955).

The second factor calls attention to the measures by which prejudice may be averted or lessened. The "shaping of relief" is a familiar expedient to this end. See, e.g., the award of money damages in lieu of specific relief where the latter might affect an absentee adversely. *Ward* v. *Deavers*, 203 F.2d 72 (D.C.Cir. 1953); *Miller & Lux, Inc.* v. *Nickel*, 141 F.Supp. 41 (N.D.Calif. 1956). On the use of "protective provisions," see *Roos* v. *Texas Co.*, supra; *Atwood* v. *Rhode Island Hosp. Trust Co.*, 275 Fed. 513, 519 (1st Cir. 1921), cert. denied, 257 U.S. 661 (1922); cf. *Stumpf* v. *Fidelity Gas Co.*, 294 F.2d 886 (9th Cir. 1961); and the general statement in *National Licorice Co.* v. *Labor Board*, 309 U.S. 350, 363 (1940).

Sometimes the party is himself able to take measures to avoid prejudice. Thus a defendant faced with a prospect of a second suit by an absentee may be in a position to bring the latter into the action by defensive interpleader. See *Hudson* v. *Newell*, 172 F.2d 848, 852 mod., 176 F.2d 546 (5th Cir. 1949); *Gauss* v. *Kirk*, 198 F.2d 83, 86 (D.C.Cir. 1952); *Abel* v. *Brayton Flying Service, Inc.*, 248 F.2d 713, 716 (5th Cir. 1957) (suggestion of possibility of counterclaim under Rule 13(h)); cf. *Parker Rust-Proof Co.* v. *Western Union Tel. Co.*, 105 F.2d 976 (2d Cir. 1939) cert. denied, 308 U.S. 597 (1939). See also the absentee may sometimes be able to avert prejudice to himself by voluntarily appearing in the action or intervening on an ancillary basis. See Developments in the Law, supra, 71 Harv.L.Rev. at 882; Annot., Intervention or Subsequent Joinder of Parties as Affecting Jurisdiction of Federal Court Based on Diversity of Citizenship, 134 A.L.R. 335 (1941); *Johnson* v. *Middleton*, 175 F.2d 535 (7th Cir. 1949); *Kentucky Nat. Gas Corp.* v. *Duggins*, 165 F.2d 1011 (6th Cir. 1948); *McComb* v. *McCormack*, 159 F.2d 219 (5th Cir. 1947). The court should consider whether this, in turn, would impose undue hardship on the absentee. (For the possibility of the court's informing an absentee of the pendency of the action, see comment under subdivision (c) below.)

The third factor—whether an "adequate" judgment can be rendered in the absence of a given person—calls attention to the extent of the relief that can be accorded among the parties joined. It meshes with the other factors, especially the "shaping of relief" mentioned under the second factor. Cf. *Kroese* v. *General Steel Castings Corp.*, 179 F.2d 760 (3d Cir. 1949), cert. denied, 339 U.S. 983 (1950).

The fourth factor, looking to the practical effects of a dismissal, indicates that the court should consider whether there is any assurance that the plaintiff, if dismissed, could sue effectively in another forum where better joinder would be possible. See *Fitzgerald* v. *Haynes*, 241 F.2d 417, 420 (3d Cir. 1957); *Fouke* v. *Schenewerk*, 197 F.2d 234, 236 (5th Cir. 1952); cf. *Warfield* v. *Marks*, 190 F.2d 178 (5th Cir. 1951).

The subdivision uses the word "indispensable" only in a conclusory sense, that is, a person is "regarded as indispensable" when he cannot be made a party and, upon consideration of the factors above mention, it is determined that in his absence it would be preferable to dismiss the action, rather than to retain it.

A person may be added as a party at any stage of the action on motion or on the court's initiative (see Rule 21); and a motion to dismiss, on the ground that a person has not been joined and justice requires that the action should not proceed in his absence, may be made as late as the trial on the merits (see Rule 12(h)(2), as amended; cf. Rule 12(b)(7), as amended). However, when the moving party is seeking dismissal in order to protect himself against a later suit by the absent person (subdivision (a)(2)(ii)), and is not seeking vicariously to protect the absent person against a prejudicial judgment (subdivision (a)(2)(i)), his undue delay in making the motion can properly be counted against him as a reason for denying the motion. A joinder question should be decided with reasonable promptness, but decision may properly be deferred if adequate information is not available at the time. Thus the relationship of an absent person to the action, and the practical effects of an adjudication upon him and others, may not be sufficiently revealed at the pleading stage; in such a case it would be appropriate to defer decision until the action was further advanced. Cf. Rule 12(d).

The amended rule makes no special provision for the problem arising in suits against subordinate Federal officials where it has often been set up as a defense that some superior officer must be joined. Frequently this defense has been accompanied by or intermingled with defenses of sovereign community or lack of consent of the United States to suit. So far as the issue of joinder can be isolated from the rest, the new subdivision seems better adapted to handle it than the predecessor provision. See the discussion in *Johnson* v. *Kirkland*, 290 F.2d 440, 446–47 (5th Cir. 1961) (stressing the practical orientation of the decisions); *Shaughnessy* v. *Pedreiro*, 349 U.S. 48, 54 (1955). Recent legislation, P.L. 87-748, 76 Stat. 744, approved October 5, 1962, adding §§ 1361, 1391(e) to Title 28, U.S.C., vests original jurisdiction in the District Courts over actions in the nature of mandamus to compel officials of the United States to perform their legal duties, and extends the range of service of process and liberalizes venue in these actions. If, then, it is found that a particular official should be joined in the action, the legislation will make it easy to bring him in.

Subdivision (c) parallels the predecessor subdivision (c) of Rule 19. In some situations it may be desirable to advise a person who has not been joined of the fact that the action is pending, and in particular cases the court in its discretion may itself convey this information by directing a letter or other informal notice to the absentee.

Subdivision (d) repeats the exception contained in the first clause of the predecessor subdivision (a).

### CROSS REFERENCES

Class actions, see rule 23.

Indispensable party, defense of failure to join, see rule 12.

Interpleader, see rule 22.

Intervention, see rule 24.

Jurisdiction and venue unaffected by these rules, see rule 82.

Lien enforcement, ordering absent defendant to appear or plead, see section 1655 of this title.

Misjoinder and nonjoinder of parties, see rule 21.

Permissive joinder of parties, see rule 20.

Substitution of parties, see rule 25.

### Rule 20. Permissive Joinder of Parties

#### (a) Permissive joinder

All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons (and any vessel, cargo or other property subject to admiralty process in rem) may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

#### (b) Separate trials

The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice.

(As amended Feb. 28, 1966, eff. July 1, 1966.)

#### Notes of Advisory Committee on Rules

The provisions for joinder here stated are in substance the provisions found in England, California, Illinois, New Jersey, and New York. They represent only a moderate expansion of the present federal equity practice to cover both law and equity actions.

With this rule compare also former Equity Rules 26 (Joinder of Causes of Action), 37 (Parties Generally—Intervention), 40 (Nominal Parties), and 42 (Joint and Several Demands).

The provisions of this rule for the joinder of parties are subject to Rule 82 (Jurisdiction and Venue Unaffected).

*Note to Subdivision (a).* The first sentence is derived from English Rules Under the Judicature Act (The Annual Practice, 1937) O. 16, r. 1. Compare Calif.Code Civ.Proc. (Deering, 1937) §§378, 379a; Ill.Rev.Stat. (1937) ch. 110, §§147-148; N.J.Comp.Stat. (2 Cum.Supp., 1911-1924), N.Y.C.P.A. (1937) §§209, 211. The second sentence is derived from English Rules Under the Judicature Act (The Annual Practice, 1937) O. 16, r. 4. The third sentence is derived from O. 16, r. 5, and the fourth from O. 16, r.r. 1 and 4.

*Note to Subdivision (b).* This is derived from English Rules Under the Judicature Act (The Annual Practice, 1937) O. 16, r.r. 1 and 5.

#### Notes of Advisory Committee on 1966 Amendment to Rules

See the amendment of Rule 18(a) and the Advisory Committee's Note thereto. It has been thought that a lack of clarity in the antecedent of the word "them," as it appeared in two places in Rule 20(a), contributed to the view, taken by some courts, that this rule limited the joinder of claims in certain situations of permissive party joinder. Although the amendment of Rule 18(a) should make clear that this view is untenable, it has been considered advisable to amend Rule 20(a) to eliminate any ambiguity. See 2 Barron & Holtzoff, Federal Practice & Procedure 202 (Wright Ed. 1961).

A basic purpose of unification of admiralty and civil procedure is to reduce barriers to joinder; hence the reference to "any vessel," etc.

#### Cross References

Collusive and improper joinder of parties, jurisdiction of district courts, see section 1359 of this title.

Interpleader, see rule 22.
Intervention, see rule 24.
Misjoinder and nonjoinder of parties, see rule 21.
Necessary joinder of parties, see rule 19.
Substitution of parties, see rule 25,

### Rule 21. Misjoinder and Non-Joinder of Parties

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

#### Notes of Advisory Committee on Rules

See English Rules Under the Judicature Act (The Annual Practice, 1937) O. 16, r. 11. See also Equity Rules 43 (Defect of Parties—Resisting Objection) and 44 (Defect of Parties—Tardy Objection).

For separate trials see Rules 13(i) (Counterclaims and Cross-Claims: Separate Trials; Separate Judgments), 20(b) (Permissive Joinder of Parties: Separate Trials), and 42(b) (Separate Trials, generally) and the note to the latter rule.

#### Cross References

Collusive and improper joinder of parties, jurisdiction of district courts, see section 1359 of this title.

Intervention of parties, see rule 24.
Necessary joinder of parties, see rule 19.
Permissive joinder of parties, see rule 20.
Removal of causes, realignment of parties, see section 1447 of this title.

### Rule 22. Interpleader

(1) Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20.

(2) The remedy herein provided is in addition to and in no way supersedes or limits the remedy provided by Title 28, U.S.C., §§1335, 1397, and 2361. Actions under those provisions shall be conducted in accordance with these rules.

(As amended Dec. 29, 1948, eff. Oct. 20, 1949.)

#### Notes of Advisory Committee on Rules

The first paragraph provides for interpleader relief along the newer and more liberal lines of joinder in the alternative. It avoids the confusion and restrictions that developed around actions of strict interpleader and actions in the nature of interpleader. Compare *John Hancock Mutual Life Insurance Co.* v.

*Kegan et al.*, 22 F.Supp. 326 (D.C.Md., 1938). It does not change the rules on service of process, jurisdiction, and venue, as established by judicial decision.

The second paragraph allows an action to be brought under the recent interpleader statute when applicable. By this paragraph all remedies under the statute are continued, but the manner of obtaining them is in accordance with these rules. For temporary restraining orders and preliminary injunctions under this statute, see Rule 65(e).

This rule substantially continues such statutory provisions as U.S.C., Title 38, § 445 (Actions on claims; jurisdiction; parties; procedure; limitation; witnesses; definitions) (actions upon veterans' contracts of insurance with the United States), providing for interpleader by the United States where it acknowledges indebtedness under a contract of insurance with the United States; U.S.C., Title 49, § 97 (Interpleader of conflicting claimants) (by carrier which has issued bill of lading). See Chafee, The Federal Interpleader Act of 1936: I and II (1936), 45 Yale L.J. 963, 1161.

### AMENDMENTS

1948—The amendment effective October 20, 1949, substituted the reference to "Title 28, U.S.C., §§ 1335, 1397, and 2361," at the end of the first sentence of paragraph (2), for the reference to "Section 24(26) of the Judicial Code, as amended, U.S.C., Title 28, § 41(26)." The amendment also substituted the words "those provisions" in the second sentence of paragraph (2) for the words "that section."

## Rule 23. Class Actions

### (a) Prerequisites to a class action

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

### (b) Class actions maintainable

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive or the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

### (c) Determination by order whether class action to be maintained; notice; judgment; actions conducted partially as class actions

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

### (d) Orders in conduct of actions

In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

**(e) Dismissal or compromise**

A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(As amended Feb. 28, 1966, eff. July 1, 1966.)

### NOTES OF ADVISORY COMMITTEE ON RULES

*Note to Subdivision (a).* This is a substantial restatement of former Equity Rule 38 (Representatives of Class) as that rule has been construed. It applies to all actions, whether formerly denominated legal or equitable. For a general analysis of class actions, effect of judgment, and requisites of jurisdiction see Moore, Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft, 25 Georgetown L.J. 551, 570 et seq. (1937); Moore and Cohn, Federal Class Actions, 32 Ill.L.Rev. 307 (1937); Moore and Cohn, Federal Class Actions—Jurisdiction and Effect of Judgment, 32 Ill.L.Rev. 555—567 (1938); Lesar, Class Suits and the Federal Rules, 22 Minn.L.Rev. 34 (1937); cf. Arnold and James, Cases on Trials, Judgments and Appeals (1936) 175; and see Blume, Jurisdictional Amount in Representative Suits, 15 Minn.L.Rev. 501 (1931).

The general test of former Equity Rule 38 (Representatives of Class) that the question should be "one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court," is a common test. For states which require the two elements of a common or general interest and numerous persons, as provided for in former Equity Rule 38, see Del.Ch.Rule 113; Fla.Comp.Gen.Laws Ann. (Supp., 1936) § 4918 (7); Georgia Code (1933) § 37-1002, and see English Rules Under the Judicature Act (The Annual Practice, 1937) O. 16, r. 9. For statutory provisions providing for class actions when the question is one of common or general interest or when the parties are numerous, see Ala.Code Ann. (Michie, 1928) § 5701; 2 Ind.Stat.Ann. (Burns, 1933) § 2-220; N.Y.C.P.A. (1937) § 195; Wis.Stat. (1935) § 260.12. These statutes have, however, been uniformly construed as though phrased in the conjunctive. See *Garfein* v. *Stiglitz*, 260 Ky. 430, 86 S.W.2d 155 (1935). The rule adopts the test of former Equity Rule 38, but defines what constitutes a "common or general interest". Compare with code provisions which make the action dependent upon the propriety of joinder of the parties. See Blume, The "Common Questions" Principle in the Code Provision for Representative Suits, 30 Mich.L.Rev. 878 (1932). For discussion of what constitutes "numerous persons" see Wheaton, Representative Suits Involving Numerous Litigants, 19 Corn.L.Q. 399 (1934); Note, 36 Harv.L.Rev. 89 (1922).

*Clause (1), Joint, Common, or Secondary Right.* This clause is illustrated in actions brought by or against representatives of an unincorporated association. See *Oster* v. *Brotherhood of Locomotive Firemen and Enginemen*, 271 Pa. 419, 114 Atl. 377 (1921); *Pickett* v. *Walsh*, 192 Mass. 572, 78 N.E. 753, 6 L.R.A., N.S., 1067 (1906); *Colt* v. *Hicks*, 97 Ind.App. 177, 179 N.E. 335 (1932). Compare Rule 17(b) as to when an unincorporated association has capacity to sue or be sued in its common name; *United Mine Workers of America* v. *Coronado Coal Co.*, 259 U.S. 344, 42 S.Ct. 570, 66 L.Ed. 975, 27 A.L.R. 762 (1922) (an unincorporated association was sued as an entity for the purpose of enforcing against it a federal substantive right); Moore, Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft, 25 Georgetown L.J. 551, 566 (for discussion of jurisdictional requisites when an unincorporated association sues or is sued in its common name and jurisdiction is founded upon diversity of citizenship). For an action brought by representatives of one group against representatives of another group for distribution of a fund held by an unincorporated association, see *Smith* v. *Swormstedt*, 16 How. 288, 14 L.Ed. 942 (U.S. 1853). Compare *Christopher, et al.* v. *Brusselback*, 302 U.S. 500, 58 S.Ct. 350, 82 L.Ed. 388 (1938).

For an action to enforce rights held in common by policyholders against the corporate issuer of the policies, see *Supreme Tribe of Ben Hur* v. *Cauble*, 255 U.S. 356, 41 S.Ct. 338, 65 L.Ed. 673 (1921). See also *Terry* v. *Little*, 101 U.S. 216, 25 L.Ed. 864 (1880); *John A. Roebling's Sons Co.* v. *Kinnicutt*, 248 Fed. 596 (D.C.N.Y., 1917) dealing with the right held in common by creditors to enforce the statutory liability of stockholders.

Typical of a secondary action is a suit by stockholders to enforce a corporate right. For discussion of the general nature of these actions see *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 56 S.Ct. 466, 80 L.Ed. 688 (1936); Glenn, The Stockholder's Suit—Corporate and Individual Grievances, 33 Yale L.J. 580 (1924); McLaughlin, Capacity of Plaintiff-Stockholder to Terminate a Stockholder's Suit, 46 Yale L.J. 421 (1937). See also Subdivision (b) of this rule which deals with Shareholder's Action; Note, 15 Minn.L.Rev. 453 (1931).

*Clause (2).* A creditor's action for liquidation or reorganization of a corporation is illustrative of this clause. An action by a stockholder against certain named defendants as representatives of numerous claimants presents a situation converse to the creditor's action.

*Clause (3).* See *Everglades Drainage League* v. *Napoleon Broward Drainage Dist.*, 253 Fed. 246 (D.C.Fla., 1918); *Gramling* v. *Maxwell*, 52 F.2d 256 (D.C.N.C., 1931), approved in 30 Mich.L.Rev. 624 (1932); *Skinner* v. *Mitchell*, 108 Kan. 861, 197 Pac. 569 (1921); *Duke of Bedford* v. *Ellis* (1901) A.C. 1, for class actions when there were numerous persons and there was only a question of law or fact common to them; and see Blume, The "Common Questions" Principle in the Code Provision for Representative Suits, 30 Mich.L.Rev. 878 (1932).

*Note to Subdivision (b).* This is former Equity Rule 27 (Stockholder's Bill) with verbal changes. See also *Hawes* v. *Oakland*, 104 U.S. 450, 26 L.Ed. 827 (1882) and former Equity Rule 94, promulgated January 23, 1882, 104 U.S. IX.

*Note to Subdivision (c).* See McLaughlin, Capacity of Plaintiff-Stockholder to Terminate a Stockholder's Suit, 46 Yale L.J. 421 (1937).

### SUPPLEMENTARY NOTE OF ADVISORY COMMITTEE REGARDING THIS RULE

*Note.* Subdivision (b), relating to secondary actions by shareholders, provides among other things, that in such an action the complainant "shall aver (1) that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law . . ."

As a result of the decision in *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 58 S. Ct. 817 (decided April 25, 1938, after this rule was promulgated by the Supreme Court, though before it took effect) a question has arisen as to whether the provision above quoted deals with a matter of substantive right or is a matter of procedure. If it is a matter of substantive law or right, then under *Erie R. Co.* v. *Tompkins* clause (1) may not be validly applied in cases pending in states whose local law permits a shareholder to maintain such actions, although not a shareholder at the time of the transactions complained of. The Advisory Committee, believing the question should be settled in the courts, proposes no change in Rule 23 but thinks rather that the situation should be explained in an appropriate note.

The rule has a long history. In *Hawes* v. *Oakland*, 1882, 104 U.S. 450, the Court held that a shareholder could not maintain such an action unless he owned shares at the time of the transactions complained of, or unless they devolved on him by operation of law. At that time the decision in *Swift* v. *Tyson*, 1842, 16 Peters 1, was the law, and the federal courts considered themselves free to establish their own principles of equity jurisprudence, so the Court was not in 1882 and has not been, until *Erie R. Co.* v. *Tompkins* in 1938, concerned with the question whether *Hawes* v. *Oakland* dealt with substantive right or procedure.

Following the decision in *Hawes* v. *Oakland*, and at the same term, the Court, to implement its decision, adopted former Equity Rule 94, which contained the same provision above quoted from Rule 23 F.R.C.P. The provision in former Equity Rule 94 was later embodied in former Equity Rule 27, of which the present Rule 23 is substantially a copy.

In *City of Quincy* v. *Steel*, 1887, 120 U.S. 241, 245, 7 S.Ct. 520, the Court referring to *Hawes* v. *Oakland* said: "In order to give effect to the principles there laid down, this Court at that term adopted Rule 94 of the rules of practice for courts of equity of the United States."

Some other cases dealing with former Equity Rules 94 or 27 prior to the decision in *Erie R. Co.* v. *Tompkins* are *Dimpfel* v. *Ohio & Miss. R. R.*, 1884, 110 U.S. 209, 3 S.Ct. 573; *Illinois Central R. Co.* v. *Adams*, 1901, 180 U.S. 28, 34, 21 S.Ct. 251; *Venner* v. *Great Northern Ry.*, 1908, 209 U.S. 24, 30, 28 S.Ct. 328; *Jacobson* v. *General Motors Corp.*, S.D.N.Y. 1938, 22 F.Supp. 255, 257. These cases generally treat *Hawes* v. *Oakland* as establishing a "principle" of equity, or as dealing not with jurisdiction but with the "right" to maintain an action, or have said that the defense under the equity rule is analogous to the defense that the plaintiff has no "title" and results in a dismissal "for want of equity."

Those state decisions which held that a shareholder acquiring stock after the event may maintain a derivative action are founded on the view that it is a right belonging to the shareholder at the time of the transaction and which passes as a right to the subsequent purchaser. See *Pollitz* v. *Gould*, 1911, 202 N.Y. 11, 94 N.E. 1088.

The first case arising after the decision in *Erie R. Co.* v. *Tompkins*, in which this problem was involved, was *Summers* v. *Hearst*, S.D.N.Y. 1938, 23 F.Supp. 986. It concerned former Equity Rule 27, as Federal Rule 23 was not then in effect. In a well considered opinion Judge Leibell reviewed the decisions and said: "The federal cases that discuss this section of Rule 27 support the view that it states a principle of substantive law." He quoted *Pollitz* v. *Gould*, 1911, 202 N.Y. 11, 94 N.E. 1088, as saying that the United States Supreme Court "seems to have been more concerned with establishing this rule as one of practice than of substantive law" but that "whether it be regarded as establishing a principle of law or a rule of practice, this authority has been subsequently followed in the United States courts."

He then concluded that, although the federal decisions treat the equity rule as "stating a principle of substantive law", if former "Equity Rule 27 is to be modified or revoked in view of *Erie R. Co.* v. *Tompkins*, it is not the province of this Court to suggest it, much less impliedly to follow that course by disregarding the mandatory provisions of the Rule."

Some other federal decisions since 1938 touch the question.

In *Picard* v. *Sperry Corporation*, S.D.N.Y. 1941, 36 F.Supp. 1006, 1009-10, affirmed without opinion, C.C.A.2d, 1941, 120 F.2d 328, a shareholder, not such at the time of the transactions complained of, sought to intervene. The court held an intervenor was as much subject to Rule 23 as an original plaintiff; and that the requirement of Rule 23(b) was "a matter of practice," not substance, and applied in New York where the state law was otherwise, despite *Erie R. Co.* v. *Tompkins*. In *York* v. *Guaranty Trust Co. of New York*, C.C.A.2d, 1944, 143 F.2d 503, rev'd on other grounds, 1945, 65 S.Ct. 1464, the court said: "Restrictions on the bringing of stockholders' actions, such as those imposed by F.R.C.P. 23(b) or other state statutes are procedural," citing the Picard and other cases.

In *Gallup* v. *Caldwell*, C.C.A.3d, 1941, 120 F.2d 90, 95, arising in New Jersey, the point was raised but not decided, the court saying that it was not satisfied that the then New Jersey rule differed from Rule 23(b), and that "under the circumstances the proper course was to follow Rule 23(b)."

In *Mullins* v. *De Soto Securities Co.*, W.D.La. 1942, 45 F.Supp. 871, 878, the point was not decided, because the court found the Louisiana rule to be the same as that stated in Rule 23(b).

In *Toebelman* v. *Missouri-Kansas Pipe Line Co.*, D.Del. 1941, 41 F.Supp. 334, 340, the court dealt only with another part of Rule 23(b), relating to prior demands on the stockholders and did not discuss *Erie R. Co.* v. *Tompkins*, or its effect on the rule.

In *Perrott* v. *United States Banking Corp.*, D.Del. 1944, 53 F.Supp. 953, it appeared that the Delaware law does not require the plaintiff to have owned shares at the time of the transaction complained of. The court sustained Rule 23(b), after discussion of the authorities, saying:

"It seems to me the rule does not go beyond procedure. * * * Simply because a particular plaintiff cannot qualify as a proper party to maintain such an action does not destroy or even whittle at the cause of action. The cause of action exists until a qualified plaintiff can get it started in a federal court."

In *Bankers Nat. Corp.* v. *Barr*, S.D.N.Y. 1945, 9 Fed.Rules Serv. 23b.11, Case 1, the court held Rule 23(b) to be one of procedure, but that whether the plaintiff was a stockholder was a substantive question to be settled by state law.

The New York rule, as stated in *Pollitz* v. *Gould*, supra, has been altered by an act of the New York Legislature, Chapter 667, Laws of 1944, effective April 9, 1944, General Corporation Law, § 61, which provides that "in any action brought by a shareholder in the right of a . . . corporation, it must appear that the plaintiff was a stockholder at the time of the transaction of which he complains, or that his stock thereafter devolved upon him by operation of law." At the same time a further and separate provision was enacted, requiring under certain circumstances the giving of security for reasonable expenses and attorney's fees, to which security the corporation in whose right the action is brought and the defendants therein may have recourse. (Chapter 668, Laws of 1944, effective April 9, 1944, General Corporation Law, § 61-b.) These provisions are aimed at so-called "strike" stockholders' suits and their attendant abuses. *Shielcrawt* v. *Moffett*, Ct.App. 1945, 294 N.Y. 180, 61 N.E.2d 435, rev'g 51 N.Y.S.2d 188, aff'g 49 N.Y.S.2d 64; *Noel Associates, Inc.* v. *Merrill*, Sup.Ct. 1944, 184 Misc. 646, 63 N.Y.S.2d 143.

Insofar as § 61 is concerned, it has been held that the section is procedural in nature. *Klum* v. *Clinton Trust Co.*, Sup.Ct. 1944, 183 Misc. 340, 48 N.Y.S.2d 267; *Noel Associates, Inc.* v. *Merrill*, supra. In the latter case the court pointed out that "The 1944 amendment to Section 61 rejected the rule laid down in the Pollitz case and substituted, in place thereof, in its precise language, the rule which has long prevailed in the Federal Courts and which is now Rule 23(b) . . ." There is, nevertheless, a difference of opinion regarding the application of the statute to pending actions. See *Klum* v. *Clinton Trust Co.*, supra (applicable); *Noel Associates, Inc.* v. *Merrill*, supra (inapplicable).

With respect to § 61-b, which may be regarded as a separate problem, *Noel Associates, Inc.* v. *Merrill*, supra, it has been held that even though the statute is procedural in nature—a matter not definitely decided—the Legislature evinced no intent that the provision should apply to actions pending when it became effective. *Shielcrawt* v. *Moffett*, supra. As to actions instituted after the effective date of the legislation, the constitutionality of § 61-b is in dispute. See *Wolf* v. *Atkinson*, Sup. Ct. 1944, 182 Misc. 675, 49 N.Y.S.2d 703 (constitutional); *Citron* v. *Mangel Stores Corp.*, Sup.Ct. 1944, 50 N.Y.S.2d 416 (unconstitutional); Zlinkoff, The

American Investor and the Constitutionality of Section 61-B of the New York General Corporation Law, 1945, 54 Yale L.J. 352.

New Jersey also enacted a statute, similar to Chapters 667 and 668 of the New York law. See P. L. 1945, Ch. 131, R.S.Cum.Supp. 14:3-15. The New Jersey provision similar to Chapter 668, § 61-b, differs, however, in that it specifically applies retroactively. It has been held that this provision is procedural and hence will not govern a pending action brought against a New Jersey corporation in the New York courts. *Shielcrawt* v. *Moffett*, Sup.Ct.N.Y. 1945, 184 Misc. 1074, 56 N.Y.S.2d 134.

See also generally, 2 Moore's Federal Practice, 1938, 2250–2253, and Cum.Supplement § 23.05.

The decisions here discussed show that the question is a debatable one, and that there is respectable authority for either view, with a recent trend towards the view that Rule 23(b)(1) is procedural. There is reason to say that the question is one which should not be decided by the Supreme Court ex parte, but left to await a judicial decision in a litigated case, and that in the light of the material in this note, the only inference to be drawn from a failure to amend Rule 23(b) would be that the question is postponed to await a litigated case.

The Advisory Committee is unanimously of the opinion that this course should be followed.

If, however, the final conclusion is that the rule deals with a matter of substantive right, then the rule should be amended by adding a provision that Rule 23(b)(1) does not apply in jurisdictions where state law permits a shareholder to maintain a secondary action, although he was not a shareholder at the time of the transactions of which he complains.

### Notes of Advisory Committee on 1966 Amendment to Rules

Difficulties with the original rule. The categories of class actions in the original rule were defined in terms of the abstract nature of the rights involved: the so-called "true" category was defined as involving "joint, common, or secondary rights"; the "hybrid" category, as involving "several" rights related to "specific property"; the "spurious" category, as involving "several" rights affected by a common question and related to common relief. It was thought that the definitions accurately described the situations amendable to the class-suit device, and also would indicate the proper extent of the judgment in each category, which would in turn help to determine the res judicata effect of the judgment if questioned in a later action. Thus the judgments in "true" and "hybrid" class actions would extend to the class (although in somewhat different ways); the judgment in a "spurious" class action would extend only to the parties including intervenors. See Moore, Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft, 25 Geo.L.J. 551, 570–76 (1937).

In practice, the terms "joint," "common," etc., which were used as the basis of the Rule 23 classification proved obscure and uncertain. See Chaffee, Some Problems of Equity 245-46, 256-57 (1950); Kalven & Rosenfield, The Contemporary Function of the Class Suit, 8 U. of Chi.L.Rev. 684, 707 & n. 73 (1941); Keeffe, Levy & Donovan, Lee Defeats Ben Hur, 33 Corn.L.Q. 327, 329–36 (1948); Developments in the Law: Multiparty Litigation in the Federal Courts, 71 Harv.L.Rev. 874, 931 (1958); Advisory Committee's Note to Rule 19, as amended. The courts had considerable difficulty with these terms. See, e.g., *Gullo* v. *Veterans' Coop. H. Assn.*, 13 F.R.D. 11 (D.D.C. 1952); *Shipley* v. *Pittsburgh & L. E. R. Co.*, 70 F.Supp. 870 (W.D.Pa. 1947); *Deckert* v. *Independence Shares Corp.*, 27 F.Supp. 763 (E.D.Pa. 1939), rev'd, 108 F.2d 51 (3d Cir. 1939), rev'd, 311 U.S. 282 (1940), on remand, 39 F.Supp. 592 (E.D.Pa. 1941), rev'd sub nom. *Pennsylvania Co. for Ins. on Lives* v. *Deckert*, 123 F.2d 979 (3d Cir. 1941) (see Chafee, supra, at 264–65).

Nor did the rule provide an adequate guide to the proper extent of the judgments in class actions. First, we find instances of the courts classifying actions as "true" or intimating that the judgments would be decisive for the class where these results seemed appropriate but were reached by dint of depriving the word "several" of coherent meaning. See, e.g., *System Federation No. 91* v. *Reed*, 180 F.2d 991 (6th Cir. 1950); *Wilson* v. *City of Paducah*, 100 F.Supp. 116 (W.D.Ky. 1951); *Citizens Banking Co.* v. *Monticello State Bank*, 143 F.2d 261 (8th Cir. 1944); *Redmond* v. *Commerce Trust Co.*, 144 F.2d 140 (8th Cir. 1944), cert. denied, 323 U.S. 776 (1944); *United States* v. *American Optical Co.*, 97 F.Supp. 66 (N.D.Ill. 1951); (*National Hairdressers' & C. Assn.* v. *Philad. Co.*, 34 F.Supp. 264 (D.Del. 1940); 41 F.Supp. 701 (D.Del. 1940), aff'd mem., 129 F.2d 1020 (3d Cir. 1942). Second, we find cases classified by the courts as "spurious" in which, on a realistic view, it would seem fitting for the judgments to extend to the class. See, e.g., *Knapp* v. *Bankers Sec. Corp.*, 17 F.R.D. 245 (E.D.Pa. 1954); aff'd 230 F.2d 717 (3d Cir. 1956); *Giesecke* v. *Denver Tramway Corp.*, 81 F.Supp. 957 (D.Del. 1949); *York* v. *Guaranty Trust Co.*, 143 F.2d 503 (2d Cir. 1944), rev'd on grounds not here relevant, 326 U.S. 90 (1945) (see Chafee, supra, at 208); cf. *Webster Eisenlohr, Inc.* v. *Kalodner*, 145 F.2d 316, 320 (3d Cir. 1944), cert. denied, 325 U.S. 807 (1945). But cf. the early decisions, *Duke of Bedford* v. *Ellis* [1901], A.C. 1; *Sheffield Waterworks* v. *Yeomans*, L.R. 2 Ch.App. 8 (1866); *Brown* v. *Vermuden*, 1 Ch.Cas. 272, 22 Eng.Rep. 796 (1676).

The "spurious" action envisaged by original Rule 23 was in any event an anomaly because, although denominated a "class" action and pleaded as such, it was supposed not to adjudicate the rights or liabilities of any person not a party. It was believed to be an advantage of the "spurious" category that it would invite decisions that a member of the "class" could, like a member of the class in a "true" or "hybrid" action, intervene on an ancillary basis without being required to show an independent basis of Federal jurisdiction, and have the benefit of the date of the commencement of the action for purposes of the statute of limitations. See 3 Moore's Federal Practice, pars. 23.10[1], 23.12 (2d ed. 1963). These results were attained in some instances but not in others. On the statute of limitations, see *Union Carbide & Carbon Corp.* v. *Nisley*, 300 F.2d 561 (10th Cir. 1961), pet. cert. dism., 371 U.S. 801 (1963); but cf. *P. W. Husserl, Inc.* v. *Newman*, 25 F.R.D. 264 (S.D.N.Y. 1960); *Athas* v. *Day*, 161 F.Supp. 916 (D.Colo. 1958). On ancillary intervention, see *Amen* v. *Black*, 234 F.2d 12 (10th Cir. 1956), cert. granted, 352 U.S. 888 (1956), dism. on stip., 355 U.S. 600 (1958); but. cf. *Wagner* v. *Kemper*, 13 F.R.D. 128 (W.D.Mo. 1952). The results, however, can hardly depend upon the mere appearance of a "spurious" category in the rule; they should turn no more basic considerations. See discussion of subdivision (c)(1) below.

Finally, the original rule did not squarely address itself to the question of the measures that might be taken during the course of the action to assure procedural fairness, particularly giving notice to members of the class, which may in turn be related in some instances to the extension of the judgment to the class. See Chafee, supra, at 230–31; Keeffe, Levy & Donovan, supra; Developments in the Law, supra, 71 Harv.L.Rev. at 937–38; Note, Binding Effect of Class Actions, 67 Harv.L.Rev. 1059, 1062–65 (1954); Note, Federal Class Actions: A Suggested Revision of Rule 23, 46 Colum.L.Rev. 818, 833–36 (1946); Mich.Gen.Court R. 208.4 (effective Jan. 1, 1963); Idaho R.Civ.P. 23(d); Minn.R.Civ.P. 23.04; N.Dak.R.Civ.P. 23(d).

The amended rule describes in more practical terms the occasions for maintaining class actions; provides that all class actions maintained to the end as such will result in judgments including those whom the court finds to be members of the class, whether or not the judgment is favorable to the class; and refers to the measures which can be taken to assure the fair conduct of these actions.

Subdivision (a) states the prerequisites for maintaining any class action in terms of the numerousness of the class making joinder of the members impracticable, the existence of questions common to the class, and the desired qualifications of the representative parties. See Weinstein, Revision of Procedure; Some Problems in Class Actions, 9 Buffalo L.Rev. 433, 458-59 (1960); 2 Barron & Holtzoff, Federal Practice & Procedure § 562, at 265, § 572, at 351-52 (Wright ed. 1961). These are necessary but not sufficient conditions for a class action. See, e.g., *Giordano* v. *Radio Corp. of Am.*, 183 F.2d 558, 560 (3d Cir. 1950); *Zachman* v. *Erwin*, 186 F.Supp. 681 (S.D.Tex. 1959); *Baim & Blank, Inc.* v. *Warren Connelly Co., Inc.*, 19 F.R.D. 108 (S.D.N.Y. 1956). Subdivision (b) describes the additional elements which in varying situations justify the use of a class action.

Subdivision (b)(1). The difficulties which would be likely to arise if resort were had to separate actions by or against the individual members of the class here furnish the reasons for, and the principal key to, the propriety and value of utilizing the class-action device. The considerations stated under clauses (A) and (B) are comparable to certain of the elements which define the persons whose joinder in an action is desirable as stated in Rule 19(a), as amended. See amended Rule 19(a)(2)(i) and (ii), and the Advisory Committee's Note thereto; Hazard, Indispensable Party; The Historical Origin of a Procedural Phantom, 61 Colum.L.Rev. 1254, 1259-60 (1961); cf. 3 Moore, supra, par. 23.08, at 3435.

Clause (A): One person may have rights against, or be under duties toward, numerous persons constituting a class, and be so positioned that conflicting or varying adjudications in lawsuits with individual members of the class might establish incompatible standards to govern his conduct. The class action device can be used effectively to obviate the actual or virtual dilemma which would thus confront the party opposing the class. The matter has been stated thus: "The felt necessity for a class action is greatest when the courts are called upon to order or sanction the alteration of the status quo in circumstances such that a large number of persons are in a position to call on a single person to alter the status quo, or to complain if it is altered, and the possibility exists that [the] actor might be called upon to act in inconsistent ways." Louisell & Hazard, Pleading and Procedure; State and Federal 719 (1962); see *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U.S. 356, 366-67 (1921). To illustrate: Separate actions by individuals against a municipality to declare a bond issue invalid or condition or limit it, to prevent or limit the making of a particular appropriation or to compel or invalidate an assessment, might create a risk of inconsistent or varying determinations. In the same way, individual litigations of the rights and duties of riparian owners, or of landowners' rights and duties respecting a claimed nuisance, could create a possibility of incompatible adjudications. Actions by or against a class provide a ready and fair means of achieving unitary adjudication. See *Maricopa County Mun. Water Con. Dist.* v. *Looney*, 219 F.2d 529 (9th Cir. 1955); *Rank* v. *Krug*, 142 F.Supp. 1, 154-59 (S.D.Calif. 1956), on app., *State of California* v. *Rank*, 293 F.2d 340, 348 (9th Cir. 1961); *Gart* v. *Cole*, 263 F.2d 244 (2d Cir. 1959), cert. denied 359 U.S. 978 (1959); cf. *Martinez* v. *Maverick Cty. Water Con. & Imp. Dist.*, 219 F.2d 666 (5th Cir. 1955); 3 Moore, supra, par. 23.11[2], at 3458-59.

Clause (B): This clause takes in situations where the judgment in a nonclass action by or against an individual member of the class, while not technically concluding the other members, might do so as a practical matter. The vice of an individual actions would lie in the fact that the other members of the class, thus practically concluded, would have had no representation in the lawsuit. In an action by policy holders against a fraternal benefit association attacking a financial reorganization of the society, it would hardly have been practical, if indeed it would have been possible, to confine the effects of a validation of the reorganization to the individual plaintiffs. Consequently a class action was called for with adequate representation of all members of the class. See *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U.S. 356 (1921); *Waybright* v. *Columbian Mut. Life Ins. Co.*, 30 F.Supp. 885 (W.D.Tenn. 1939); cf. *Smith* v. *Swormstedt*, 16 How. (57 U.S.) 288 (1853). For much the same reason actions by shareholders to compel the declaration of a dividend the proper recognition and handling of redemption or pre-emption rights, or the like (or actions by the corporation for corresponding declarations of rights), should ordinarily be conducted as class actions, although the matter has been much obscured by the insistence that each shareholder has an individual claim. See *Knapp* v. *Bankers Securities Corp.*, 17 F.R.D. 245 (E.D.Pa. 1954), aff'd, 230 F.2d 717 (3d Cir. 1956); *Giesecke* v. *Denver Tramway Corp.*, 81 F.Supp. 957 (D.Del. 1949); *Zahn* v. *Transamerica Corp.*, 162 F.2d 36 (3d Cir. 1947); *Speed* v. *Transamerica Corp.*, 100 F.Supp. 461 (D.Del. 1951); *Sobel* v. *Whittier Corp.*, 95 F.Supp. 643 (E.D.Mich. 1951), app. dism., 195 F.2d 361 (6th Cir. 1952); *Goldberg* v. *Whittier Corp.*, 111 F.Supp. 382 (E.D.Mich. 1953); *Dann* v. *Studebaker-Packard Corp.*, 288 F.2d 201 (6th Cir. 1961); *Edgerton* v. *Armour & Co.*, 94 F.Supp. 549 (S.D.Calif. 1950); *Ames* v. *Mengel Co.*, 190 F.2d 344 (2d Cir. 1951). (These shareholders' actions are to be distinguished from derivative actions by shareholders dealt with in new Rule 23.1). The same reasoning applies to an action which charges a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class of security holders or other beneficiaries, and which requires an accounting or like measures to restore the subject of the trust. See *Bosenberg* v. *Chicago T. & T. Co.*, 128 F.2d 245 (7th Cir. 1942); *Citizens Banking Co.* v. *Monticello State Bank*, 143 F.2d 261 (8th Cir. 1944); *Redmond* v. *Commerce Trust Co.*, 144 F.2d 140 (8th Cir. 1944), cert. denied, 323 U.S. 776 (1944); cf. *York* v. *Guaranty Trust Co.*, 143 F.2d 503 (2d Cir. 1944), rev'd on grounds not here relevant, 326 U.S. 99 (1945).

In various situations an adjudication as to one or more members of the class will necessarily or probably have an adverse practical effect on the interests of other members who should therefore be represented in the lawsuit. This is plainly the case when claims are made by numerous persons against a fund insufficient to satisfy all claims. A class action by or against representative members to settle the validity of the claims as a whole, or in groups, followed by separate proof of the amount of each valid claim and proportionate distribution of the fund, meets the problem. Cf. *Dickinson* v. *Burnham*, 197 F.2d 973 (2d Cir. 1952), cert. denied, 344 U.S. 875 (1952); 3 Moore, supra, at par. 23.09. The same reasoning applies to an action by a creditor to set aside a fraudulent conveyance by the debtor and to appropriate the property to his claim, when the debtor's assets are insufficient to pay all creditors' claims. See *Hefferman* v. *Bennett & Armour*, 110 Cal.App.2d 564, 243 P.2d 846 (1952); cf. *City & County of San Francisco* v. *Market Street Ry.*, 95 Cal.App.2d 648, 213 P.2d 780 (1950). Similar problems, however, can arise in the absence of a fund either present or potential. A negative or mandatory injunction secured by one of a numerous class may disable the opposing party from performing claimed duties toward the other members of the class or materially affect his ability to do so. An adjudication as to movie "clearances and runs" nominally affecting only one exhibitor would often have practical effects on all the exhibitors in the same territorial area. Cf. *United States* v. *Paramount Pictures, Inc.*, 66 F.Supp. 323, 341-46 (S.D.N.Y. 1946); 334 U.S. 131, 144-48 (1948). Assuming a sufficiently numerous class of exhibitors, a class action would be advisable. (Here representation of subclasses of exhibitors could become necessary; see subdivision (c)(3)(B).)

Subdivision (b)(2). This subdivision is intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate. Declaratory relief "corresponds" to injunctive relief when as a practical matter it affords injunctive relief or serves as a basis for later injunctive relief. The subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages. Action or inaction is directed to a class within the meaning of this subdivision even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class.

Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration. See *Potts* v. *Flax*, 313 F.2d 284 (5th Cir. 1963); *Bailey* v. *Patterson*, 323 F.2d 201 (5th Cir. 1963), cert. denied, 377 U.S. 972 (1964); *Brunson* v. *Board of Trustees of School District No. 1, Clarendon City, S.C.*, 311 F.2d 107 (4th Cir. 1962), cert. denied, 373 U.S. 933 (1963); *Green* v. *School Bd. of Roanoke, Va.*, 304 F.2d 118 (4th Cir. 1962); *Orleans Parish School Bd.* v. *Bush*, 242 F.2d 156 (5th Cir. 1957), cert. denied, 354 U.S. 921 (1957); *Mannings* v. *Board of Public Inst. of Hillsborough County, Fla.*, 277 F.2d 370 (5th Cir. 1960); *Northcross* v. *Board of Ed. of City of Memphis*, 302 F.2d 818 (6th Cir. 1962), cert. denied 370 U.S. 944 (1962); *Frasier* v. *Board of Trustees of Univ. of N.C.*, 134 F.Supp. 589 (M.D.N.C. 1955, 3-judge court), aff'd, 350 U.S. 979 (1956). Subdivision (b)(2) is not limited to civil-rights cases. Thus an action looking to specific or declaratory relief could be brought by a numerous class of purchasers, say retailers of a given description, against a seller alleged to have undertaken to sell to that class at prices higher than those set for other purchasers, say retailers of another description, when the applicable law forbids such a pricing differential. So also a patentee of a machine, charged with selling or licensing the machine on condition that purchasers or licensees also purchase or obtain licenses to use an ancillary unpatented machine, could be sued on a class basis by a numerous group of purchasers or licensees, or by a numerous group of competing sellers or licensors of the unpatented machine, to test the legality of the "tying" condition.

Subdivision (b)(3). In the situations to which this subdivision relates, class-action treatment is not as clearly called for as in those described above, but it may nevertheless be convenient and desirable depending upon the particular facts. Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote, uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results. Cf. Chafee, supra, at 201.

The court is required to find, as a condition of holding that a class action may be maintained under this subdivision, that the questions common to the class predominate over the questions affecting individual members. It is only where this predominance exists that economies can be achieved by means of the class-action device. In this view, a fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class. On the other hand, although having some common core, a fraud case may be unsuited for treatment as a class action if there was material variation in the representation made or in the kinds or degrees of reliance by the persons to whom they were addressed. See *Oppenheimer* v. *F. J. Young & Co., Inc.*, 144 F.2d 387 (2d Cir. 1944); *Miller* v. *National City Bank of N.Y.*, 166 F.2d 723 (2d Cir. 1948); and for like problems in other contexts, see *Hughes* v. *Encyclopaedia Brittanica*, 199 F.2d 295 (7th Cir. 1952); *Sturgeon* v. *Great Lakes Steel Corp.*, 143 F.2d 819 (6th Cir. 1944). A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried. See *Pennsylvania R.R.* v. *United States*, 111 F.Supp. 80 (D.N.J. 1953); cf. Weinstein, supra, 9 Buffalo L.Rev. at 469. Private damage claims by numerous individuals arising out of concerted antitrust violations may or may not involve predominating common questions. See *Union Carbide & Carbon Corp.* v. *Nisley*, 300 F.2d 561 (10th Cir. 1961), pet. cert. dism., 371 U.S. 801 (1963); cf. *Weeks* v. *Bareco Oil Co.*, 125 F.2d 84 (7th Cir. 1941); *Kainz* v. *Anheuser-Busch, Inc.*, 194 F.2d 737 (7th Cir. 1952); *Hess* v. *Anderson, Clayton & Co.*, 20 F.R.D. 466 (S.D.Calif. 1957).

That common questions predominate is not itself sufficient to justify a class action under subdivision (b)(3), for another method of handling the litigious situation may be available which has greater practical advantages. Thus one or more actions agreed to by the parties as test or model actions may be preferable to a class action; or it may prove feasible and preferable to consolidate actions. Cf. Weinstein, supra, 9 Buffalo L.Rev. at 438–54. Even when a number of separate actions are proceeding simultaneously, experience shows that the burdens on the parties and the courts can sometimes be reduced by arrangements for avoiding repetitious discovery or the like. Currently the Coordinating Committee on Multiple Litigation in the United States District Courts (a subcommittee of the Committee on Trial Practice and Technique of the Judicial Conference of the United States) is charged with developing methods for expediting such massive litigation. To reinforce the point that the court with the aid of the parties ought to assess the relative advantages of alternative procedures for handling the total controversy, subdivision (b)(3) requires, as a further condition of maintaining the class action, that the court shall find that that procedure is "superior" to the others in the particular circumstances.

Factors (A)–(D) are listed, non-exhaustively, as pertinent to the findings. The court is to consider the interests of individual members of the class in controlling their own litigations and carrying them on as they see fit. See *Weeks* v. *Bareco Oil Co.*, 125 F.2d 84, 88–90, 93–94 (7th Cir. 1941) (anti-trust action); see also *Pentland* v. *Dravo Corp.*, 152 F.2d 851 (3d Cir. 1945), and Chaffee, supra, at 273–75, regarding policy of Fair Labor Standards Act of 1938, § 16(b), 29 U.S.C. § 216(b), prior to amendment by Portal-to-Portal Act of 1947, § 5(a). [The present provisions of 29 U.S.C. § 216(b) are not intended to be affected by Rule 23, as amended.]

In this connection the court should inform itself of any litigation actually pending by or against the individuals. The interests of individuals in conducting separate lawsuits may be so strong as to call for denial of a class action. On the other hand, these interests may be theoretic rather than practical; the class may have a high degree of cohesion and prosecution of the action through representatives would be quite unobjectionable, or the amounts at stake for individuals may be so small that separate suits would be impracticable. The burden that separate suits would impose on the party opposing the class, or upon the court calendars, may also fairly be considered. (See the discussion, under subdivision (c)(2) below, of the right of members to be excluded from the class upon their request.)

Also pertinent is the question of the desirability of concentrating the trial of the claims in the particular forum by means of a class action, in contrast to allowing the claims to be litigated separately in forums to which they would ordinarily be brought. Finally, the court should consider the problems of management which are likely to arise in the conduct of a class action.

Subdivision (c)(1). In order to give clear definition to the action, this provision requires the court to determine, as early in the proceedings as may be practicable, whether an action brought as a class action is to be so maintained. The determination depends in each case on satisfaction of the terms of subdivision (a) and the relevant provisions of subdivision (b).

An order embodying a determination can be conditional; the court may rule, for example, that a class action may be maintained only if the representation is improved through intervention of additional parties of a stated type. A determination once made can be altered or amended before the decision on the merits if, upon fuller development of the facts, the original determination appears unsound. A negative determination means that the action should be stripped of its character as a class action. See subdivision (d)(4). Although an action thus becomes a nonclass action, the court may still be receptive to interventions before the decision on the merits so that the litigation may cover as many interests as can be conveniently handled; the questions whether the intervenors in the nonclass action shall be permitted to claim "ancillary" jurisdiction or the benefit of the date of the commencement of the action for purposes of the statute of limitations are to be decided by reference to the laws governing jurisdiction and limitations as they apply in particular contexts.

Whether the court should require notice to be given to members of the class of its intention to make a determination, or of the order embodying it, is left to the court's discretion under subdivision (d)(2).

Subdivision (c)(2) makes special provision for class actions maintained under subdivision (b)(3). As noted in the discussion of the latter subdivision, the interests of the individuals in pursuing their own litigations may be so strong here as to warrant denial of a class action altogether. Even when a class action is maintained under subdivision (b)(3), this individual interest is respected. Thus the court is required to direct notice to the members of the class of the right of each member to be excluded from the class upon his request. A member who does not request exclusion may, if he wishes, enter an appearance in the action through his counsel; whether or not he does so, the judgment in the action will embrace him.

The notice setting forth the alternatives open to the members of the class, is to be the best practicable under the circumstances, and shall include individual notice to the members who can be identified through reasonable effort. (For further discussion of this notice, see the statement under subdivision (d)(2) below.)

Subdivision (c)(3). The judgment in a class action maintained as such to the end will embrace the class, that is, in a class action under subdivision (b)(1) or (b)(2), those found by the court to be class members; in a class action under subdivision (b)(3), those to whom the notice prescribed by subdivision (c)(2) was directed, excepting those who requested exclusion or who are ultimately found by the court not to be members of the class. The judgment has this scope whether it is favorable or unfavorable to the class. In a (b)(1) or (b)(2) action the judgment "describes" the members of the class, but need not specify the individual members; in a (b)(3) action the judgment "specifies" the individual members who have been identified and described the others.

Compare subdivision (c)(4) as to actions conducted as class actions only with respect to particular issues. Where the class-action character of the lawsuit is based solely on the existence of a "limited fund," the judgment, while extending to all claims of class members against the fund, has ordinarily left unaffected the personal claims of nonappearing members against the debtor. See 3 Moore, supra, par. 23.11[4].

Hitherto, in a few actions conducted as "spurious" class actions and thus nominally designed to extend only to parties and others intervening before the determination of liability, courts have held or intimated that class members might be permitted to intervene after a decision on the merits favorable to their interests, in order to secure the benefits of the decision for themselves, although they would presumably be unaffected by an unfavorable decision. See, as to the propriety of this so-called "one-way" intervention in "spurious" actions, the conflicting views expressed in *Union Carbide & Carbon Corp.* v. *Nisley*, 300 F.2d 561 (10th Cir. 1961), pet. cert. dism., 371 U.S. 801 (1963); *York* v. *Guaranty Trust Co.*, 143 F.2d 503, 529 (2d Cir. 1944), rev'd on grounds not here relevant, 326 U.S. 99 (1945); *Pentland* v. *Dravo Corp.*, 152 F.2d 851, 856 (3d Cir. 1945); *Speed* v. *Transamerica Corp.*, 100 F.Supp. 461, 463 (D.Del. 1951); *State Wholesale Grocers* v. *Great Atl. & Pac. Tea Co.*, 24 F.R.D. 510 (N.D.Ill. 1959); *Alabama Ind. Serv. Stat. Assn.* v. *Shell Pet Corp.*, 28 F.Supp. 386, 390 (N.D.Ala. 1939); *Tolliver* v. *Cudahy Packing Co.*, 39 F.Supp. 337, 339 (E.D.Tenn. 1941); Kalven & Rosenfield, supra, 8 U. of Chi.L.Rev. 684 (1941); Comment, 53 Nw.U.L.Rev. 627, 632–33 (1958); Developments in the Law, supra, 71 Harv.L.Rev. at 935; 2 Barron & Holtzoff, supra, § 568; but cf. *Lockwood* v. *Hercules Powder Co.*, 7 F.R.D. 24, 28–29 (W.D.Mo. 1947); *Abram* v. *San Joaquin Cotton Oil Co.*, 46 F.Supp. 969, 976–77 (S.D.Calif. 1942); Chaffee, supra, at 280, 285; 3 Moore, supra, par. 23.12, at 3476. Under proposed subdivision (c)(3), one-way intervention is excluded; the action will have been early determined to be a class or nonclass action, and in the former case the judgment, whether or not favorable, will include the class, as above stated.

Although thus declaring that the judgment in a class action includes the class, as defined, subdivision (c)(3) does not disturb the recognized principle that the court conducting the action cannot predetermine the res judicata effect of the judgment; this can be tested only in a subsequent action. See Restatement, Judgments § 86, comment (h), § 116 (1942). The court, however, in framing the judgment in any suit brought as a class action, must decide what its extent or coverage shall be, and if the matter is carefully considered, questions of res judicata are less likely to be raised at a later time and if raised will be more satisfactorily answered. See Chafee, supra, at 294; Weinstein, supra, 9 Buffalo L.Rev. at 460.

Subdivision (c)(4). This provision recognizes that an action may be maintained as a class action as to particular issues only. For example, in a fraud or similar case the action may retain its "class" character only through the adjudication of liability to the class; the members of the class may thereafter be required to come in individually and prove the amounts of their respective claims.

Two or more classes may be represented in a single action. Where a class is found to include subclasses divergent in interest, the class may be divided correspondingly, and each subclass treated as a class.

Subdivision (d) is concerned with the fair and efficient conduct of the action and lists some types of orders which may be appropriate.

The court should consider how the proceedings are to be arranged in sequence, and what measures should be taken to simplify the proof and argument. See subdivision (d)(1). The orders resulting from this consideration, like the others referred to in subdivision (d), may be combined with a pretrial order under Rule 16, and are subject to modification as the case proceeds.

Subdivision (d)(2) sets out a non-exhaustive list of possible occasions for orders requiring notice to the class. Such notice is not a novel conception. For example, in "limited fund" cases, members of the class have been notified to present individual claims after the basic class decision. Notice has gone to members of a class so that they might express any opposition to the representation, see *United States* v. *American Optical Co.*, 97 F.Supp. 66 (N.D.Ill. 1951), and 1950–51 CCH Trade Cases 64573–74 (par. 62869); cf. *Weeks* v. *Bareco Oil Co.*, 125 F.2d 84, 94 (7th Cir. 1941), and notice may encourage interventions to improve the representation of the class. Cf. *Oppenheimer* v. *F. J. Young & Co.*, 144 F.2d 387 (2d Cir. 1944). Notice has been used to poll members on a proposed modification of a consent decree. See record in *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683 (1961).

Subdivision (d)(2) does not require notice at any stage, but rather calls attention to its availability and invokes the court's discretion. In the degree that there is cohesiveness or unity in the class and the representation is effective, the need for notice to the class will tend toward a minimum. These indicators suggest that notice under subdivision (d)(2) may be particularly useful and advisable in certain class actions maintained under subdivision (b)(3), for example, to permit members of the class to object to the representation. Indeed, under subdivision (c)(2), notice must be ordered, and is not merely discretionary, to give the members in a subdivision (b)(3) class action an opportunity to secure exclusion from the class. This mandatory notice pursuant to subdivision (c)(2), together with any discretionary notice which the court may find it advisable to give under subdivision (d)(2), is designed to fulfill requirements of due process to which the class action procedure is of course subject. See *Hansberry* v. *Lee*, 311 U.S. 32 (1940); *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); cf. *Dickinson* v. *Burnham*, 197 F.2d 973, 979 (2d Cir. 1952), and studies cited at 979 n. 4; see also *All American Airways, Inc.* v. *Elderd*, 209 F.2d 247, 249 (2d Cir. 1954); *Gart* v. *Cole*, 263 F.2d 244, 248-49 (2d Cir. 1959), cert. denied, 359 U.S. 978 (1959).

Notice to members of the class, whenever employed under amended Rule 23, should be accommodated to the particular purpose but need not comply with the formalities for service of process. See Chafee, supra, at 230-31; *Brendle* v. *Smith*, 7 F.R.D. 119 (S.D.N.Y. 1946). The fact that notice is given at one stage of the action does not mean that it must be given at subsequent stages. Notice is available fundamentally "for the protection of the members of the class or otherwise for the fair conduct of the action" and should not be used merely as a device for the undesirable solicitation of claims. See the discussion in *Cherner* v. *Transitron Electronic Corp.*, 201 F.Supp. 934 (D.Mass. 1962); *Hormel* v. *United States*, 17 F.R.D. 303 (S.D.N.Y. 1955).

In appropriate cases the court should notify interested government agencies of the pendency of the action or of particular steps therein.

Subdivision (d)(3) reflects the possibility of conditioning the maintenance of a class action, e.g., on the strengthening of the representation, see subdivision (c)(1) above; and recognizes that the imposition of conditions on intervenors may be required for the proper and efficient conduct of the action.

As to orders under subdivision (d)(4), see subdivision (c)(1) above.

Subdivision (e) requires approval of the court, after notice, for the dismissal or compromise of any class action.

### Cross References

Capacity of unincorporated association to sue or be sued, see rule 17.

Process on corporations in stockholder's derivative action, see section 1695 of this title.

Venue in stockholder's derivative action, see section 1401 of this title.

## Rule 23.1. Derivative Actions by Shareholders

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (1) that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.

(Added Feb. 28, 1966, eff. July 1, 1966.)

### Notes of Advisory Committee on Rules

A derivative action by a shareholder of a corporation or by a member of an unincorporated association has distinctive aspects which require the special provisions set forth in the new rule. The next-to-the-last sentence recognizes that the question of adequacy of representation may arise when the plaintiff is one of a group of shareholders or members. Cf. 3 Moore's Federal Practice, par. 23.08 (2d ed. 1963).

The court has inherent power to provide for the conduct of the proceedings in a derivative action, including the power to determine the course of the proceedings and require that any appropriate notice be given to shareholders or members.

## Rule 23.2. Actions Relating to Unincorporated Associations

An action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties may be maintained only if it appears that the representative parties will fairly and adequately protect the interests of the association and its members. In the conduct of the action the court may make appropriate orders corresponding with those described in Rule 23(d), and the procedure for dismissal or compromise of the action shall correspond with that provided in Rule 23(e).

(Added Feb. 28, 1966, eff. July 1, 1966.)

### Notes of Advisory Committee on Rules

Although an action by or against representatives of the membership of an unincorporated association has often been viewed as a class action, the real or main purpose of this characterization has been to give "entity treatment" to the association when for formal reasons it cannot sue or be sued as a jural person under Rule 17(b). See Louisell & Hazard, Pleading and Procedure: State and Federal 718 (1962); 3 Moore's Federal Practice, par. 23.08 (2d ed. 1963); Story, J. in *West* v. *Randall*, 29 Fed.Cas. 718, 722-23, No. 17,424 (C.C.D.R.I. 1820); and, for examples, *Gibbs* v. *Buck*, 307 U.S. 66 (1939); *Tunstall* v. *Brotherhood of Locomotive F. & E.*, 148 F.2d 403 (4th Cir. 1945); *Oskoian* v. *Canuel*, 269 F.2d 311 (1st Cir. 1959). Rule 23.2 deals separately with these actions, referring where appropriate to Rule 23.

## Rule 24. Intervention

### (a) Intervention of right

Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

**(b) Permissive intervention**

Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

**(c) Procedure**

A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C., § 2403.

(As amended Dec. 27, 1946; Dec. 29, 1948, eff. Oct. 20, 1949; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966.)

### Notes of Advisory Committee on Rules

The right to intervene given by the following and similar statutes is preserved, but the procedure for its assertion is governed by this rule:

U.S.C., Title 28, former:
- § 45a (Special attorneys; participation by Interstate Commerce Commission; intervention) (in certain cases under interstate commerce laws)
- § 48 (Suits to be against United States; intervention by United States)
- § 401 (Intervention by United States; constitutionality of Federal statute)

U.S.C., Title 40:
- § 276a-2 (b) (Bonds of contractors for public buildings or works; rights of persons furnishing labor and materials).

Compare with the last sentence of former Equity Rule 37 (Parties Generally—Intervention). This rule amplifies and restates the present federal practice at law and in equity. For the practice in admiralty see Admiralty Rules 34 (How Third Party May Intervene) and 42 (Claims Against Proceeds in Registry). See generally Moore and Levi, Federal Intervention: I The Right to Intervene and Reorganization (1936), 45 Yale L.J. 565. Under the codes two types of intervention are provided, one for the recovery of specific real or personal property (2 Ohio Gen.Code Ann. (Page, 1926) § 11263; Wyo.Rev.Stat.Ann. (Courtright, 1931) § 89-522), and the other allowing intervention generally when the applicant has an interest in the matter in litigation (1 Colo.Stat.Ann. (1935) Code Civ.Proc. § 22; La.Code Pract. (Dart, 1932) Arts. 389-394; Utah Rev.Stat.Ann. (1933) § 104-3-24). The English intervention practice is based upon various rules and decisions and falls into the two categories of absolute right and discretionary right. For the absolute right see English Rules Under the Judicature Act (The Annual Practice, 1937) O. 12, r. 24 (admiralty), r. 25 (land), r. 23 (probate); O. 57, r. 12 (execution); J. A. (1925) §§ 181, 182, 183(2) (divorce); *In re Metropolitan Amalgamated Estates, Ltd.*, (1912) 2 Ch. 497 (receivership); *Wilson* v. *Church*, 9 Ch.D. 552 (1878) (representative action). For the discretionary right see O. 16, r. 11 (nonjoinder) and *Re Fowler*, 142 L. T. Jo. 94 (Ch. 1916), *Vavasseur* v. *Krupp*, 9 Ch.D. 351 (1878) (persons out of the jurisdiction).

### Notes of Advisory Committee on 1946 and 1948 Amendments to Rule

*Note. Subdivision (a).* The addition to subdivision (a)(3) covers the situation where property may be in the actual custody of some other officer or agency—such as the Secretary of the Treasury—but the control and disposition of the property is lodged in the court wherein the action is pending.

*Subdivision (b).* The addition in subdivision (b) permits the intervention of governmental officers or agencies in proper cases and thus avoids exclusionary constructions of the rule. For an example of the latter, see Matter of Bender Body Co., Ref.Ohio 1941, 47 F.Supp. 224, aff'd as moot, N.D.Ohio 1942, 47 F.Supp. 224, 234, holding that the Administrator of the Office of Price Administration, then acting under the authority of an Executive Order of the President, could not intervene in a bankruptcy proceeding to protest the sale of assets above ceiling prices. Compare, however, *Securities and Exchange Commission* v. *United States Realty & Improvement Co.*, 1940, 310 U.S. 434, 60 S.Ct. 1044, where permissive intervention of the Commission to protect the public interest in an arrangement proceeding under Chapter XI of the Bankruptcy Act was upheld. See also dissenting opinion in *Securities and Exchange Commission* v. *Long Island Lighting Co.*, C.C.A.2d, 1945, 148 F.2d 252, judgment vacated as moot and case remanded with direction to dismiss complaint, 1945, 325 U.S. 833, 65 S.Ct. 1085. For discussion see Commentary, Nature of Permissive Intervention Under Rule 24b, 1940, 3 Fed.Rules Serv. 704; Berger, Intervention by Public Agencies in Private Litigation in the Federal Courts, 1940, 50 Yale L.J. 65.

Regarding the construction of subdivision (b)(2), see *Allen Calculators, Inc.* v. *National Cash Register Co.*, 1944, 322 U.S. 137, 64 S. Ct. 905.

### Notes of Advisory Committee on 1963 Amendment to Rules

This amendment conforms to the amendment of Rule 5(a). See the Advisory Committee's Note to that amendment.

### Notes of Advisory Committee on 1966 Amendment to Rules

In attempting to overcome certain difficulties which have arisen in the application of present Rule 24(a)(2) and (3), this amendment draws upon the revision of the related Rules 19 (joinder of persons needed for just adjudication) and 23 (class actions), and the reasoning underlying that revision.

Rule 24(a)(3) as amended in 1948 provided for intervention of right where the applicant established that he would be adversely affected by the distribution or disposition of property involved in an action to which he had not been made a party. Significantly, some decided cases virtually disregarded the language of this provision. Thus Professor Moore states: "The concept of a fund has been applied so loosely that it is possible for a court to find a fund in almost any in personam action." 4 Moore's Federal Practice, par. 24.09[3], at 55 (2d ed. 1962), and see, e.g., *Formulabs, Inc.* v. *Hartley Pen Co.*, 275 F.2d 52 (9th Cir. 1960). This development was quite natural, for Rule 24(a)(3) was unduly restricted. If an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene, and his right to do so should not depend on whether there is a fund to be distributed or otherwise disposed of. Intervention of right is here seen to be a kind of counterpart to Rule 19(a)(2)(i) on joinder of persons needed for a just adjudication: where, upon motion of a party in an action, an absentee should be joined so that he may protect his interest which as a practical matter may be substantially impaired by the disposition of the action, he ought to have a right to intervene in the action on his own motion. See Louisell & Hazard, Pleading and Procedure: State and Federal 749-50 (1962).

The general purpose of original Rule 24(a)(2) was to entitle an absentee, purportedly represented by a party, to intervene in the action if he could establish with fair probability that the representation was inadequate. Thus, where an action is being prosecuted or defended by a trustee, a beneficiary of the trust should have a right to intervene if he can show that the trustee's representation of his interest probably is inadequate; similarly a member of a class should have the right to intervene in a class action if he can show the inadequacy of the representation of his interest by the representative parties before the court.

Original Rule 24(a)(2), however, made it a condition of intervention that "the applicant is or may be bound by a judgment in the action," and this created difficulties with intervention in class actions. If the "bound" language was read literally in the sense of res judicata, it could defeat intervention in some meritorious cases. A member of a class to whom a judgment in a class action extended by its terms (see Rule 23(c)(3), as amended) might be entitled to show in a later action, when the judgment in the class action was claimed to operate as res judicata against him, that the "representative" in the class action had not in fact adequately represented him. If he could make this showing, the class-action judgment might be held not to bind him. See *Hansberry* v. *Lee*, 311 U.S. 32 (1940). If a class member sought to intervene in the class action proper, while it was still pending, on grounds of inadequacy of representation, he could be met with the argument: if the representation was in fact inadequate, he would not be "bound" by the judgment when it was subsequently asserted against him as res judicata, hence he was not entitled to intervene; if the representation was in fact adequate, there was no occasion or ground for intervention. See *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683 (1961); cf. *Sutphen Estates, Inc.* v. *United States*, 342 U.S. 19 (1951). This reasoning might be linguistically justified by original Rule 24(a)(2); but it could lead to poor results. Compare the discussion in *International M. & I. Corp.* v. *Von Clemm*, 301 F.2d 857 (2d Cir. 1962); *Atlantic Refining Co.* v. *Standard Oil Co.*, 304 F.2d 387 (D.C.Cir. 1962). A class member who claims that his "representative" does not adequately represent him, and is able to establish that proposition with sufficient probability, should not be put to the risk of having a judgment entered in the action which by its terms extends to him, and be obliged to test the validity of the judgment as applied to his interest by a later collateral attack. Rather he should, as a general rule, be entitled to intervene in the action.

The amendment provides that an applicant is entitled to intervene in an action when his position is comparable to that of a person under Rule 19(a)(2)(i), as amended, unless his interest is already adequately represented in the action by existing parties. The Rule 19(a)(2)(i) criterion imports practical considerations, and the deletion of the "bound" language similarly frees the rule from undue preoccupation with strict considerations of res judicata.

The representation whose adequacy comes into question under the amended rule is not confined to formal representation like that provided by a trustee for his beneficiary or a representative party in a class action for a member of the class. A party to an action may provide practical representation to the absentee seeking intervention although no such formal relationship exists between them, and the adequacy of this practical representation will then have to be weighed. See *International M. & I. Corp.* v. *Von Clemm*, and *Atlantic Refining Co.* v. *Standard Oil Co.*, both supra; *Wolpe* v. *Poretsky*, 144 F.2d 505 (D.C.Cir. 1944), cert. denied, 323 U.S. 777 (1944); cf. *Ford Motor Co.* v. *Bisanz Bros.*, 249 F.2d 22 (8th Cir. 1957); and generally, Annot., 84 A.L.R.2d 1412 (1961).

An intervention of right under the amended rule may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings.

### CROSS REFERENCES

Intervention of—

- Parties interested in action to enforce, suspend or annul orders of the Interstate Commerce Commission, see section 2323 of this title.
- United States where constitutionality of federal statute is questioned, see section 2403 of this title.

### FORMS

Motion to intervene as defendant, see form 23, Appendix of Forms.

## Rule 25. Substitution of Parties

### (a) Death

(1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons, and may be served in any judicial district. Unless the motion for substitution is made not later than 90 days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.

(2) In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

### (b) Incompetency

If a party becomes incompetent, the court upon motion served as provided in subdivision (a) of this rule may allow the action to be continued by or against his representative.

### (c) Transfer of interest

In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule.

### (d) Public officers; death or separation from office

(1) When a public officer is a party to an action in his official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a

party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

(2) When a public officer sues or is sued in his official capacity, he may be described as a party by his official title rather than by name; but the court may require his name to be added.

(As amended Dec. 29, 1948, eff. Oct. 20, 1949; Apr. 17, 1961, eff. July 19, 1961; Jan. 21, 1963, July 1, 1963.)

### NOTES OF ADVISORY COMMITTEE ON RULES

*Note to Subdivision (a).* 1. The first paragraph of this rule is based upon former Equity Rule 45 (Death of Party—Revivor) and U.S.C., Title 28, former § 778 (Death of parties; substitution of executor or administrator). The *scire facias* procedure provided for in the statute cited is superseded and the writ is abolished by Rule 81 (b). Paragraph two states the content of U.S.C., Title 28, former § 779 (Death of one of several plaintiffs or defendants). With these two paragraphs compare generally English Rules Under the Judicature Act (The Annual Practice, 1937) O. 17, r.r. 1-10.

2. This rule modifies U.S.C., Title 28, former §§ 778 (Death of parties; substitution of executor or administrator), 779 (Death of one of several plaintiffs or defendants), and 780 (Survival of actions, suits, or proceedings, etc.) insofar as they differ from it.

*Note to Subdivisions (b) and (c).* These are a combination and adaptation of N.Y.C.P.A. (1937) § 83 and Calif.Code Civ.Proc. (Deering, 1937) § 385; see also 4 Nev.Comp.Laws (Hillyer, 1929) § 8561.

*Note to Subdivision (d).* With the first and last sentences compare U.S.C., Title 28, former § 780 (Survival of actions, suits, or proceedings, etc.). With the second sentence of this subdivision compare *Ex parte La Prade*, 289 U.S. 444, 53 S.Ct. 682, 77 L.Ed. 1311 (1933).

### AMENDMENTS

1948—The amendment effective October 19, 1949, inserted the words, "the Canal Zone, a territory, an insular possession," in the first sentence of subdivision (d), and, in the same sentence, after the phrase "or other governmental agency," deleted the words, "or any other officer specified in the act of February 13, 1925, ch. 229, § 11 (43 Stat. 941), formerly section 780 of this title".

### NOTES OF ADVISORY COMMITTEE ON 1961 AMENDMENT TO RULES

Subdivision (d)(1). Present Rule 25(d) is generally considered to be unsatisfactory. 4 Moore's, Federal Practice ¶ 25.01[7] (2d ed. 1950; Wright, Amendments to the Federal Rules: The Function of a Continuing Rules Committee, 7 Vand.L.Rev. 521, 529 (1954); Developments in the Law—Remedies Against the United States and Its Officials, 70 Harv.L.Rev. 827, 931-34 (1957). To require, as a condition of substituting a successor public officer as a party to a pending action, that an application be made with a showing that there is substantial need for continuing the litigation, can rarely serve any useful purpose and fosters a burdensome formality. And to prescribe a short, fixed time period for substitution which cannot be extended even by agreement, see *Snyder* v. *Buck*, 340 U.S. 15, 19 (1950), with the penalty of dismissal of the action, "makes a trap for unsuspecting litigants which seems unworthy of a great government." *Vibra Brush Corp.* v. *Schaffer*, 256 F.2d 681, 684 (2d Cir. 1958). Although courts have on occasion found means of undercutting the rule, e.g. *Acheson* v. *Furusho*, 212 F.2d 284 (9th Cir. 1954) (substitution of defendant officer unnecessary on theory that only a declaration of status was sought), it has operated harshly in many instances, e.g. *Snyder* v. *Buck*, supra; *Poindexter* v. *Folsom*, 242 F.2d 516 (3d Cir. 1957).

Under the amendment, the successor is automatically substituted as a party without an application or showing of need to continue the action. An order of substitution is not required, but may be entered at any time if a party desires or the court thinks fit.

The general term "public officer" is used in preference to the enumeration which appears in the present rule. It comprises Federal, State, and local officers.

The expression "in his official capacity" is to be interpreted in its context as part of a simple procedural rule for substitution; care should be taken not to distort its meaning by mistaken analogies to the doctrine of sovereign immunity from suit or the Eleventh Amendment. The amended rule will apply to all actions brought by public officers for the government, and to any action brought in form against a named officer, but intrinsically against the government or the office or the incumbent thereof whoever he may be from time to time during the action. Thus the amended rule will apply to actions against officers to compel performance of official duties or to obtain judicial review of their orders. It will also apply to actions to prevent officers from acting in excess of their authority or under authority not validly conferred, cf. *Philadelphia Co.* v. *Stimson*, 223 U.S. 605 (1912), or from enforcing unconstitutional enactments, cf. *Ex parte Young*, 209 U.S. 123 (1908); *Ex parte La Prade*, 289 U.S. 444 (1933). In general it will apply whenever effective relief would call for corrective behavior by the one then having official status and power, rather than one who has lost that status and power through ceasing to hold office. Cf. *Land* v. *Dollar*, 330 U.S. 731 (1947); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). Excluded from the operation of the amended rule will be the relatively infrequent actions which are directed to securing money judgments against the named officers enforceable against their personal assets; in these cases Rule 25(a)(1), not Rule 25(d), applies to the question of substitution. Examples are actions against officers seeking to make them pay damages out of their own pockets for defamatory utterances or other misconduct in some way related to the office, see *Barr* v. *Matteo*, 360 U.S. 564 (1959); *Howard* v. *Lyons*, 360 U.S. 593 (1959); *Gregoire* v. *Biddle*, 177 F.2d 579 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950). Another example is the anomalous action for a tax refund against a collector of internal revenue, see *Ignelzi* v. *Granger*, 16 F.R.D. 517 (W.D.Pa. 1955), 28 U.S.C. § 2006, 4 Moore, supra, ¶ 25.05, p. 531; but see 28 U.S.C. § 1346(a)(1), authorizing the bringing of such suits against the United States rather than the officer.

Automatic substitution under the amended rule, being merely a procedural device for substituting a successor for a past officeholder as a party, is distinct from and does not affect any substantive issues which may be involved in the action. Thus a defense of immunity from suit will remain in the case despite a substitution.

Where the successor does not intend to pursue the policy of his predecessor which gave rise to the lawsuit, it will be open to him, after substitution, as plaintiff to seek voluntary dismissal of the action, or as defendant to seek to have the action dismissed as moot or to take other appropriate steps to avert a judgment or decree. Contrast *Ex parte La Prade*, supra; *Allen* v. *Regents of the University System*, 304 U.S. 439 (1938); *McGrath* v. *National Assn. of Mfgrs.*, 344 U.S. 804 (1952); *Danenberg.* v. *Cohen*, 213 F.2d 944 (7th Cir. 1954).

As the present amendment of Rule 25(d)(1) eliminates a specified time period to secure substitution of public officers, the reference in Rule 6(b) (regarding enlargement of time) to Rule 25 will no longer apply to these public-officer substitutions.

As to substitution on appeal, the rules of the appellate courts should be consulted.

Subdivision (d)(2). This provision, applicable in "official capacity" cases as described above, will encourage the use of the official title without any mention of the officer individually, thereby recognizing the intrinsic character of the action and helping to eliminate concern with the problem of substitution. If for any reason it seems desirable to add the individual's name, this may be done upon motion or on the court's initiative; thereafter the procedure of amended Rule 25(d)(1) will apply if the individual named ceases to hold office.

For examples of naming the office or title rather than the officeholder, see *Annot.*, 102 A.L.R. 943, 948–52; *Comment*, 50 Mich.L.Rev. 443, 450 (1952); cf. 26 U.S.C. § 7484. Where an action is brought by or against a board or agency with continuity of existence, it has been often decided that there is no need to name the individual members and substitution is unnecessary when the personnel changes. 4 Moore, supra, ¶ 25.09, p. 536. The practice encouraged by amended Rule 25(d)(2) is similar.

### Notes of Advisory Committee on 1963 Amendment to Rules

Present Rule 25(a)(1), together with present Rule 6(b), results in an inflexible requirement that an action be dismissed as to a deceased party if substitution is not carried out within a fixed period measured from the time of the death. The hardships and inequities of this unyielding requirement plainly appear from the cases. See e.g., *Anderson* v. *Yungkau*, 329 U.S. 482, 67 S.Ct. 428, 91 L.Ed. 436 (1947); *Iovino* v. *Waterson*, 274 F.2d 41 (1959), cert. denied, *Carlin* v. *Sovino*, 362 U.S. 949, 80 S.Ct. 860, 4 L.Ed.2d 867 (1960); *Perry* v. *Allen*, 239 F.2d 107 (5th Cir. 1956); *Starnes v. Pennsylvania R.R.*, 26 F.R.D. 625 (E.D.N.Y.), aff'd per curiam, 295 F.2d 704 (2d Cir. 1961), cert. denied, 369 U.S. 813, 82 S.Ct. 688, 7 L.Ed.2d 612 (1962); *Zdanok* v. *Glidden Co.*, 28 F.R.D. 346 (S.D.N.Y. 1961). See also 4 Moore's Federal Practice ¶ 25.01[9] (Supp. 1960); 2 Barron & Holtzoff, Federal Practice & Procedure § 621, at 420–21 (Wright ed. 1961).

The amended rule establishes a time limit for the motion to substitute based not upon the time of the death, but rather upon the time information of the death as provided by the means of a suggestion of death upon the record, i.e., service of a statement of the fact of the death. Cf. Ill.Ann.Stat., ch. 110, § 54(2) (Smith-Hurd 1956). The motion may not be made later than 90 days after the service of the statement unless the period is extended pursuant to Rule 6(b), as amended. See the Advisory Committee's Note to amended Rule 6(b). See also the new Official Form 30.

A motion to substitute may be made by any party or by the representative of the deceased party without awaiting the suggestion of death. Indeed, the motion will usually be so made. If a party or the representative of the deceased party desires to limit the time within which another may make the motion, he may do so by suggesting the death upon the record.

A motion to substitute made within the prescribed time will ordinarily be granted, but under the permissive language of the first sentence of the amended rule ("the court may order") it may be denied by the court in the exercise of a sound discretion if made long after the death—as can occur if the suggestion of death is not made or is delayed—and circumstances have arisen rendering it unfair to allow substitution. Cf. *Anderson* v. *Yungkau*, supra, 329 U.S. at 485, 486, 67 S.Ct. at 430, 431, 91 L.Ed. 436, where it was noted under the present rule that settlement and distribution of the state of a deceased defendant might be so far advanced as to warrant denial of a motion for substitution even though made within the time limit prescribed by that rule. Accordingly, a party interested in securing substitution under the amended rule should not assume that he can rest indefinitely awaiting the suggestion of death before he makes his motion to substitute.

### Cross References

Depositions, right to use after substitution, see rule 26.

Extension of time for substitution, prohibiting, see rule 6.

## TITLE V—DEPOSITIONS AND DISCOVERY

### Advisory Committee's Explanatory Statement Concerning 1970 Amendments of the Discovery Rules

This statement is intended to serve as a general introduction to the amendments of Rules 26–37, concerning discovery, as well as related amendments of other rules. A separate note of customary scope is appended to amendments proposed for each rule. This statement provides a framework for the consideration of individual rule changes.

#### *Changes in the Discovery Rules*

The discovery rules, as adopted in 1938, were a striking and imaginative departure from tradition. It was expected from the outset that they would be important, but experience has shown them to play an even larger role than was initially foreseen. Although the discovery rules have been amended since 1938, the changes were relatively few and narrowly focused, made in order to remedy specific defects. The amendments now proposed reflect the first comprehensive review of the discovery rules undertaken since 1938. These amendments make substantial changes in the discovery rules. Those summarized here are among the more important changes.

*Scope of Discovery.* New provisions are made and existing provisions changed affecting the scope of discovery: (1) The contents of insurance policies are made discoverable (Rule 26(b)(2)). (2) A showing of good cause is no longer required for discovery of documents and things and entry upon land (Rule 34). However, a showing of need is required for discovery of "trial preparation" materials other than a party's discovery of his own statement and a witness' discovery of his own statement; and protection is afforded against disclosure in such documents of mental impressions, conclusions, opinions, or legal theories concerning the litigation. (Rule 26(b)(3)). (3) Provision is made for discovery with respect to experts retained for trial preparation, and particularly those experts who will be called to testify at trial (Rule 26(b)(4)). (4) It is provided that interrogatories and requests for admission are not objectionable simply because they relate to matters of opinion or contention, subject of course to the supervisory power of the court (Rules 33(b), 36(a)). (5) Medical examination is made available as to certain nonparties. (Rule 35(a)).

*Mechanics of Discovery.* A variety of changes are made in the mechanics of the discovery process, affecting the sequence and timing of discovery, the respective obligations of the parties with respect to requests, responses, and motions for court orders, and the related powers of the court to enforce discovery requests and to protect against their abusive use. A new provision eliminates the automatic grant of priority in discovery to one side (Rule 26(d)). Another provides that a party is not under a duty to supplement his responses to requests for discovery, except as specified (Rule 26(e)).

Other changes in the mechanics of discovery are designed to encourage extrajudicial discovery with a minimum of court intervention. Among these are the following: (1) The requirement that a plaintiff seek leave of court for early discovery requests is eliminated or reduced, and motions for a court order under Rule 34 are made unnecessary. Motions under Rule 35 are continued. (2) Answers and objections are to be served together and an enlargement of the time for response is provided. (3) The party seeking discovery, rather than the objecting party, is made responsible for invoking judicial determination of discovery disputes not resolved by the parties. (4) Judicial sanctions are tightened with respect to unjustified insistence upon or objection to discovery. These changes bring Rules 33, 34, and 36 substantially into line with the procedure now provided for depositions.

Failure to amend Rule 35 in the same way is based upon two considerations. First, the Columbia Survey (described below) finds that only about 5 percent of medical examinations require court motions, of which about half result in court orders. Second and of greater importance, the interest of the person to be examined in the privacy of his person was recently stressed by the Supreme Court in *Schlagenhauf* v. *Holder*, 379 U.S. 104 (1964). The court emphasized the trial judge's responsibility to assure that the medical examination was justified, particularly as to its scope.

*Rearrangement of Rules.* A limited rearrangement of the discovery rules has been made, whereby certain provisions are transferred from one rule to another. The reasons for this rearrangement are discussed below in a separate section of this statement, and the details are set out in a table at the end of this statement.

*Optional Procedures.* In two instances, new optional procedures have been made available. A new procedure is provided to a party seeking to take the deposition of a corporation or other organization (Rule 30(b)(6)). A party on whom interrogatories have been served requesting information derivable from his business records may under specified circumstances produce the records rather than give answers (Rule 33(c)).

*Other Changes.* This summary of changes is by no means exhaustive. Various changes have been made in order to improve, tighten, or clarify particular provisions, to resolve conflicts in the case law, and to improve language. All changes, whether mentioned here or not, are discussed in the appropriate note for each rule.

### *A Field Survey of Discovery Practice*

Despite widespread acceptance of discovery as an essential part of litigation, disputes have inevitably arisen concerning the values claimed for discovery and abuses alleged to exist. Many disputes about discovery relate to particular rule provisions or court decisions and can be studied in traditional fashion with a view to specific amendment. Since discovery is in large measure extra-judicial, however, even these disputes may be enlightened by a study of discovery "in the field." And some of the larger questions concerning discovery can be pursued only by a study of its operation at the law office level and in unreported cases.

The Committee, therefore, invited the Project for Effective Justice of Columbia Law School to conduct a field survey of discovery. Funds were obtained from the Ford Foundation and the Walter E. Meyer Research Institute of Law, Inc. The survey was carried on under the direction of Prof. Maurice Rosenberg of Columbia Law School. The Project for Effective Justice has submitted a report to the Committee entitled "Field Survey of Federal Pretrial Discovery" (hereafter referred to as the Columbia Survey). The Committee is deeply grateful for the benefit of this extensive undertaking and is most appreciative of the cooperation of the Project and the funding organizations. The Committee is particularly grateful to Professor Rosenberg who not only directed the survey but has given much time in order to assist the Committee in assessing the results.

The Columbia Survey concludes, in general, that there is no empirical evidence to warrant a fundamental change in the philosophy of the discovery rules. No widespread or profound failings are disclosed in the scope or availability of discovery. The costs of discovery do not appear to be oppressive, as a general matter, either in relation to ability to pay or to the stakes of the litigation. Discovery frequently provides evidence that would not otherwise be available to the parties and thereby makes for a fairer trial or settlement. On the other hand, no positive evidence is found that discovery promotes settlement.

More specific findings of the Columbia Survey are described in other Committee notes, in relation to particular rule provisions and amendments. Those interested in more detailed information may obtain it from the Project for Effective Justice.

### *Rearrangement of the Discovery Rules*

The present discovery rules are structured entirely in terms of individual discovery devices, except for Rule 27 which deals with perpetuation of testimony, and Rule 37 which provides sanctions to enforce discovery. Thus, Rules 26 and 28 to 32 are in terms addressed only to the taking of a deposition of a party or third person. Rules 33 to 36 then deal in succession with four additional discovery devices: Written interrogatories to parties, production for inspection of documents and things, physical or mental examination and requests for admission.

Under the rules as promulgated in 1938, therefore, each of the discovery devices was separate and self-contained. A defect of this arrangement is that there is no natural location in the discovery rules for provisions generally applicable to all discovery or to several discovery devices. From 1938 until the present, a few amendments have applied a discovery provision to several rules. For example, in 1948, the scope of deposition discovery in Rule 26(b) and the provision for protective orders in Rule 30(b) were incorporated by reference in Rules 33 and 34. The arrangement was adequate so long as there were few provisions governing discovery generally and these provisions were relatively simple.

As will be seen, however, a series of amendments are now proposed which govern most or all of the discovery devices. Proposals of a similar nature will probably be made in the future. Under these circumstances, it is very desirable, even necessary, that the discovery rules contain one rule addressing itself to discovery generally.

Rule 26 is obviously the most appropriate rule for this purpose. One of its subdivisions, Rule 26(b), in terms governs only scope of deposition discovery, but it has been expressly incorporated by reference in Rules 33 and 34 and is treated by courts as setting a general standard. By means of a transfer to Rule 26 of the provisions for protective orders now contained in Rule 30(b), and a transfer from Rule 26 of provisions addressed exclusively to depositions, Rule 26 is converted into a rule concerned with discovery generally. It becomes a convenient vehicle for the inclusion of new provisions dealing with the scope, timing, and regulation of discovery. Few additional transfers are needed. See table showing rearrangement of rules, set out below.

There are, to be sure, disadvantages in transferring any provision from one rule to another. Familiarity with the present pattern, reinforced by the references made by prior court decisions and the various secondary writings about the rules, is not lightly to be sacrificed. Revision of treatieses and other references works is burdensome and costly. Moreover, many States have adopted the existing pattern as a model for their rules.

On the other hand, the amendments now proposed will in any event require revision of texts and reference works as well as reconsideration by States following the Federal model. If these amendments are to be incorporated in an understandable way, a rule with general discovery provisions is needed. As will be seen, the proposed rearrangement produces a more coherent and intelligible pattern for the discovery rules taken as a whole. The difficulties described are those encountered whenever statutes are reexamined and revised. Failure to rearrange the discovery rules now would freeze the present scheme, making future change even more difficult.

Table Showing Rearrangement of Rules

| *Existing Rule No.* | *New Rule No.* |
|---|---|
| 26(a) | 30(a), 31(a) |
| 26(c) | 30(c) |
| 26(d) | 32(a) |

| *Existing Rule No.* | *New Rule No.* |
|---|---|
| 26(e) | 32(b) |
| 26(f) | 32(c) |
| 30(a) | 30(b) |
| 30(b) | 26(c) |
| 32 | 32(d) |

### Rule 26. General Provisions Governing Discovery

#### (a) Discovery methods

Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise under subdivision (c) of this rule, the frequency of use of these methods is not limited.

#### (b) Scope of discovery

Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In general.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) *Insurance agreements.* A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

(3) *Trial preparation: materials.* Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) *Trial preparation: experts.* Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A)(ii) and (b)(4)(B) of this rule; and (ii) with respect to discovery obtained under subdivision (b)(4)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

#### (c) Productive orders

Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

### (d) Sequence and timing of discovery

Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

### (e) Supplementation of responses

A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

(2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (A) he knows that the response was incorrect when made, or (B) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Mar. 30, 1970, eff. July 1, 1970.)

### NOTES OF ADVISORY COMMITTEE ON RULES

*Note to Subdivision* (*a*). This rule freely authorizes the taking of depositions under the same circumstances and by the same methods whether for the purpose of discovery or for the purpose of obtaining evidence. Many states have adopted this practice on account of its simplicity and effectiveness, safeguarding it by imposing such restrictions upon the subsequent use of the deposition at the trial or hearing as are deemed advisable. See Ark.Civ.Code (Crawford, 1934) §§ 606–607; Calif.Code Civ.Proc. (Deering, 1937) § 2021; 1 Colo.Stat.Ann. (1935) Code Civ.Proc. § 376; Idaho Code Ann. (1932) § 16–906; Ill. Rules of Pract., Rule 19 (Ill.Rev.Stat. (1937) ch. 110, § 259.19); Ill.Rev.Stat. (1937) ch. 51, § 24; 2 Ind.Stat.Ann. (Burns, 1933) §§ 2-1501, 2–1506; Ky.Codes (Carroll, 1932) Civ.Pract. § 557; 1 Mo.Rev.Stat. (1929) § 1753; 4 Mont.Rev.Codes Ann. (1935) § 10645; Neb.Comp.Stat. (1929) ch. 20, §§ 1246–7; 4 Nev.Comp.Laws (Hillyer, 1929) § 9001; 2 N.H.Pub.Laws (1926) ch. 337, § 1; N.C.Code Ann. (1935) § 1809; 2 N.D.Comp.Laws Ann. (1913) §§ 7889–7897; 2 Ohio Gen.Code Ann. (Page, 1926) §§ 11525–6; 1 Ore.Code Ann. (1930) Title 9, § 1503; 1 S.D.Comp.Laws (1929) §§ 2713–16; Tex.Stat. (Vernon, 1928) arts. 3738, 3752, 3769; Utah Rev.Stat.Ann. (1933) § 104–51–7; Wash. Rules of Practice adopted by the Supreme Ct., Rule 8, 2 Wash.Rev.Stat.Ann. (Remington, 1932) § 308–8; W.Va.Code (1931) ch. 57, art. 4, § 1. Compare Equity Rules 47 (Depositions—To be Taken in Exceptional Instances); 54 (Depositions Under Revised Statutes, Sections 863, 865, 866, 867—Cross-Examination); 58 (Discovery—Interrogatories—Inspection and Production of Documents—Admission of Execution or Genuineness).

This and subsequent rules incorporate, modify, and broaden the provisions for depositions under U.S.C., Title 28, former §§ 639 (Depositions *de bene esse;* when and where taken; notice), 640 (Same; mode of taking), 641 (Same; transmission to court), 644 (Depositions under *dedimus potestatem* and *in perpetuam*), 646 (Deposition under *dedimus potestatem;* how taken). These statutes are superseded insofar as they differ from this and subsequent rules. U.S.C., Title 28, former § 643 (Depositions; taken in mode prescribed by State laws) is superseded by the third sentence of Subdivision (a).

While a number of states permit discovery only from parties or their agents, others either make no distinction between parties or agents of parties and ordinary witnesses, or authorize the taking of ordinary depositions, without restriction, from any persons who have knowledge of relevant facts. See Ark.Civ.Code (Crawford, 1934) §§ 606–607; 1 Idaho Code Ann. (1932) § 16–906; Ill. Rules of Pract., Rule 19 (Ill.Rev.Stat. (1937) ch. 110, § 259.19); Ill.Rev.Stat. (1937) ch. 51, § 24; 2 Ind.Stat.Ann. (Burns, 1933) § 2–1501; Ky.Codes (Carroll, 1932) Civ.Pract. §§ 554–558; 2 Md.Ann.Code (Bagby, 1924) Art. 35, § 21; 2 Minn.Stat. (Mason, 1927) § 9820; 1 Mo.Rev.Stat. (1929) §§ 1753, 1759; Neb.Comp.Stat. (1929) ch. 20, §§ 1246–7; 2 N.H.Pub.Laws (1926) ch. 337, § 1; 2 N.D.Comp.Laws Ann. (1913) § 7897; 2 Ohio Gen.Code Ann. (Page, 1926) §§ 11525–6; 1 S.D.Comp.Laws (1929) §§ 2713–16; Tex.Stat. (Vernon, 1928) arts. 3738, 3752, 3769; Utah Rev.Stat.Ann. (1933) § 104–51–7; Wash. Rules of Practice adopted by Supreme Ct., Rule 8, 2 Wash.Rev.Stat.Ann. (Remington, 1932) § 308–8; W.Va.Code (1931) ch. 57, art. 4, § 1.

The more common practice in the United States is to take depositions on notice by the party desiring them, without any order from the court, and this has been followed in these rules. See Calif.Code Civ.Proc. (Deering 1937) § 2031; 2 Fla.Comp.Gen.Laws Ann. (1927) §§ 4405–7; 1 Idaho Code Ann. (1932) § 16–902; Ill. Rules of Pract., Rule 19 (Ill.Rev.Stat. (1937) ch. 110, § 25919); Ill.Rev.Stat. (1937) ch. 51, § 24; 2 Ind.Stat.Ann. (Burns, 1933) § 2–1502; Kan.Gen.Stat.Ann. (1935) § 60–2827; Ky.Codes (Carroll, 1932) Civ.Pract. § 565; 2 Minn.Stat. (Mason, 1927) § 9820; 1 Mo.Rev.Stat. (1929) § 1761; 4 Mont.Rev.Codes Ann. (1935) § 10651; Nev.Comp.Laws (Hillyer, 1929) § 9002; N.C.Code Ann. (1935) § 1809; 2

N.D.Comp.Laws Ann. (1913) § 7895; Utah Rev.Stat.Ann. (1933) § 104-51-8.

*Note to Subdivision* (*b*). While the old chancery practice limited discovery to facts supporting the case of the party seeking it, this limitation has been largely abandoned by modern legislation. See Ala.Code Ann. (Michie, 1928) §§ 7764-7773; 2 Ind.Stat.Ann. (Burns, 1933) §§ 2-1028, 2-1506, 2-1728-2-1732; Iowa Code (1935) § 11185; Ky.Codes (Carroll, 1932) Civ.Pract. §§ 557, 606 (8); La.Code Pract. (Dart, 1932) arts. 347-356; 2 Mass.Gen.Laws (Ter.Ed., 1932) ch. 231, §§ 61-67; 1 Mo.Rev.Stat. (1929) §§ 1753, 1759; Neb.Comp.Stat. (1929) §§ 20-1246, 20-1247; 2 N.H.Pub.Laws (1926) ch. 337, § 1; 2 Ohio Gen.Code Ann. (Page, 1926) §§ 11497, 11526; Tex.Stat. (Vernon, 1928) arts. 3738, 3753, 3769; Wis.Stat. (1935) § 326.12; Ontario Consol.Rules of Pract. (1928) Rules 237-347; Quebec Code of Civ.Proc. (Curran, 1922) §§ 286-290.

*Note to Subdivisions* (*d*), (*e*), *and* (*f*). The restrictions here placed upon the use of depositions at the trial or hearing are substantially the same as those provided in U.S.C., Title 28, former § 641, for depositions taken, *de bene esse*, with the additional provision that any deposition may be used when the court finds the existence of exceptional circumstances. Compare English Rules Under the Judicature Act (The Annual Practice, 1937) O. 37, r. 18 (with additional provision permitting use of deposition by consent of the parties). See also former Equity Rule 64 (Former Depositions, Etc., May be Used Before Master); and 2 Minn. Stat. (Mason, 1927) § 9835 (Use in a subsequent action of a deposition filed in a previously dismissed action between the same parties and involving the same subject matter).

### Notes of Advisory Committee on 1946 Amendment to Rules

*Note. Subdivision* (*a*). The amendment eliminates the requirement of leave of court for the taking of a deposition except where a plaintiff seeks to take a deposition within 20 days after the commencement of the action. The retention of the requirement where a deposition is sought by a plaintiff within 20 days of the commencement of the action protects a defendant who has not had an opportunity to retain counsel and inform himself as to the nature of the suit; the plaintiff, of course, needs no such protection. The present rule forbids the plaintiff to take a deposition, without leave of court, before the answer is served. Sometimes the defendant delays the serving of an answer for more than 20 days, but as 20 days are sufficient time for him to obtain a lawyer, there is no reason to forbid the plaintiff to take a deposition without leave merely because the answer has not been served. In all cases, Rule 30(a) empowers the court, for cause shown, to alter the time of the taking of a deposition, and Rule 30(b) contains provisions giving ample protection to persons who are unreasonably pressed. The modified practice here adopted is along the line of that followed in various states. See, e.g., 8 Mo.Rev.Stat.Ann., 1939, § 1917; 2 Burns' Ind.Stat.Ann., 1933, § 2-1506.

*Subdivision* (*b*). The amendments to subdivision (b) make clear the broad scope of examination and that it may cover not only evidence for use at the trial but also inquiry into matters in themselves inadmissible as evidence but which will lead to the discovery of such evidence. The purpose of discovery is to allow a broad search for facts, the names of witnesses, or any other matters which may aid a party in the preparation or presentation of his case. *Engl* v. *Aetna Life Ins. Co.*, C.C.A.2d, 1943, 139 F.2d 469; *Mahler* v. *Pennsylvania R. Co.*, E.D.N.Y. 1945, 8 Fed.Rules Serv. 33,351, Case 1. In such a preliminary inquiry admissibility at trial should not be the test as to whether the information sought is within the scope of proper examination. Such a standard unnecessarily curtails the utility of discovery practice. Of course, matters entirely without bearing either as direct evidence or as leads to evidence are not within the scope of inquiry, but to the extent that the examination develops useful information, it functions successfully as an instrument of discovery, even if it produces no testimony directly admissible. *Lewis* v. *United Air Lines Transportation Corp.*, D.Conn. 1939, 27 F.Supp. 946; *Engl* v. *Aetna Life Ins. Co.*, supra; *Mahler* v. *Pennsylvania R. Co.*, supra; *Bloomer* v. *Sirian Lamp Co.*, D.Del. 1944, 8 Fed.Rules Serv. 26b.31, Case 3; *Rousseau* v. *Langley*, S.D.N.Y. 1945, 9 Fed.Rules Serv. 34.41, Case 1 (Rule 26 contemplates "examinations not merely for the narrow purpose of adducing testimony which may be offered in evidence but also for the broad discovery of information which may be useful in preparation for trial."); *Olson Transportation Co.* v. *Socony-Vacuum Co.*, E.D.Wis. 1944, 8 Fed.Rules Serv. 34.41, Case 2 (". . . the Rules . . . permit 'fishing' for evidence as they should."); Note, 1945, 45 Col.L.Rev. 482. Thus hearsay, while inadmissible itself, may suggest testimony which properly may be proved. Under Rule 26 (b) several cases, however, have erroneously limited discovery on the basis of admissibility, holding that the word "relevant" in effect meant "material and competent under the rules of evidence". *Poppino* v. *Jones Store Co.*, W.D.Mo. 1940, 1 F.R.D. 215, 3 Fed.Rules Serv. 26b.5, Case 1; *Benevento* v. *A. & P. Food Stores, Inc.*, E.D.N.Y. 1939, 26 F.Supp. 424. Thus it has been said that inquiry might not be made into statements or other matters which, when disclosed, amounted only to hearsay. See *Maryland for use of Montvila* v. *Pan-American Bus Lines, Inc.*, D.Md. 1940, 1 F.R.D. 213, 3 Fed.Rules Serv. 26b.211, Case 3; *Gitto* v. *"Italia," Societa Anonima Di Navigazione*, E.D.N.Y. 1940, 31 F.Supp. 567; *Rose Silk Mills, Inc.* v. *Insurance Co. of North America*, S.D.N.Y. 1939, 29 F.Supp. 504; *Colpak* v. *Hetterick*, E.D.N.Y. 1941, 40 F.Supp. 350; *Matthies* v. *Peter F. Connolly Co.*, E.D.N.Y. 1941, 6 Fed.Rules Serv. 30a.22, Case 1, 2 F.R.D. 277; *Matter of Examination of Citizens Casualty Co. of New York* S.D.N.Y. 1942, 3 F.R.D. 171, 7 Fed.Rules Serv. 26b.211, Case 1; *United States* v. *Silliman*, D.C.N.J. 1944 8 Fed.Rules Serv. 26b.52, Case 1. The contrary and better view, however, has often been stated. See e.g., *Engl* v. *Aetna Life Ins. Co.*, supra; *Stevenson* v. *Melady*, S.D.N.Y. 1940, 3 Fed.Rules Serv. 26b.31, Case 1, 1 F.R.D. 329; *Lewis* v. *United Air Lines Transport Corp.*, supra; *Application of Zenith Radio Corp.*, E.D.Pa. 1941, 4 Fed.Rules Serv. 30b. 21, Case 1, 1 F.R.D. 627; *Steingut* v. *Guaranty Trust Co. of New York*, S.D.N.Y. 1941, 1 F.R.D. 723, 4 Fed.Rules Serv. 26b.5. Case 2: *DeSeversky* v. *Republic Aviation Corp*, E.D.N.Y. 1941, 2 F.R.D. 183, 5 Fed.Rules Serv. 26b.31, Case 5; *Moore* v. *George A. Hormel & Co.*, S.D.N.Y. 1942, 6 Fed.Rules Serv. 30b.41, Case 1, 2 F.R.D. 340; *Hercules Powder Co.* v. *Rohm & Haas Co.*, D.Del. 1943, 7 Fed.Rules Serv. 45b.311, Case 2, 3 F.R.D. 302; *Bloomer* v. *Sirian Lamp Co.*, supra; *Crosby Steam Gage & Valve Co.* v. *Manning, Maxwell & Moore, Inc.*, D.Mass. 1944, 8 Fed.Rules Serv. 26b.31, Case 1; *Patterson Oil Terminals, Inc.* v. *Charles Kurz & Co., Inc.*, E.D.Pa. 1945, 9 Fed.Rules Serv. 33.321, Case 2; *Pueblo Trading Co.* v. *Reclamation Dist. No. 1500*, N.D.Cal. 1945, 9 Fed.Rules Serv. 33.321, Case 4, 4 F.R.D. 471. See also discussion as to the broad scope of discovery in *Hoffman* v. *Palmer*, C.C.A.2d, 1942, 129 F.2d 976, 995-997, aff'd on other grounds, 1942, 318 U.S. 109, 63 S.Ct. 477; Note, 1945, 45 Col.L.Rev. 482.

### Notes of Advisory Committee on 1963 Amendment to Rules

This amendment conforms to the amendment of Rule 28(b). See the next-to-last paragraph of the Advisory Committee's Note to that amendment.

### Notes of Advisory Committee on 1966 Amendment to Rules

The requirement that the plaintiff obtain leave of court in order to serve notice of taking of a deposition within 20 days after commencement of the action gives rises to difficulties when the prospective deponent is about to become unavailable for examination. The problem is not confined to admiralty, but has been of special concern in that context because of the mobility of vessels and their personnel. When Rule 26 was adopted as Admiralty Rule 30A in 1961, the problem was alleviated by permitting depositions *de bene esse*, for which leave of court is not required. See Advisory Committee's Note to Admiralty Rule 30A (1961).

A continuing study is being made in the effort to devise a modification of the 20-day rule appropriate to both the civil and admiralty practice to the end that Rule 26(a) shall state a uniform rule applicable alike to what are now civil actions and suits in admiralty. Meanwhile, the exigencies of maritime litigation require preservation, for the time being at least, of the traditional de bene esse procedure for the post-unification counterpart of the present suit in admiralty. Accordingly, the amendment provides for continued availability of that procedure in admiralty and maritime claims within the meaning of Rule 9(h).

### Notes of Advisory Committee on 1970 Amendment to Rules

A limited rearrangement of the discovery rules is made, whereby certain rule provisions are transferred, as follows: Existing Rule 26(a) is transferred to Rules 30(a) and 31(a). Existing Rule 26(c) is transferred to Rule 30(c). Existing Rules 26(d), (e), and (f) are transferred to Rule 32. Revisions of the transferred provisions, if any, are discussed in the notes appended to Rules 30, 31, and 32. In addition, Rule 30(b) is transferred to Rule 26(c). The purpose of this rearrangement is to establish Rule 26 as a rule governing discovery in general. (The reasons are set out in the Advisory Committee's explanatory statement.)

*Subdivision (a)—Discovery Devices.* This is a new subdivision listing all of the discovery devices provided in the discovery rules and establishing the relationship between the general provisions of Rule 26 and the specific rules for particular discovery devices. The provision that the frequency of use of these methods is not limited confirms existing law. It incorporates in general form a provision now found in Rule 33.

*Subdivision (b)—Scope of Discovery.* This subdivision is recast to cover the scope of discovery generally. It regulates the discovery obtainable through any of the discovery devices listed in Rule 26(a).

All provisions as to scope of discovery are subject to the initial qualification that the court may limit discovery in accordance with these rules. Rule 26(c) (transferred from 30(b)) confers broad powers on the courts to regulate or prevent discovery even though the materials sought are within the scope of 26(b), and these powers have always been freely exercised. For example, a party's income tax return is generally held not privileged, 2A Barron & Holtzoff, Federal Practice and Procedure, § 65.2 (Wright ed. 1961), and yet courts have recognized that interests in privacy may call for a measure of extra protection. *E.g., Wiesenberger* v. *W. E. Hutton & Co.,* 35 F.R.D. 556 (S.D.N.Y. 1964). Similarly, the courts have in appropriate circumstances protected materials that are primarily of an impeaching character. These two types of materials merely illustrate the many situations, not capable of governance by precise rule, in which courts must exercise judgment. The new subsections in Rule 26(d) do not change existing law with respect to such situations.

*Subdivision (b)(1)—In General.* The language is changed to provide for the scope of discovery in general terms. The existing subdivision, although in terms applicable only to depositions, is incorporated by reference in existing Rules 33 and 34. Since decisions as to relevance to the subject matter of the action are made for discovery purposes well in advance of trial, a flexible treatment of relevance is required and the making of discovery, whether voluntary or under court order, is not a concession or determination of relevance for purposes of trial. *Cf.* 4 Moore's Federal Practice ¶ 26-16[1] (2d ed. 1966).

*Subdivision (b)(2)—Insurance Policies.* Both cases and commentators are sharply in conflict on the question whether defendant's liability insurance coverage is subject to discovery in the usual situation when the insurance coverage is not itself admissible and does not bear on another issue on the case. Examples of Federal cases requiring disclosure and supporting comments: *Cook* v. *Welty,* 253 F.Supp. 875 (D.D.C. 1966) (cases cited); *Johanek* v. *Aberle,* 27 F.R.D. 272 (D. Mont. 1961); Williams, Discovery of Dollar Limits in Liability Policies in Automobile Tort Cases, 10 Ala.L.Rev. 355 (1958); Thode. Some Reflections on the 1957 Amendments to the Texas Rules, 37 Tex.L.Rev. 33, 40-42 (1958). Examples of Federal cases refusing disclosure and supporting comments: Bisserier v. Manning, 207 F.Supp. 476 (D.N.J. 1962); Cooper v. Stender, 30 F.R.D. 389 (E.D.Tenn. 1962); Frank, Discovery and Insurance, Coverage 1959 Ins.L.J. 281; Fournier, Pre-Trial Discovery of Insurance Coverage and Limits, 28 Ford L.Rev. 215 (1959).

The division in reported cases is close. State decisions based on provisions similar to the federal rules are similarly divided. See cases collected in 2A Barron & Holtzoff, Federal Practice and Procedure § 647.1, nn. 45.5, 45.6 (Wright ed. 1961). It appears to be difficult if not impossible to obtain appellate review of the issue. Resolution by rule amendment is indicated. The question is essentially procedural in that it bears upon preparation for trial and settlement before trial, and courts confronting the question, however, they have decided it, have generally treated it as procedural and governed by the rules.

The amendment resolves this issue in favor of disclosure. Most of the decisions denying discovery, some explicitly, reason from the text of Rule 26(b) that it permits discovery only of matters which will be admissible in evidence or appear reasonably calculated to lead to such evidence; they avoid considerations of policy, regarding them as foreclosed. See *Bisserier* v. *Manning, supra.* Some note also that facts about a defendant's financial status are not discoverable as such, prior to judgment with execution unsatisfied, and fear that, if courts hold insurance coverage discoverable, they must extend the principle to other aspects of the defendant's financial status. The cases favoring disclosure rely heavily on the practical significance of insurance in the decisions lawyers make about settlement and trial preparation. In *Clauss* v. *Danker,* 264 F.Supp. 246 (S.D.N.Y. 1967), the court held that the rules forbid disclosure but called for an amendment to permit it.

Disclosure of insurance coverage will enable counsel for both sides to make the same realistic appraisal of the case, so that settlement and litigation strategy are based on knowledge and not speculation. It will conduce to settlement and avoid protracted litigation in some cases, though in others it may have an opposite effect. The amendment is limited to insurance coverage, which should be distinguished from any other facts concerning defendant's financial status (1) because insurance is an asset created specifically to satisfy the claim; (2) because the insurance company ordinarily controls the litigation; (3) because information about coverage is available only from defendant or his insurer; and (4) because disclosure does not involve a significant invasion of privacy.

Disclosure is required when the insurer "may be liable" on part or all of the judgment. Thus, an insurance company must disclose even when it contests liability under the policy, and such disclosure does not constitute a waiver of its claim. It is immaterial whether the liability is to satisfy the judgment directly or merely to indemnify or reimburse another after he pays the judgment.

The provision applies only to persons "carrying on an insurance business" and thus covers insurance companies and not the ordinary business concern that enters into a contract of indemnification. *Cf.* N.Y.Ins. Law § 41. Thus, the provision makes no change in existing law on discovery of indemnity agreements other than insurance agreements by persons carrying on an insurance business. Similarly, the provision does not cover the business concern that creates a reserve fund for purposes of self-insurance.

For some purposes other than discovery, an application for insurance is treated as a part of the insurance agreement. The provision makes clear that, for discovery purposes, the application is not to be so treated.

The insurance application may contain personal and financial information concerning the insured, discovery of which is beyond the purpose of this provision.

In no instance does disclosure make the facts concerning insurance coverage admissible in evidence.

*Subdivision (b)(3)—Trial Preparation: Materials.* Some of the most controversial and vexing problems to emerge from the discovery rules have arisen out of requests for the production of documents or things prepared in anticipation of litigation or for trial. The existing rules make no explicit provision for such materials. Yet, two verbally distinct doctrines have developed, each conferring a qualified immunity on these materials—the "good cause" requirement in Rule 34 (now generally held applicable to discovery of documents via deposition under Rule 45 and interrogatories under Rule 33) and the work-product doctrine of *Hickman* v. *Taylor,* 329 U.S. 495 (1947). Both demand a showing of justification before production can be had, the one of "good cause" and the other variously described in the *Hickman* case: "necessity or justification," "denial * * * would unduly prejudice the preparation of petitioner's case," or "cause hardship or injustice" 329 U.S. at 509-510.

In deciding the *Hickman* case, the Supreme Court appears to have expressed a preference in 1947 for an approach to the problem of trial preparation materials by judicial decision rather than by rule. Sufficient experience has accumulated, however, with lower court applications of the *Hickman* decision to warrant a reappraisal.

The major difficulties visible in the existing case law are (1) confusion and disagreement as to whether "good cause" is made out by a showing of relevance and lack of privilege, or requires an additional showing of necessity, (2) confusion and disagreement as to the scope of the *Hickman* work-product doctrine, particularly whether it extends beyond work actually performed by lawyers, and (3) the resulting difficulty of relating the "good cause" required by Rule 34 and the "necessity or justification" of the work-product doctrine, so that their respective roles and the distinctions between them are understood.

*Basic Standard.* Since Rule 34 in terms requires a showing of "good cause" for the production of all documents and things, whether or not trial preparation is involved, courts have felt that a single formula is called for and have differed over whether a showing of relevance and lack of privilege is enough or whether more must be shown. When the facts of the cases are studied, however, a distinction emerges based upon the type of materials. With respect to documents not obtained or prepared with an eye to litigation, the decisions, while not uniform, reflect a strong and increasing tendency to relate "good cause" to a showing that the documents are relevant to the subject matter of the action. *E.g., Connecticut Mutual Life Ins. Co.* v. *Shields,* 17 F.R.D. 273 (S.D.N.Y. 1959), with cases cited; *Houdry Process Corp.* v. *Commonwealth Oil Refining Co.,* 24 F.R.D. 58 (S.D.N.Y. 1955); see *Bell* v. *Commercial Ins. Co.,* 280 F.2d 514, 517 (3d Cir. 1960). When the party whose documents are sought shows that the request for production is unduly burdensome or oppressive, courts have denied discovery for lack of "good cause", although they might just as easily have based their decision on the protective provisions of existing Rule 30(b) (new Rule 26(c)). *E.g., Lauer* v. *Tankrederi,* 39 F.R.D. 334 (E.D.Pa. 1966).

As to trial-preparation materials, however, the courts are increasingly interpreting "good cause" as requiring more than relevance. When lawyers have prepared or obtained the materials for trial, all courts require more than relevance; so much is clearly commanded by *Hickman.* But even as to the preparatory work of nonlawyers, while some courts ignore work-product and equate "good cause" with relevance, *e.g., Brown* v. *New York, N.H. & H. RR.,* 17 F.R.D. 324 (S.D.N.Y. 1955), the more recent trend is to read "good cause" as requiring inquiry into the importance of and need for the materials as well as into alternative sources for securing the same information. In *Guilford Nat'l Bank* v. *Southern Ry.,* 297 F.2d 921 (4th Cir. 1962), statements of witnesses obtained by claim agents were held not discoverable because both parties had had equal access to the witnesses at about the same time, shortly after the collision in question. The decision was based solely on Rule 34 and "good cause"; the court declined to rule on whether the statements were work-product. The court's treatment of "good cause" is quoted at length and with approval in *Schlagenhauf* v. *Holder,* 379 U.S. 104, 117-118 (1964). See also *Mitchell* v. *Bass,* 252 F. 2d 513 (8th Cir. 1958); *Hauger* v. *Chicago, R.I. & Pac. RR.,* 216 F.2d 501 (7th Cir. 1954); *Burke v. United States,* 32 F.R.D. 213 (E.D.N.Y. 1963). While the opinions dealing with "good cause" do not often draw an explicit distinction between trial preparation materials and other materials, in fact an overwhelming proportion of the cases in which special showing is required are cases involving trial preparation materials.

The rules are amended by eliminating the general requirement of "good cause" from Rule 34 but retaining a requirement of a special showing for trial preparation materials in this subdivision. The required showing is expressed, not in terms of "good cause" whose generality has tended to encourage confusion and controversy, but in terms of the elements of the special showing to be made: substantial need of the materials in the preparation of the case and inability without undue hardship to obtain the substantial equivalent of the materials by other means.

These changes conform to the holdings of the cases, when viewed in light of their facts. Apart from trial preparation, the fact that the materials sought are documentary does not in and of itself require a special showing beyond relevance and absence of privilege. The protective provisions are of course available, and if the party from whom production is sought raises a special issue of privacy (as with respect to income tax returns or grand jury minutes) or points to evidence primarily impeaching, or can show serious burden or expense, the court will exercise its traditional power to decide whether to issue a protective order. On the other hand, the requirement of a special showing for discovery of trial preparation materials reflects the view that each side's informal evaluation of its case should be protected, that each side should be encouraged to prepare independently, and that one side should not automatically have the benefit of the detailed preparatory work of the other side. See Field and McKusick, Maine Civil Practice 264 (1959).

Elimination of a "good cause" requirement from Rule 34 and the establishment of a requirement of a special showing in this subdivision will eliminate the confusion caused by having two verbally distinct requirements of justification that the courts have been unable to distinguish clearly. Moreover, the language of the subdivision suggests the factors which the courts should consider in determining whether the requisite showing has been made. The importance of the materials sought to the party seeking them in preparation of his case and the difficulty he will have obtaining them by other means are factors noted in the *Hickman* case. The courts should also consider the likelihood that the party, even if he obtains the information by independent means, will not have the substantial equivalent of the documents the production of which he seeks.

Consideration of these factors may well lead the court to distinguish between witness statements taken by an investigator, on the one hand, and other parts of the investigative file, on the other. The court in *Southern Ry.* v. *Lanham,* 403 F.2d 119 (5th Cir. 1968), while it naturally addressed itself to the "good cause" requirements of Rule 34, set forth as controlling considerations the factors contained in the language of this subdivision. The analysis of the court suggests circumstances under which witness statements will be discoverable. The witness may have given a fresh and contemporaneous account in a written statement while he is available to the party seeking discovery only a substantial time thereafter. *Lanham, supra* at

127-128; *Guilford, supra* at 926. Or he may be reluctant or hostile. *Lanham, supra* at 128-129; *Brookshire* v. *Pennsylvania RR.*, 14 F.R.D. 154 (N.D.Ohio 1953); *Diamond* v. *Mohawk Rubber Co.*, 33 F.R.D. 264 (D. Colo. 1963). Or he may have a lapse of memory. *Tannenbaum* v. *Walker*, 16 F.R.D. 570 (E.D.Pa. 1954). Or he may probably be deviating from his prior statement. *Cf. Hauger* v. *Chicago, R.I. & Pac. RR.*, 216 F.2d 501 (7th Cir. 1954). On the other hand, a much stronger showing is needed to obtain evaluative materials in an investigator's reports. *Lanham, supra* at 131-133; *Pickett* v. *L. R. Ryan, Inc.*, 237 F.Supp. 198 (E.D.S.C. 1965).

Materials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes are not under the qualified immunity provided by this subdivision. *Gossman* v. *A. Duie Pyle, Inc.*, 320 F.2d 45 (4th Cir. 1963); *cf. United States* v. *New York Foreign Trade Zone Operators, Inc.*, 304 F.2d 792 (2d Cir. 1962). No change is made in the existing doctrine, noted in the *Hickman* case, that one party may discover relevant facts known or available to the other party, even though such facts are contained in a document which is not itself discoverable.

*Treatment of Lawyers; Special Protection of Mental Impressions, Conclusions, Opinions, and Legal Theories Concerning the Litigation.*—The courts are divided as to whether the work-product doctrine extends to the preparatory work only of lawyers. The *Hickman* case left this issue open since the statements in that case were taken by a lawyer. As to courts of appeals, compare *Alltmont* v. *United States*, 177 F.2d 971, 976 (3d Cir. 1949), *cert. denied*, 339 U.S. 967 (1950) (*Hickman* applied to statements obtained by FBI agents on theory it should apply to "all statements of prospective witnesses which a party has obtained for his trial counsel's use"), with *Southern Ry.* v. *Campbell*, 309 F.2d 569 (5th Cir. 1962) (statements taken by claim agents not work-product), and *Guilford Nat'l Bank* v. *Southern Ry.*, 297 F.2d 921 (4th Cir. 1962) (avoiding issue of work-product as to claim agents, deciding case instead under Rule 34 "good cause"). Similarly, the district courts are divided on statements obtained by claim agents, compare, *e.g., Brown* v. *New York, N.H. & H. RR.*, 17 F.R.D. 324 (S.D.N.Y. 1955) with *Hanke* v. *Milwaukee Electric Ry. & Transp. Co.*, 7 F.R.D. 540 (E.D. Wis. 1947); investigators, compare *Burke* v. *United States*, 32 F.R.D. 213 (E.D.N.Y.1963) with *Snyder* v. *United States*, 20 F.R.D. 7 (E.D.N.Y.1956); and insurers, compare *Gottlieb* v. *Bresler*, 24 F.R.D. 371 (D.D.C.1959) with *Burns* v. *Mulder*, 20 F.R.D. 605 (ED.Pa 1957). See 4 Moore's Federal Practice ¶ 26.23 [8.1] (2d ed. 1966); 2A Barron & Holtzoff, Federal Practice and Procedure § 652.2 (Wright ed. 1961).

A complication is introduced by the use made by courts of the "good cause" requirement of Rule 34, as described above. A court may conclude that trial preparation materials are not work-product because not the result of lawyer's work and yet hold that they are not producible because "good cause" has not been shown. *Cf. Guilford Nat'l Bank* v. *Southern Ry.*, 297 F.2d 921 (4th Cir. 1962), cited and described above. When the decisions on "good cause" are taken into account, the weight of authority affords protection of the preparatory work of both lawyers and nonlawyers (though not necessarily to the same extent) by requiring more than a showing of relevance to secure production.

Subdivision (b)(3) reflects the trend of the cases by requiring a special showing, not merely as to materials prepared by an attorney, but also as to materials prepared in anticipation of litigation or preparation for trial by or for a party or any representative acting on his behalf. The subdivision then goes on to protect against disclosure the mental impressions, conclusions, opinions, or legal theories concerning the litigation of an attorney or other representative of a party. The *Hickman* opinion drew special attention to the need for protecting an attorney against discovery of memoranda prepared from recollection of oral interviews. The courts have steadfastly safeguarded against disclosure of lawyers' mental impressions and legal theories, as well as mental impressions and subjective evaluations of investigators and claim-agents. In enforcing this provision of the subdivision, the courts will sometimes find it necessary to order disclosure of a document but with portions deleted.

Rules 33 and 36 have been revised in order to permit discovery calling for opinions, contentions, and admissions relating not only to fact but also to the application of law to fact. Under those rules, a party and his attorney or other representative may be required to disclose, to some extent, mental impressions, opinions, or conclusions. But documents or parts of documents containing these matters are protected against discovery by this subdivision. Even though a party may ultimately have to disclose in response to interrogatories or requests to admit, he is entitled to keep confidential documents containing such matters prepared for internal use.

*Party's Right to Own Statement.*—An exception to the requirement of this subdivision enables a party to secure production of his own statement without any special showing. The cases are divided. Compare, *e.g., Safeway Stores, Inc.* v. *Reynolds*, 176 F.2d 476 (D.C. Cir. 1949); *Shupe* v. *Pennsylvania RR.*, 19 F.R.D. 144 (W.D.Pa. 1956); with *e.g., New York Central RR.* v. *Carr*, 251 F.2d 433 (4th Cir. 1957); *Belback* v. *Wilson Freight Forwarding Co.*, 40 F.R.D. 16 (W.D.Pa. 1966).

Courts which treat a party's statement as though it were that of any witness overlook the fact that the party's statement is, without more, admissible in evidence. Ordinarily, a party gives a statement without insisting on a copy because he does not yet have a lawyer and does not understand the legal consequences of his actions. Thus, the statement is given at a time when he functions at a disadvantage. Discrepancies between his trial testimony and earlier statement may result from lapse of memory or ordinary inaccuracy; a written statement produced for the first time at trial may give such discrepancies a prominence which they do not deserve. In appropriate cases the court may order a party to be deposed before his statement is produced. *E.g., Smith* v. *Central Linen Service Co.*, 39 F.R.D. 15 (D.Md. 1966); *McCoy* v. *General Motors Corp.*, 33 F.R.D. 354 (W.D.Pa. 1963).

Commentators strongly support the view that a party be able to secure his statement without a showing. 4 Moore's Federal Practice ¶ 26.23 [8.4] (2d ed. 1966); 2A Barron & Holtzoff, Federal Practice and Procedure § 652.3 (Wright ed. 1961); see also Note, Developments in the Law—Discovery, 74 Harv.L.Rev. 940, 1039 (1961). The following states have by statute or rule taken the same position: *Statutes:* Fla.Stat.Ann. § 92.33; Ga.Code Ann. § 38-2109(b); La.Stat.Ann.R.S. 13:3732; Mass.Gen.Laws Ann. c. 271, § 44; Minn.Stat.Ann. § 602.01; N.Y.C.P.L.R. § 3101(e). *Rules:* Mo.R.C.P. 56.01(a); N.Dak.R.C.P. 34(b); Wyo.R.C.P. 34(b); *cf.* Mich.G.C.R. 306.2.

In order to clarify and tighten the provision on statements by a party, the term "statement" is defined. The definition is adapted from 18 U.S.C. § 3500(e) (Jencks Act). The statement of a party may of course be that of plaintiff or defendant, and it may be that of an individual or of a corporation or other organization.

*Witness' Right to Own Statement.*—A second exception to the requirement of this subdivision permits a nonparty witness to obtain a copy of his own statement without any special showing. Many, though not all, of the considerations supporting a party's right to obtain his statement apply also to the non-party witness. Insurance companies are increasingly recognizing that a witness is entitled to a copy of his statement and are modifying their regular practice accordingly.

*Subdivision (b)(4)—Trial Preparation: Experts.* This is a new provision dealing with discovery of information (including facts and opinions) obtained by a party from an expert retained by that party in relation to litigation or obtained by the expert and not yet transmitted to the party. The subdivision deals separately with those experts whom the party expects to call as trial witnesses and with those experts who have been retained or specially employed by the party but who are not expected to be witnesses. It should be noted that the subdivision does not address itself to the expert whose information was not acquired in preparation for trial but rather because he was an actor or viewer with respect to transactions or occurrences that are part of the subject matter of the lawsuit. Such an expert should be treated as an ordinary witness.

Subsection (b)(4)(A) deals with discovery of information obtained by or through experts who will be called as witnesses at trial. The provision is responsive to problems suggested by a relatively recent line of authorities. Many of these cases present intricate and difficult issues as to which expert testimony is likely to be determinative. Prominent among them are food and drug, patent, and condemnation cases. See, *e.g.*, *United States* v. *Nysco Laboratories, Inc.*, 26 F.R.D. 159, 162 (E.D.N.Y. 1960) (food and drug); *E. I. du Pont de Nemours & Co.* v. *Phillips Petroleum Co.*, 24 F.R.D. 416, 421 (D.Del. 1959) (patent); *Cold Metal Process Co.* v. *Aluminum Co. of America*, 7 F.R.D. 425 (N.D.Ohio 1947), aff'd. *Sachs* v. *Aluminum Co. of America*, 167 F.2d 570 (6th Cir. 1948) (same); *United States* v. *50.34 Acres of Land*, 13 F.R.D. 19 (E.D.N.Y. 1952) (condemnation).

In cases of this character, a prohibition against discovery of information held by expert witnesses produces in acute form the very evils that discovery has been created to prevent. Effective cross-examination of an expert witness requires advance preparation. The lawyer even with the help of his own experts frequently cannot anticipate the particular approach his adversary's expert will take or the data on which he will base his judgment on the stand. McGlothlin, Some Practical Problems in Proof of Economic, Scientific, and Technical Facts, 23 F.R.D. 467, 478 (1958). A California study of discovery and pretrial in condemnation cases notes that the only substitute for discovery of experts' valuation materials is "lengthy—and often fruitless—cross-examination during trial," and recommends pretrial exchange of such material. Calif.Law Rev.Comm'n, Discovery in Eminent Domain Proceedings 707-710 (Jan.1963). Similarly, effective rebuttal requires advance knowledge of the line of testimony of the other side. If the latter is foreclosed by a rule against discovery, then the narrowing of issues and elimination of surprise which discovery normally produces are frustrated.

These considerations appear to account for the broadening of discovery against experts in the cases cited where expert testimony was central to the case. In some instances, the opinions are explicit in relating expanded discovery to improved cross-examination and rebuttal at trial. *Franks* v. *National Dairy Products Corp.*, 41 F.R.D. 234 (W.D.Tex. 1966); *United States* v. *23.76 Acres*, 32 F.R.D. 593 (D.Md. 1963); see also an unpublished opinion of Judge Hincks, quoted in *United States* v. *48 Jars, etc.*, 23 F.R.D. 192, 198 (D.D.C. 1958). On the other hand, the need for a new provision is shown by the many cases in which discovery of expert trial witnesses is needed for effective cross-examination and rebuttal, and yet courts apply the traditional doctrine and refuse disclosure. *E.g.*, *United States* v. *Certain Parcels of Land*, 25 F.R.D. 192 (N.D.Cal. 1959); *United States* v. *Certain Acres*, 18 F.R.D. 98 (M.D.Ga. 1955).

Although the trial problems flowing from lack of discovery of expert witnesses are most acute and noteworthy when the case turns largely on experts, the same problems are encountered when a single expert testifies. Thus, subdivision (b)(4)(A) draws no line between complex and simple cases, or between cases with many experts and those with but one. It establishes by rule substantially the procedure adopted by decision of the court in *Knighton* v. *Villian & Fassio*, 39 F.R.D. 11 (D.Md. 1965). For a full analysis of the problem and strong recommendations to the same effect, see Friedenthal, Discovery and Use of an Adverse Party's Expert Information, 14 Stan.L.Rev. 455, 485-488 (1962); Long, Discovery and Experts under the Federal Rules of Civil Procedure, 38 F.R.D. 111 (1965).

Past judicial restrictions on discovery of an adversary's expert, particularly as to his opinions, reflect the fear that one side will benefit unduly from the other's better preparation. The procedure established in subsection (b)(4)(A) holds the risk to a minimum. Discovery is limited to trial witnesses, and may be obtained only at a time when the parties know who their expert witnesses will be. A party must as a practical matter prepare his own case in advance of that time, for he can hardly hope to build his case out of his opponent's experts.

Subdivision (b)(4)(A) provides for discovery of an expert who is to testify at the trial. A party can require one who intends to use the expert to state the substance of the testimony that the expert is expected to give. The court may order further discovery, and it has ample power to regulate its timing and scope and to prevent abuse. Ordinarily, the order for further discovery shall compensate the expert for his time, and may compensate the party who intends to use the expert for past expenses reasonably incurred in obtaining facts or opinions from the expert. Those provisions are likely to discourage abusive practices.

Subdivision (b)(4)(B) deals with an expert who has been retained or specially employed by the party in anticipation of litigation or preparation for trial (thus excluding an expert who is simply a general employee of the party not specially employed on the case), but who is not expected to be called as a witness. Under its provisions, a party may discover facts known or opinions held by such an expert only on a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

Subdivision (b)(4)(B) is concerned only with experts retained or specially consulted in relation to trial preparation. Thus the subdivision precludes discovery against experts who were informally consulted in preparation for trial, but not retained or specially employed. As an ancillary procedure, a party may on a proper showing require the other party to name experts retained or specially employed, but not those informally consulted.

These new provisions of subdivision (b)(4) repudiate the few decisions that have held an expert's information privileged simply because of his status as an expert, *e.g.*, *American Oil Co.* v. *Pennsylvania Petroleum Products Co.*, 23 F.R.D. 680, 685-686 (D.R.I. 1959). See Louisell, Modern California Discovery 315-316 (1963). They also reject as ill-considered the decisions which have sought to bring expert information within the work-product doctrine. See *United States* v. *McKay*, 372 F.2d 174, 176-177 (5th Cir. 1967). The provisions adopt a form of the more recently developed doctrine of "unfairness". See *e.g.*, *United States* v. *23.76 Acres of Land*, 32 F.R.D. 593, 597 (D.Md. 1963); Louisell, *supra*, at 317-318; 4 Moore's Federal Practice § 26.24 (2d ed. 1966).

Under subdivision (b)(4)(C), the court is directed or authorized to issue protective orders, including an order that the expert be paid a reasonable fee for time spent in responding to discovery, and that the party whose expert is made subject to discovery be paid a fair portion of the fees and expenses that the party incurred in obtaining information from the expert. The court may issue the latter order as a condition of discovery, or it may delay the order until after discovery is completed. These provisions for fees and expenses meet the objection that it is unfair to permit one side to obtain without cost the benefit of an expert's work for which the other side has paid, often a substantial sum. *E.g.*, *Lewis* v. *United Air Lines Transp. Corp.*, 32 F.Supp. 21 (W.D.Pa. 1940); *Walsh* v. *Reynolds Metal Co.*, 15 F.R.D. 376 (D.N.J. 1954). On the other hand, a party may not obtain discovery simply by offering to pay fees and expenses. *Cf.* *Boynton* v. *R. J. Reynolds Tobacco Co.*, 36 F.Supp. 593 (D.Mass. 1941).

In instances of discovery under subdivision (b)(4)(B), the court is directed to award fees and expenses to the other party, since the information is of direct value to the discovering party's preparation of his case. In ordering discovery under (b)(4)(A)(ii), the court has discretion whether to award fees and expenses to the other party; its decision should depend upon whether the discovering party is simply learning about the other party's case or is going beyond this to develop his own case. Even in cases where the court is directed to issue a protective order, it may decline to do so if it finds that manifest injustice would result. Thus, the court can protect, when necessary and appropriate, the interests of an indigent party.

*Subdivision (c)—Protective Orders.* The provisions of existing Rule 30(b) are transferred to this subdivision (c), as part of the rearrangement of Rule 26. The language has been changed to give it application to discovery generally. The subdivision recognizes the power of the court in the district where a deposition is being taken to make protective orders. Such power is needed when the deposition is being taken far from the court where the action is pending. The court in the district where the deposition is being taken may, and frequently will, remit the deponent or party to the court where the action is pending.

In addition, drafting changes are made to carry out and clarify the sense of the rule. Insertions are made to avoid any possible implication that a protective order does not extend to "time" as well as to "place" or may not safeguard against "undue burden or expense."

The new reference to trade secrets and other confidential commercial information reflects existing law. The courts have not given trade secrets automatic and complete immunity against disclosure, but have in each case weighed their claim to privacy against the need for disclosure. Frequently, they have been afforded a limited protection. See, *e.g., Covey Oil Co.* v. *Continental Oil Co.*, 340 F.2d 993 (10th Cir. 1965); *Julius M. Ames Co.* v. *Bostitch, Inc.*, 235 F.Supp. 856 (S.D.N.Y. 1964).

The subdivision contains new matter relating to sanctions. When a motion for a protective order is made and the court is disposed to deny it, the court may go a step further and issue an order to provide or permit discovery. This will bring the sanctions of Rule 37(b) directly into play. Since the court has heard the contentions of all interested persons, an affirmative order is justified. See Rosenberg, Sanctions to Effectuate Pretrial Discovery, 58 Col.L.Rev. 480, 492–493 (1958). In addition, the court may require the payment of expenses incurred in relation to the motion.

*Subdivision (d)—Sequence and Priority.* This new provision is concerned with the sequence in which parties may proceed with discovery and with related problems of timing. The principal effects of the new provision are first, to eliminate any fixed priority in the sequence of discovery, and second, to make clear and explicit the court's power to establish priority by an order issued in a particular case

A priority rule developed by some courts, which confers priority on the party who first serves notice of taking a deposition, is unsatisfactory in several important respects:

First, this priority rule permits a party to establish a priority running to all depositions as to which he has given earlier notice. Since he can on a given day serve notice of taking many depositions he is in a position to delay his adversary's taking of depositions for an inordinate time. Some courts have ruled that deposition priority also permits a party to delay his answers to interrogatories and production of documents. *E.g., E. I. du Pont de Nemours & Co.* v. *Phillips Petroleum Co.*, 23 *F.R.D.* 237 (D.Del. 1959); *but cf. Sturdevant* v. *Sears, Roebuck & Co.*, 32 F.R.D. 426 (W.D.Mo. 1963).

Second, since notice is the key to priority, if both parties wish to take depositions first a race results. See *Caldwell-Clements, Inc.* v. *McGraw-Hill Pub. Co.*, 11 F.R.D. 156 (S.D.N.Y. 1951) (description of tactics used by parties). But the existing rules on notice of deposition create a race with runners starting from different positions. The plaintiff may not give notice without leave of court until 20 days after commencement of the action, whereas the defendant may serve notice at any time after commencement. Thus, a careful and prompt defendant can almost always secure priority. This advantage of defendants is fortuitous, because the purpose of requiring plaintiff to wait 20 days is to afford defendant an opportunity to obtain counsel, not to confer priority.

Third, although courts have ordered a change in the normal sequence of discovery on a number of occasions, *e.g., Kaeppler* v. *James H. Matthews & Co.*, 200 F.Supp. 229 (E.D.Pa. 1961); *Park & Tilford Distillers Corp.* v. *Distillers Co.*, 19 F.R.D. 169 (S.D.N.Y. 1956), and have at all times avowed discretion to vary the usual priority, most commentators are agreed that courts in fact grant relief only for "the most obviously compelling reasons." 2A Barron & Holtzoff, Federal Practice and Procedure 447–47 (Wright ed. 1961); see also Younger, Priority of Pretrial Examination in the Federal Courts—A Comment, 34 N.Y.U.L.Rev. 1271 (1959); Freund, The Pleading and Pretrial of an Antitrust Claim, 46 Corn.L.Q. 555, 564, (1964). Discontent with the fairness of actual practice has been evinced by other observers. Comments, 59 Yale L.J. 117, 134–136 (1949); Yudkin, Some Refinements in Federal Discovery Procedure, 11 Fed.B.J. 289, 296–297 (1951); Developments in the Law-Discovery, 74 Harv.L.Rev. 940, 954–958 (1961).

Despite these difficulties, some courts have adhered to the priority rule, presumably because it provides a test which is easily understood and applied by the parties without much court intervention. It thus permits deposition discovery to function extrajudicially, which the rules provide for and the courts desire. For these same reasons, courts are reluctant to make numerous exceptions to the rule.

The Columbia Survey makes clear that the problem of priority does not affect litigants generally. It found that most litigants do not move quickly to obtain discovery. In over half of the cases, both parties waited at least 50 days. During the first 20 days after commencement of the action—the period when defendant might assure his priority by noticing depositions—16 percent of the defendants acted to obtain discovery. A race could not have occurred in more than 16 percent of the cases and it undoubtedly occurred in fewer. On the other hand, five times as many defendants as plaintiffs served notice of deposition during the first 19 days. To the same effect, see Comment, Tactical Use and Abuse of Depositions Under the Federal Rules, 59 Yale L.J. 117, 134 (1949).

These findings do not mean, however, that the priority rule is satisfactory or that a problem of priority does not exist. The court decisions show that parties do bottle on this issue and carry their disputes to court. The statistics show that these court cases are not typical. By the same token, they reveal that more extensive exercise of judicial discretion to vary the priority will not bring a flood of litigation, and that a change in the priority rule will in fact affect only a small fraction of the cases.

It is contended by some that there is no need to alter the existing priority practice. In support, it is urged that there is no evidence that injustices in fact result from present practice and that, in any event, the courts can and do promulgate local rules, as in New York, to deal with local situations and issue orders to avoid possible injustice in particular cases.

Subdivision (d) is based on the contrary view that the rule of priority based on notice is unsatisfactory and unfair in its operation. Subdivision (d) follows an approach adapted from Civil Rule 4 of the District Court for the Southern District of New York. That rule provides that starting 40 days after commencement of the action, unless otherwise ordered by the court, the fact that one part is taking a deposition shall not prevent another party from doing so "concurrenly." In practice, the depositions are not usually taken simultaneously; rather, the parties work out arrangements for alternation in the taking of depositions. One party may take a complete deposition and then the other, or, if the depositions are extensive, one party deposes for a set time, and then the other. See *Caldwell-Clements, Inc.* v. *McGraw-Hill Pub. Co.*, 11 F.R.D. 156 (S.D.N.Y. 1951).

In principle, one party's initiation of discovery should not wait upon the other's completion, unless delay is dictated by special considerations. Clearly the principle is feasible with respect to all methods of discovery other than depositions. And the experience of the Southern District of New York shows that the principle can be applied to depositions as well. The courts have not had an increase in motion business on this matter. Once it is clear to lawyers that they bargain on an equal footing, they are usually able to arrange for an orderly succession of depositions without judicial intervention. Professor Moore has called attention to Civil Rule 4 and suggested that it may usefully be extended to other areas. 4 Moore's Federal Practice 1154 (2d ed. 1966).

The court may upon motion and by order grant priority in a particular case. But a local court rule purporting to confer priority in certain classes of cases would be inconsistent with this subdivision and thus void.

*Subdivision (e)—Supplementation of Responses.* The rules do not now state whether interrogatories (and questions at deposition as well as requests for inspection and admissions) impose a "continuing burden" on the responding party to supplement his answers if he obtains new information. The issue is acute when new information renders substantially incomplete or inaccurate an answer which was complete and accurate when made. It is essential that the rules provide an answer to this question. The parties can adjust to a rule either way, once they know what it is. See 4 Moore's Federal Practice ¶33.25[4] (2d ed. 1966).

Arguments can be made both ways. Imposition of a continuing burden reduces the proliferation of additional sets of interrogatories. Some courts have adopted local rules establishing such a burden. *E.g.*, E.D.Pa.R. 20(f), quoted in *Taggart* v. *Vermont Transp. Co.*, 32 F.R.D. 587 (E.D.Pa. 1963); D.Me.R.15(c). Others have imposed the burden by decision, *E.g.*, *Chenault* v. *Nebraska Farm Products, Inc.*, 9 F.R.D. 529, 533 (D.Nebr. 1949). On the other hand, there are serious objections to the burden, especially in protracted cases. Although the party signs the answers, it is his lawyer who understands their significance and bears the responsibility to bring answers up to date. In a complex case all sorts of information reaches the party, who little understands its bearing on answers previously given to interrogatories. In practice, therefore, the lawyer under a continuing burden must periodically recheck all interrogatories and canvass all new information. But a full set of new answers may no longer be needed by the interrogating party. Some issues will have been dropped from the case, some questions are now seen as unimportant, and other questions must in any event be reformulated. See *Novick* v. *Pennsylvania RR.*, 18 F.R.D. 296, 298 (W.D.Pa. 1955).

Subdivision (e) provides that a party is not under a continuing burden except as expressly provided. *Cf.* Note, 68 Harv.L.Rev. 673, 677 (1955). An exception is made as to the identity of persons having knowledge of discoverable matters, because of the obvious importance to each side of knowing all witnesses and because information about witnesses routinely comes to each lawyer's attention. Many of the decisions on the issue of a continuing burden have in fact concerned the identity of witnesses. An exception is also made as to expert trial witnesses in order to carry out the provisions of Rule 26(b)(4). See *Diversified Products Corp.* v. *Sports Center Co.*, 42 F.R.D. 3 (D.Md. 1967).

Another exception is made for the situation in which a party, or more frequently his lawyer, obtains actual knowledge that a prior response is incorrect. This exception does not impose a duty to check the accuracy of prior responses, but it prevents knowing concealment by a party or attorney. Finally, a duty to supplement may be imposed by order of the court in a particular case (including an order resulting from a pretrial conference) or by agreement of the parties. A party may of course make a new discovery request which requires supplementation of prior responses.

The duty will normally be enforced, in those limited instances where it is imposed, through sanctions imposed by the trial court, including exclusion of evidence, continuance, or other action, as the court may deem appropriate.

### CROSS REFERENCES

Certification and filing of depositions, see rule 30.
Consequences of refusal to appear for deposition, see rule 37.
Continuance to procure depositions opposing motion for summary judgment, see rule 56.
Depositions—
  Before action or pending appeal, see rule 27.
  Of witnesses upon written interrogatories, see rule 31.
  Opposing motion for summary judgment, see rule 56.
Effect of errors and irregularities in depositions, see rule 32.
Examination and cross-examination of deponents, see rule 43.
Failure to attend or serve subpoena, expenses, see rule 30.
Motion to terminate or limit examination, see rule 30.
Notice for taking deposition, see rule 30.
Objections to admissibility of depositions, see rule 32.
Order compelling answer to question propounded upon oral examination, see rule 37.
Orders for protection of parties and deponents, see rule 30.
Persons before whom depositions may be taken, see rule 28.
Record of examination, see rule 30.
Stipulations regarding taking depositions, see rule 29.
Subpoena for taking depositions, see rule 45.
Time and place for depositions, see rules 30 and 45.
Written interrogatories of party, see rule 33.

## Rule 27. Depositions Before Action or Pending Appeal

### (a) Before Action

(1) *Petition.* A person who desires to perpetuate his own testimony or that of another person regarding any matter that may be cognizable in any court of the United States may file a verified petition in the United States district court in the district of the residence of any expected adverse party. The petition shall be entitled in the name of the petitioner and shall show: 1, that the petitioner expects to be a party to an action cognizable in a court of the United States but is presently unable to bring it or cause it to be brought, 2, the subject matter of the expected action and his interest therein, 3, the facts which he desires to establish by the proposed testimony and his reasons for desiring to perpetuate it, 4, the names or a description of the persons he expects will be adverse parties and their addresses so far as known, and 5, the names and addresses of the persons to be examined and the substance of the testimony which he expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

(2) *Notice and Service.* The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse

party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least 20 days before the date of hearing the notice shall be served either within or without the district or state in the manner provided in Rule 4(d) for service of summons; but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served in the manner provided in Rule 4(d), an attorney who shall represent them, and, in case they are not otherwise represented, shall cross-examine the deponent. If any expected adverse party is a minor or incompetent the provisions of Rule 17(c) apply.

(3) *Order and Examination.* If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with these rules; and the court may make orders of the character provided for by Rules 34 and 35. For the purpose of applying these rules to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

(4) *Use of Deposition.* If a deposition to perpetuate testimony is taken under these rules or if, although not so taken, it would be admissible in evidence in the courts of the state in which it is taken, it may be used in any action involving the same subject matter subsequently brought in a United States district court, in accordance with the provisions of Rule 32(a).

**(b) Pending appeal**

If an appeal has been taken from a judgment of a district court or before the taking of an appeal if the time therefor has not expired, the district court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the district court. In such case the party who desires to perpetuate the testimony may make a motion in the district court for leave to take the depositions, upon the same notice and service thereof as if the action was pending in the district court. The motion shall show (1) the names and addresses of persons to be examined and the substance of the testimony which he expects to elicit from each; (2) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken and may make orders of the character provided for by Rules 34 and 35, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in actions pending in the district court.

**(c) Perpetuation by action**

This rule does not limit the power of a court to entertain an action to perpetuate testimony.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Mar. 1, 1971, eff. July 1, 1971.)

### Notes of Advisory Committee on Rules

*Note to Subdivision (a).* This rule offers a simple method of perpetuating testimony in cases where it is usually allowed under equity practice or under modern statutes. See *Arizona* v. *California*, 292 U.S. 341, 54 S.Ct. 735, 78 L.Ed. 1298 (1934); *Todd Engineering Dry Dock and Repair Co.* v. *United States*, 32 F.2d 734 (C.C.A.5th, 1929); *Hall* v. *Stout*, 4 Del. ch. 269 (1871). For comparable state statutes see Ark.Civ.Code (Crawford, 1934) §§ 666–670; Calif.Code Civ.Proc. (Deering, 1937) 2083–2089; Ill.Rev.Stat. (1937) ch. 51, §§ 39–46; Iowa Code (1935) §§ 11400–11407; 2 Mass.Gen.Laws (Ter.Ed., 1932) ch. 233, § 46–63; N.Y.C.P.A. (1937) § 295; Ohio Gen.Code Ann. ((Throckmorton, 1936) § 12216–12222; Va.Code Ann. (Michie, 1936) § 6235; Wisc.Stat. (1935) §§ 326.27–326.29. The appointment of an attorney to represent absent parties or parties not personally notified, or a guardian ad litem to represent minors and incompetents, is provided for in several of the above statutes.

*Note to Subdivision (b).* This follows the practice approved in *Richter* v. *Union Trust Co.*, 115 U.S. 55, 5 S.Ct. 1162, 29 L.Ed. 345 (1885), by extending the right to perpetuate testimony to cases pending an appeal.

*Note to Subdivision (c).* This preserves the right to employ a separate action to perpetuate testimony under U.S.C., Title 28, former § 644 (Depositions under *dedimus potestatem* and *in perpetuam*) as an alternate method.

### Notes of Advisory Committee on 1946 Amendment to Rules

*Note.* Since the second sentence in subdivision (a)(3) refers only to depositions, it is arguable that Rules 34 and 35 are inapplicable in proceedings to perpetuate testimony. The new matter [in subdivisions (a)(3) and (b)] clarifies. A conforming change is also made in subdivision (b).

### Notes of Advisory Committee on 1971 Amendment to Rules

The reference intended in this subdivision is to the rule governing the use of depositions in court proceedings. Formerly Rule 26(d), that rule is now Rule 32(a). The subdivision is amended accordingly.

### Amendments

1948—The amendment effective October 1949, substituted the words "United States district court" in subdivision (a)(1) and (4) for "district court of the United States".

### Cross References

Persons before whom depositions may be taken, see rule 28.

## Rule 28. Persons Before Whom Depositions May Be Taken

**(a) Within the United States**

Within the United States or within a territory or insular possession subject to the dominion of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held, or before a person appointed by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony.

**(b) In foreign countries**

In a foreign country, depositions may be taken (1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, or (2) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of his commission to administer any necessary oath and take testimony, or (3) pursuant to a letter rogatory. A commission or a letter rogatory shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in [here name the country]." Evidence obtained in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.

**(c) Disqualification for interest**

No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963.)

### NOTES OF ADVISORY COMMITTEE ON RULES

In effect this rule is substantially the same as U.S.C., Title 28, former § 639 (Depositions *de bene esse;* when and where taken; notice). U.S.C., Title 28, former § 642 (Depositions, acknowledgements, and affidavits taken by notaries public) does not conflict with subdivision (a).

### NOTES OF ADVISORY COMMITTEE ON 1946 AMENDMENT TO RULES

*Note.* The added language [in subdivision (a)] provides for the situation, occasionally arising, when depositions must be taken in an isolated place where there is no one readily available who has the power to administer oaths and take testimony according to the terms of the rule as originally stated. In addition, the amendment affords a more convenient method of securing depositions in the case where state lines intervene between the location of various witnesses otherwise rather closely grouped. The amendment insures that the person appointed shall have adequate power to perform his duties. It has been held that a person authorized to act in the premises, as, for example, a master, may take testimony outside the district of his appointment. *Consolidated Fastener Co.* v. *Columbian Button & Fastener Co.,* C.C.N.D.N.Y. 1898, 85 Fed. 54; *Mathieson Alkali Works* v. *Arnold Hoffman & Co.,* C.C.A.1st, 1929, 31 F.2d 1.

### NOTES OF ADVISORY COMMITTEE ON 1963 AMENDMENT TO RULES

The amendment of clause (1) is designed to facilitate depositions in foreign countries by enlarging the class of persons before whom the depositions may be taken on notice. The class is no longer confined, as at present, to a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States. In a country that regards the taking of testimony by a foreign official in aid of litigation pending in a court of another country as an infringement upon its sovereignty, it will be expedient to notice depositions before officers of the country in which the examination is taken. See generally Symposium Letters, Rogatory (Grossman ed. 1956); Doyle, Taking Evidence by Deposition and Letters Rogatory and Obtaining Documents in Foreign Territory, Proc. A.B.A., Sec. Int'l & Comp. L. 37 (1959); Heilpern, Procuring Evidence Abroad, 14 Tul.L.Rev. 29 (1939); Jones, International Judicial Assistance: Procedural Chaos and a Program for Reform, 62 Yale L.J. 515, 526–29 (1953); Smit, International Aspects of Federal Civil Procedure, 61 Colum.L.Rev. 1031, 1056–58 (1961).

Clause (2) of amended subdivision (b), like the corresponding provision of subdivision (a) dealing with depositions taken in the United States, makes it clear that the appointment of a person by commission in itself confers power upon him to administer any necessary oath.

It has been held that a letter rogatory will not be issued unless the use of a notice or commission is shown to be impossible or impractical. See, e.g., *United States* v. *Matles,* 154 F.Supp. 574 (E.D.N.Y. 1957); *The Edmund Fanning,* 89 F.Supp. 282 (E.D.N.Y. 1950); *Branyan* v. *Koninklijke Luchtvaart Maatschappij,* 13 F.R.D. 425 (S.D.N.Y. 1953). See also *Ali Akber Kiachif* v. *Philco International Corp.,* 10 F.R.D. 277 (S.D.N.Y. 1950). The intent of the fourth sentence of the amended subdivision is to overcome this judicial antipathy and to permit a sound choice between depositions under a letter rogatory and on notice or by commission in the light of all the circumstances. In a case in which the foreign country will compel a witness to attend or testify in aid of a letter rogatory but not in aid of a commission, a letter rogatory may be preferred on the ground that it is less expensive to execute, even if there is plainly no need for compulsive process. A letter rogatory may also be preferred when it cannot be demonstrated that a witness will be recalcitrant or when the witness states that he is willing to testify voluntarily, but the contingency exists that he will change his mind at the last moment. In the latter case, it may be advisable to issue both a commission and a letter rogatory, the latter to be executed if the former fails. The choice between a letter rogatory and a commission may be conditioned by other factors, including the nature and extent of the assistance that the foreign country will give to the execution of either.

In executing a letter rogatory the courts of other countries may be expected to follow their customary procedure for taking testimony. See *United States* v. *Paraffin Wax, 2255 Bags,* 23 F.R.D. 289 (E.D.N.Y. 1959). In many non-common-law countries the judge questions the witness, sometimes without first administering an oath, the attorneys put any supplemental questions either to the witness or through the judge, and the judge dictates a summary of the testimony, which the witness acknowledges as correct. See Jones, supra, at 530–32; Doyle, supra, at 39–41. The last sentence of the amended subdivision provides, contrary to the implications of some authority, that evidence recorded in such a fashion need not be excluded on that account. See The Mandu, 11 F.Supp. 845 (E.D.N.Y. 1935). But cf. *Nelson* v. *United States,* 17 Fed.Cas. 1340 (No. 10,116) (C.C.D. Pa. 1816); *Winthrop* v. *Union Ins. Co.,* 30 Fed.Cas. 376 (No. 17901) (C.C.D.Pa. 1807). The specific reference to the lack of an oath or a verbatim transcript is intended to be illustrative. Whether or to what degree the value or weight of the evidence may be affected by the method of taking or recording the testimony is left for determination according to the circumstances of the particular case, cf. *Uebersee Finanz-Korporation, A.G.* v. *Brownell,* 121 F.Supp. 420 (D.D.C. 1954); *Danisch* v. *Guardian Life Ins. Co.,* 19 F.R.D. 235 (S.D.N.Y. 1956); the testimony may indeed be so devoid of substance or probative value as to warrant its exclusion altogether.

Some foreign countries are hostile to allowing a deposition to be taken in their country, especially by notice or commission, or to lending assistance in the taking of a deposition. Thus compliance with the terms of amended subdivision (b) may not in all cases ensure completion of a deposition abroad. Examination of the law and policy of the particular foreign country in advance of attempting a deposition is therefore advisable. See 4 Moore's Federal Practice ¶¶ 28.05-28.08 (2d ed. 1950).

CROSS REFERENCES

Certification and filing of depositions by officer, see rule 30.

Compensation of person taking deposition, see section 1821 of this title.

Foreign witnesses, depositions of, see section 1781 of this title.

Letters rogatory, failure to respond, see rule 37.

Taking responses to written interrogatories and preparation of record, see rule 31.

United States commissioners—

- Authority to take depositions, see section 637 of this title.
- Fees for taking and certifying depositions, see section 633 of this title.

Waiver as to disqualification of officer, see rule 32.

## Rule 29. Stipulations Regarding Discovery Procedure

Unless the court orders otherwise, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (2) modify the procedures provided by these rules for other methods of discovery, except that stipulations extending the time provided in Rules 33, 34, and 36 for responses to discovery may be made only with the approval of the court.

(As amended Mar. 30, 1970, eff. July 1, 1970.)

NOTES OF ADVISORY COMMITTEE ON 1970 AMENDMENT TO RULES

There is no provision for stipulations varying the procedures by which methods of discovery other than depositions are governed. It is common practice for parties to agree on such variations, and the amendment recognizes such agreements and provides a formal mechanism in the rules for giving them effect. Any stipulation varying the procedures may be superseded by court order, and stipulations extending the time for response to discovery under Rules 33, 34, and 36 require court approval.

## Rule 30. Depositions Upon Oral Examination

### (a) When depositions may be taken

After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made under Rule 4(e), except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) if special notice is given as provided in subdivision (b)(2) of this rule. The attendance of witnesses may be compelled by subpoena as provided in Rule 45. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

### (b) Notice of examination: general requirements; special notice; non-stenographic recording; production of documents and things; disposition of organization

(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(2) Leave of court is not required for the taking of a deposition by plaintiff if the notice (A) states that the person to be examined is about to go out of the district where the action is pending and more than 100 miles from the place of trial, or is about to go out of the United States, or is bound on a voyage to sea, and will be unavailable for examination unless his deposition is taken before expiration of the 30-day period, and (B) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and his signature constitutes a certification by him that to the best of his knowledge, information, and belief the statement and supporting facts are true. The sanctions provided by Rule 11 are applicable to the certification.

If a party shows that when he was served with notice under this subdivision (b)(2) he was unable through the exercise of diligence to obtain counsel to represent him at the taking of the deposition, the deposition may not be used against him.

(3) The court may for cause shown enlarge or shorten the time for taking the deposition.

(4) The court may upon motion order that the testimony at a deposition be recorded by other than stenographic means, in which event the order shall designate the manner of recording, preserving, and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. If the order is made, a party may nevertheless arrange to have a stenographic transcription made at his own expense.

(5) The notice to a party deponent may be accompanied by a request made in compliance with Rule 34 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 34 shall apply to the requests.

(6) A party may in his notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons

so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

**(c) Examination and cross-examination; record of examination; oath; objections**

Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Federal Rules of Evidence. The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other means ordered in accordance with subdivision (b)(4) of this rule. If requested by one of the parties, the testimony shall be transcribed. All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and he shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

**(d) Motion to terminate or limit examination**

At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

**(e) Submission to witness; changes; signing**

When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within 30 days of its submission to him, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed unless on a motion to suppress under Rule 32(d)(4) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

**(f) Certification and filing by officers; exhibits; copies; notice of filing**

(1) The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. He shall then securely seal the deposition in an envelope indorsed with the title of the action and marked "Deposition of [here insert name of witness]" and shall promptly file it with the court in which the action is pending or send it by registered or certified mail to the clerk thereof for filing.

Documents and things produced for inspection during the examination of the witness, shall, upon the request of a party, be marked for identification and annexed to and returned with the deposition, and may be inspected and copied by any party, except that (A) the person producing the materials may substitute copies to be marked for identification, if he affords to all parties fair opportunity to verify the copies by comparison with the originals, and (B) if the person producing the materials requests their return, the officer shall mark them, give each party an opportunity to inspect and copy them, and return them to the person producing them, and the materials may then be used in the same manner as if annexed to and returned with the deposition. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

(3) The party taking the deposition shall give prompt notice of its filing to all other parties.

**(g) Failure to attend or to serve subpoena; expenses**

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

(As amended Jan. 21, 1963, eff. July 1, 1963; Mar. 30, 1970, eff. July 1, 1970; Mar. 1, 1971, eff. July 1, 1971; Nov. 20, 1972.)

### NOTES OF ADVISORY COMMITTEE ON RULES

*Note to Subdivision (a).* This is in accordance with common practice. See U.S.C., Title 28, former § 639 (Depositions *de bene esse;* when and where taken; notice), the relevant provisions of which are incorporated in this rule; Calif.Code Civ.Proc. (Deering, 1937) § 2031; and statutes cited in respect to notice in the Note to Rule 26 (a). The provision for enlarging or shortening the time of notice has been added to give flexibility to the rule.

*Note to Subdivisions (b) and (d).* These are introduced as a safeguard for the protection of parties and deponents on account of the unlimited right of discovery given by Rule 26.

*Note to Subdivisions (c) and (e).* These follow the general plan of former Equity Rule 51 (Evidence Taken Before Examiners, Etc.) and U. S. C., Title 28, former § 640 (Depositions *de bene esse;* mode of taking), and former § 641 (Same; transmission to court), but are more specific. They also permit the deponent to require the officer to make changes in the deposition if the deponent is not satisfied with it. See also former Equity Rule 50 (Stenographer-Appointment-Fees).

*Note to Subdivision (f).* Compare former Equity Rule 55 (Depositions Deemed Published When Filed).

*Note to Subdivision (g).* This is similar to 2 Minn. Stat. (Mason, 1927) § 9833, but is more extensive.

### NOTES OF ADVISORY COMMITTEE ON 1963 AMENDMENT TO RULES

This amendment corresponds to the change in Rule 4(d)(4). See the Advisory Committee's Note to that amendment.

### NOTES OF ADVISORY COMMITTEE ON 1970 AMENDMENT TO RULES

*Subdivision (a).* This subdivision contains the provisions of existing Rule 26(a), transferred here as part of the rearrangement relating to Rule 26. Existing Rule 30(a) is transferred to 30(b). Changes in language have been made to conform to the new arrangement.

This subdivision is further revised in regard to the requirement of leave of court for taking a deposition. The present procedure, requiring a plaintiff to obtain leave of court if he serves notice of taking a deposition within 20 days after commencement of the action, is changed in several respects. First, leave is required by reference to the time the deposition is to be taken rather than the date of serving notice of taking. Second, the 20-day period is extended to 30 days and runs from the service of summons and complaint on any defendant, rather than the commencement of the action. *Cf.* Ill. S.Ct.R. 19-1, S-H Ill.Ann.Stat. § 101.19-1. Third, leave is not required beyond the time that defendant initiates discovery, thus showing that he has retained counsel. As under the present practice, a party not afforded a reasonable opportunity to appear at a deposition, because he has not yet been served with process, is protected against use of the deposition at trial against him. See Rule 32(a), transferred from 26(d). Moreover, he can later redepose the witness if he so desires.

The purpose of requiring the plaintiff to obtain leave of court is, as stated by the Advisory Committee that proposed the present language of Rule 26(a), to protect "a defendant who has not had an opportunity to retain counsel and inform himself as to the nature of the suit." Note to 1948 amendment of Rule 26(a), quoted in 3A Barron & Holtzoff, Federal Practice and Procedure 455–456 (Wright ed. 1958). In order to assure defendant of this opportunity, the period is lengthened to 30 days. This protection, however, is relevant to the time of taking the deposition, not to the time that notice is served. Similarly, the protective period should run from the service of process rather than the filing of the complaint with the court. As stated in the note to Rule 26(d), the courts have used the service of notice as a convenient reference point for assigning priority in taking depositions, but with the elimination of priority in new Rule 26(d) the reference point is no longer needed. The new procedure is consistent in principle with the provisions of Rules 33, 34, and 36 as revised.

Plaintiff is excused from obtaining leave even during the initial 30-day period if he gives the special notice provided in subdivision (b)(2). The required notice must state that the person to be examined is about to go out of the district where the action is pending and more than 100 miles from the place of trial, or out of the United States, or on a voyage to sea, and will be unavailable for examination unless deposed within the 30-day period. These events occur most often in maritime litigation, when seamen are transferred from one port to another or are about to go to sea. Yet, there are analogous situations in nonmaritime litigation, and although the maritime problems are more common, a rule limited to claims in the admirality and maritime jurisdiction is not justified.

In the recent unification of the civil and admiralty rules, this problem was temporarily met through addition in Rule 26(a) of a provision that depositions de bene esse may continue to be taken as to admiralty and maritime claims within the meaning of Rule 9(h). It was recognized at the time that "a uniform rule applicable alike to what are now civil actions and suits in admiralty" was clearly preferable, but the de bene esse procedure was adopted "for the time being at least." See Advisory Committee's note in Report of the Judicial Conference: Proposed Amendments to Rules of Civil Procedure 43–44 (1966).

The changes in Rule 30(a) and the new Rule 30 (b)(2) provide a formula applicable to ordinary civil as well as maritime claims. They replace the provision for depositions de bene esse. They authorize an early deposition without leave of court where the witness is about to depart and, unless his deposition is promptly taken, (1) it will be impossible or very difficult to depose him before trial or (2) his deposition can later be taken but only with substantially increased effort and expense. *Cf. S.S. Hai Chang,* 1966 A.M.C. 2239 (S.D.N.Y. 1966), in which the deposing party is required to prepay expenses and counsel fees of the other party's lawyer when the action is pending in New York and depositions are to be taken on the West Coast. Defendant is protected by a provision that the deposition cannot be used against him if he was unable through exercise of diligence to obtain counsel to represent him.

The distance of 100 miles from place of trial is derived from the *de bene esse* provision and also conforms to the reach of a subpoena of the trial court, as provided in Rule 45(e). See also S.D.N.Y. Civ.R. 5(a). Some parts of the de bene esse provision are omitted from Rule 30(b)(2). Modern deposition practice adequately covers the witness who lives more than 100 miles away from place of trial. If a witness is aged or infirm, leave of court can be obtained.

*Subdivision (b).* Existing Rule 30(b) on protective orders has been transferred to Rule 26(c), and existing Rule 30(a) relating to the notice of taking deposition has been transferred to this subdivision. Because new material has been added, subsection numbers have been inserted.

*Subdivision (b)(1).* If a subpoena duces tecum is to be served, a copy thereof or a designation of the materials to be produced must accompany the notice. Each party is thereby enabled to prepare for the deposition more effectively.

*Subdivision (b)(2).* This subdivision is discussed in the note to subdivision (a), to which it relates.

*Subdivision (b)(3).* This provision is derived from existing Rule 30(a), with a minor change of language.

*Subdivision (b)(4).* In order to facilitate less expensive procedures, provision is made for the recording of testimony by other than stenographic means—*e.g.,* by mechanical, electronic, or photographic means. Because these methods give rise to problems of accuracy and trustworthiness, the party taking the deposition is required to apply for a court order. The order is to specify how the testimony is to be recorded, preserved, and filed, and it may contain whatever additional safeguards the court deems necessary.

*Subdivision* (*b*)(*5*). A provision is added to enable a party, through service of notice, to require another party to produce documents or things at the taking of his deposition. This may now be done as to a nonparty deponent through use of a subpoena duces tecum as authorized by Rule 45, but some courts have held that documents may be secured from a party only under Rule 34. See 2A Barron & Holtzoff, Federal Practice and Procedure § 644.1 n. 83.2, § 792 n. 16 (Wright ed. 1961). With the elimination of "good cause" from Rule 34, the reason for this restrictive doctrine has disappeared. *Cf.* N.Y.C.P.L.R. § 3111.

Whether production of documents or things should be obtained directly under Rule 34 or at the deposition under this rule will depend on the nature and volume of the documents or things. Both methods are made available. When the documents are few and simple, and closely related to the oral examination, ability to proceed via this rule will facilitate discovery. If the discovering party insists on examining many and complex documents at the taking of the deposition, thereby causing undue burdens on others, the latter may, under Rules 26(c) or 30(d), apply for a court order that the examining party proceed via Rule 34 alone.

*Subdivision* (*b*)(*6*). A new provision is added, whereby a party may name a corporation, partnership, association, or governmental agency as the deponent and designate the matters on which he requests examination, and the organization shall then name one or more of its officers, directors, or managing agents, or other persons consenting to appear and testify on its behalf with respect to matters known or reasonably available to the organization. *Cf.* Alberta Sup.Ct.R. 255. The organization may designate persons other than officers, directors, and managing agents, but only with their consent. Thus, an employee or agent who has an independent or conflicting interest in the litigation—for example, in a personal injury case—can refuse to testify on behalf of the organization.

This procedure supplements the existing practice, whereby the examining party designates the corporate official to be deposed. Thus, if the examining party believes that certain officials who have not testified pursuant to this subdivision have added information, he may depose them. On the other hand, a court's decision whether to issue a protective order may take account of the availability and use made of the procedures provided in this subdivision.

The new procedure should be viewed as an added facility for discovery, one which may be advantageous to both sides as well as an improvement in the deposition process. It will reduce the difficulties now encountered in determining, prior to the taking of a deposition, whether a particular employee or agent is a "managing agent." See Note, Discovery Against Corporations Under the Federal Rules, 47 Iowa L.Rev. 1006–1016 (1962). It will curb the "bandying" by which officers or managing agents of a corporation are deposed in turn but each disclaims knowledge of facts that are clearly known to persons in the organization and thereby to it. *Cf. Haney* v. *Woodward & Lothrop, Inc.*, 330 F.2d 940, 944 (4th Cir. 1964). The provisions should also assist organizations which find that an unnecessarily large number of their officers and agents are being deposed by a party uncertain of who in the organization has knowledge. Some courts have held that under the existing rules a corporation should not be burdened with choosing which person is to appear for it. *E.g., United States* v. *Gahagan Dredging Corp.*, 24 F.R.D. 328, 329 (S.D.N.Y. 1958). This burden is not essentially different from that of answering interrogatories under Rule 33, and is in any case lighter than that of an examining party ignorant of who in the corporation has knowledge.

*Subdivision* (*c*). A new sentence is inserted at the beginning, representing the transfer of existing Rule 26(c) to this subdivision. Another addition conforms to the new provision in subdivision (b)(4).

The present rule provides that transcription shall be carried out unless all parties waive it. In view of the many depositions taken from which nothing useful is discovered, the revised language provides that transcription is to be performed if any party requests it. The fact of the request is relevant to the exercise of the court's discretion in determining who shall pay for transcription.

Parties choosing to serve written questions rather than participate personally in an oral deposition are directed to serve their questions on the party taking the deposition, since the officer is often not identified in advance. Confidentiality is preserved, since the questions may be served in a sealed envelope.

*Subdivision* (*d*). The assessment of expenses incurred in relation to motions made under this subdivision (d) is made subject to the provisions of Rule 37(a). The standards for assessment of expenses are more fully set out in Rule 37(a), and these standards should apply to the essentially similar motions of this subdivision.

*Subdivision* (*e*). The provision relating to the refusal of a witness to sign his deposition is tightened through insertion of a 30-day time period.

*Subdivision* (*f*)(*1*). A provision is added which codifies in a flexible way the procedure for handling exhibits related to the deposition and at the same time assures each party that he may inspect and copy documents and things produced by a nonparty witness in response to subpoena duces tecum. As a general rule and in the absence of agreement to the contrary or order of the court, exhibits produced without objection are to be annexed to and returned with the deposition, but a witness may substitute copies for purposes of marking and he may obtain return of the exhibits. The right of the parties to inspect exhibits for identification and to make copies is assured. *Cf.* N.Y.C.P.L.R. § 3116(c).

### NOTES OF ADVISORY COMMITTEE ON 1971 AMENDMENT TO RULES

The subdivision permits a party to name a corporation or other form of organization as a deponent in the notice of examination and to describe in the notice the matters about which discovery is desired. The organization is then obliged to designate natural persons to testify on its behalf. The amendment clarifies the procedure to be followed if a party desires to examine a non-party organization through persons designated by the organization. Under the rules, a subpoena rather than a notice of examination is served on a non-party to compel attendance at the taking of a deposition. The amendment provides that a subpoena may name a non-party organization as the deponent and may indicate the matters about which discovery is desired. In that event, the non-party organization must respond by designating natural persons, who are then obliged to testify as to matters known or reasonably available to the organization. To insure that a non-party organization that is not represented by counsel has knowledge of its duty to designate, the amendment directs the party seeking discovery to advise of the duty in the body of the subpoena.

### NOTES OF ADVISORY COMMITTEE ON 1972 AMENDMENT TO RULES

*Subdivision* (*c*). Existing. Rule 43(b), which is to be abrogated, deals with the use of leading questions, the calling, interrogation, impeachment, and scope of cross-examination of adverse parties, officers, etc. These topics are dealt with in many places in the Rules of Evidence. Moreover, many pertinent topics included in the Rules of Evidence are not mentioned in Rule 43(b), e.g. privilege. A reference to the Rules of Evidence generally is therefore made in subdivision (c) of Rule 30.

### EFFECTIVE DATE OF AMENDMENT PROPOSED NOVEMBER 20, 1972

Amendment of this rule embraced by the order entered by the Supreme Court of the United States on

November 20, 1972, effective on the 180th day beginning after January 2, 1975, see section 3 of Pub. L. 93-595, Jan. 2, 1975, 88 Stat. 1959, set out as a note under section 2071 of this title.

### CROSS REFERENCES

Discovery and production of documents and things for inspection, copying, or photographing, see rule 34.

Effect of taking or using depositions, see rule 26.

Errors or irregularities in depositions, effect, see rule 32.

Motion to suppress deposition, see rule 32.

Notary public and other persons authorized to administer oaths required by laws of the United States, see section 2903 of Title 5, Government Organization and Employees.

Objections to admissibility of deposition, see rule 26.

Orders for protection of party on written interrogatories, see rule 33.

Persons before whom deposition may be taken, see rule 28.

Place of examination, see rule 45.

Power of person appointed by court to take deposition to administer oaths and take testimony, see rule 28.

Scope of examination, see rule 26.

Stipulations regarding discovery procedure, see rule 29.

Subpoena for taking depositions, see rule 45.

Time of taking depositions, see rule 26.

United States magistrates, power to administer oaths and take depositions, see section 636 of this title.

Waiver of objections, see rule 32.

## Rule 31. Depositions Upon Written Questions

### (a) Serving questions; notice

After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon written questions. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating (1) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs, and (2) the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with the provisions of Rule 30(b)(6).

Within 30 days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within 10 days after being served with cross questions, a party may serve redirect questions upon all other parties. Within 10 days after being served with redirect questions, a party may serve recross questions upon all other parties. The court may for cause shown enlarge or shorten the time.

### (b) Officer to take responses and prepare record

A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rule 30(c), (e), and (f), to take the testimony of the witness in response to the questions and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the questions received by him.

### (c) Notice of filing

When the deposition is filed the party taking it shall promptly give notice thereof to all other parties.

(As amended Mar. 30, 1970, eff. July 1, 1970.)

### NOTES OF ADVISORY COMMITTEE ON RULES

This rule is in accordance with common practice. In most of the states listed in the Note to Rule 26(a), provisions similar to this rule will be found in the statutes which in their respective statutory compilations follow those cited in the Note to Rule 26(a).

### NOTES OF ADVISORY COMMITTEE ON 1970 AMENDMENT TO RULES

Confusion is created by the use of the same terminology to describe both the taking of a deposition upon "written interrogatories" pursuant to this rule and the serving of "written interrogatories" upon parties pursuant to Rule 33. The distinction between these two modes of discovery will be more readily and clearly grasped through substitution of the word "questions" for "interrogatories" throughout this rule.

*Subdivision (a).* A new paragraph is inserted at the beginning of this subdivision to conform to the rearrangement of provisions in Rules 26(a), 30(a), and 30(b).

The revised subdivision permits designation of the deponent by general description or by class or group. This conforms to the practice for depositions on oral examination.

The new procedure provided in Rule 30(b)(6) for taking the deposition of a corporation or other organization through persons designated by the organization is incorporated by reference.

The service of all questions, including cross, redirect, and recross, is to be made on all parties. This will inform the parties and enable them to participate fully in the procedure.

The time allowed for service of cross, redirect, and recross questions has been extended. Experience with the existing time limits shows them to be unrealistically short. No special restriction is placed on the time for serving the notice of taking the deposition and the first set of questions. Since no party is required to serve cross questions less than 30 days after the notice and questions are served, the defendant has sufficient time to obtain counsel. The court may for cause shown enlarge or shorten the time.

*Subdivision (d).* Since new Rule 26(c) provides for protective orders with respect to all discovery, and expressly provides that the court may order that one discovery device be used in place of another, subdivision (d) is eliminated as unnecessary.

### CROSS REFERENCES

Written interrogatories of a party, see rule 33.

## Rule 32. Use of Depositions in Court Proceedings

### (a) Use of depositions

At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (A) that the witness is dead; or (B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or (D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

Substitution of parties pursuant to Rule 25 does not affect the right to use depositions previously taken; and, when an action in any court of the United States or of any State has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor.

**(b) Objections to admissibility**

Subject to the provisions of Rule 28(b) and subdivision (d)(3) of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

**[(c) Abrogated]**

**(d) Effect of errors and irregularities in depositions**

(1) *As to notice.* All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(2) *As to disqualification of officer.* Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) *As to taking of deposition.*

(A) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(C) Objections to the form of written questions submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within 5 days after service of the last questions authorized.

(4) *As to completion and return of deposition.* Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

(As amended Mar. 30, 1970, eff. July 1, 1970; Nov. 20, 1972.)

### NOTES OF ADVISORY COMMITTEE ON RULES

This rule is in accordance with common practice. In most of the states listed in the Note to Rule 26, provisions similar to this rule will be found in the statutes which in their respective statutory compilations follow those cited in the Note to Rule 26.

### NOTES OF ADVISORY COMMITTEE ON 1970 AMENDMENT TO RULES

As part of the rearrangement of the discovery rules, existing subdivisions (d), (e), and (f) of Rule 26 are transferred to Rule 32 as new subdivisions (a), (b), and (c). The provisions of Rule 32 are retained as subdivision (d) of Rule 32 with appropriate changes in the lettering and numbering of subheadings. The new rule is given a suitable new title. A beneficial byproduct of the rearrangement is that provisions which are naturally related to one another are placed in one rule.

A change is made in new Rule 32(a), whereby it is made clear that the rules of evidence are to be applied to depositions offered at trial as though the deponent were then present and testifying at trial. This eliminates the possibility of certain technical hearsay objections which are based, not on the contents of deponent's testimony, but on his absence from court. The language of present Rule 26(d) does not appear to authorize these technical objections, but it is not entirely clear. Note present Rule 26(e), transferred to Rule 32(b); see 2A Barron & Holtzoff, Federal Practice and Procedure 164-166 (Wright ed. 1961).

An addition in Rule 32(a)(2) provides for use of a deposition of a person designated by a corporation or other organization, which is a party, to testify on its behalf. This complements the new procedure for taking the deposition of a corporation or other organization provided in Rules 30(b)(6) and 31(a). The addition is appropriate, since the deposition is in substance and effect that of the corporation or other organization which is a party.

A change is made in the standard under which a party offering part of a deposition in evidence may be required to introduce additional parts of the deposition. The new standard is contained in a proposal made by the Advisory Committee on Rules of Evidence. See Rule 1-07 and accompanying Note, Preliminary Draft of Proposed Rules of Evidence for the

United States District Courts and Magistrates 21-22 (March, 1969).

References to other rules are changed to conform to the rearrangement, and minor verbal changes have been made for clarification. The time for objecting to written questions served under Rule 31 is slightly extended.

### NOTES OF ADVISORY COMMITTEE ON 1972 AMENDMENT TO RULES

*Subdivision (c).* The concept of "making a person one's own witness" appears to have had significance principally in two respects: impeachment and waiver of incompetency. Neither retains any vitality under the Rules of Evidence. The old prohibition against impeaching one's own witness is eliminated by Evidence Rule 607. The lack of recognition in the Rules of Evidence of state rules of incompetency in the Dead Man's area renders it unnecessary to consider aspects of waiver arising from calling the incompetent party witness. Subdivision (c) is deleted because it appears to be no longer necessary in the light of the Rules of Evidence.

### EFFECTIVE DATE OF AMENDMENT PROPOSED NOVEMBER 20, 1972

Amendment of this rule embraced by the order entered by the Supreme Court of the United States on November 20, 1972, effective on the 180th day beginning after January 2, 1975, see section 3 of Pub. L. 93-595, Jan. 2, 1975, 88 Stat. 1959, set out as a note under section 2071 of this title.

### CROSS REFERENCES

Notary public and other persons authorized to administer oaths required by laws of the United States, see section 2903 of Title 5, Government Organization and Employees.

Rejection of deposition by court after refusal to sign, see rule 30.

## Rule 33. Interrogatories to Parties

### (a) Availability; procedures for use

Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories, except that a defendant may serve answers or objections within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory.

### (b) Scope; use at trial

Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the extent permitted by the rules of evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time.

### (c) Option to produce business records

Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Mar. 30, 1970, eff. July 1, 1970.)

### NOTES OF ADVISORY COMMITTEE ON RULES

This rule restates the substance of former Equity Rule 58 (Discovery—Interrogatories—Inspection and Production of Documents—Admission of Execution or Genuineness), with modifications to conform to these rules.

### NOTES OF ADVISORY COMMITTEE ON 1946 AMENDMENT TO RULES

*Note.* The added second sentence in the first paragraph of Rule 33 conforms with a similar change in Rule 26(a) and will avoid litigation as to when the interrogatories may be served. Original Rule 33 does not state the times at which parties may serve written interrogatories upon each other. It has been the accepted view, however, that the times were the same in Rule 33 as those stated in Rule 26(a). *United States* v. *American Solvents & Chemical Corp. of California*, D.Del. 1939, 30 F.Supp. 107; *Sheldon* v. *Great Lakes Transit Corp.*, W.D.N.Y. 1942, 2 F.R.D. 272, 5 Fed.Rules Serv. 33.11, Case 3; *Musher Foundation, Inc.*, v. *Alba Trading Co.*, S.D.N.Y. 1941, 42 F.Supp. 281; 2 Moore's Federal Practice, 1938, 2621. The time within which leave of court must be secured by a plaintiff has been fixed at 10 days, in view of the fact that a defendant has 10 days within which to make objections in any case, which should give him ample time to engage counsel and prepare.

Further in the first paragraph of Rule 33, the word "service" is substituted for "delivery" in conformance with the use of the word "serve" elsewhere in the rule and generally throughout the rules. See also Note to Rule 13(a) herein. The portion of the rule dealing with practice on objections has been revised so as to afford a clearer statement of the procedure. The addition of the words "to interrogatories to which objection is made" insures that only the answers to the objectionable interrogatories may be deferred, and that the answers to interrogatories not objectionable shall be forthcoming within the time prescribed in the rule. Under the original wording, answers to all interrogatories may be withheld until objections, sometimes to but a few interrogatories, are determined. The amendment expedites the procedure of the rule and serves to eliminate the strike value of objections to minor interrogatories. The elimination of the last sentence of the original rule is in line with the policy stated subsequently in this note.

The added second paragraph in Rule 33 contributes clarity and specificity as to the use and scope of interrogatories to the parties. The field of inquiry will be as broad as the scope of examination under Rule 26(b). There is no reason why interrogatories should be more limited than depositions, particularly when the former represent an inexpensive means of securing useful information. See *Hoffman* v. *Wilson Line, Inc.*, E.D.Pa. 1946, 9 Fed.Rules Serv. 33.514, Case 2; *Brewster* v. *Technicolor, Inc.*, S.D.N.Y. 1941, 2 F.R.D. 186, 5 Fed.Rules Serv. 33.319, Case 3; *Kingsway Press, Inc.* v. *Farrell Publishing Corp.*, S.D.N.Y. 1939, 30 F.Supp. 775. Under present Rule 33 some courts have unnecessarily restricted the breadth of inquiry on various grounds. See *Auer* v. *Hershey Creamery Co.*, D.N.J. 1939, 2 Fed.Rules Serv. 33.31, Case 2, 1 F.R.D. 14; *Tudor* v. *Leslie*, D.Mass. 1940, 1 F.R.D. 448, 4 Fed.Rules Serv. 33.324, Case 1. Other courts have read into the rule the requirement that interrogation should be directed only towards "important facts", and have tended to fix a more or less arbitrary limit as to the number of interrogatories which could be asked in any case. See *Knox* v. *Alter*, W.D.Pa. 1942, 2 F.R.D. 337, 6 Fed.Rules Serv. 33.352, Case 1; *Byers Theaters, Inc.* v. *Murphy*, W.D.Va. 1940, 3 Fed.Rules Serv. 33.31, Case 3, 1 F.R.D. 286; *Coca-Cola Co.* v. *Dixi-Cola Laboratories, Inc.*, D.Md. 1939, 30 F.Supp. 275. See also comment on these restrictions in Holtzoff, Instruments of Discovery Under Federal Rules of Civil Procedure, 1942, 41 Mich.L.Rev. 205, 216–217. Under amended Rule 33, the party interrogated is given the right to invoke such protective orders under Rule 30(b) as are appropriate to the situation. At the same time, it is provided that the number of or number of sets of interrogatories to be served may not be limited arbitrarily or as a general policy to any particular number, but that a limit may be fixed only as justice requires to avoid annoyance, expense, embarrassment or oppression in individual cases. The party interrogated, therefore, must show the necessity for limitation on that basis. It will be noted that in accord with this change the last sentence of the present rule, restricting the sets of interrogatories to be served, has been stricken. In *J. Schoeneman, Inc.* v. *Brauer*, W.D.Mo. 1940, 1 F.R.D. 292, 3 Fed.Rules Serv. 33.31, Case 2, the court said: "Rule 33 . . . has been interpreted . . . as being just as broad in its implications as in the case of depositions . . . It makes no difference therefore, how many interrogatories are propounded. If the inquiries are pertinent the opposing party cannot complain." To the same effect, see *Canuso* v. *City of Niagara Falls*, W.D.N.Y. 1945, 8 Fed.Rules Serv. 33.352, Case 1; *Hoffman* v. *Wilson Line, Inc.*, supra.

By virtue of express language in the added second paragraph of Rule 33, as amended, any uncertainty as to the use of the answers to interrogatories is removed. The omission of a provision on this score in the original rule has caused some difficulty. See, e.g., *Bailey* v. *New England Mutual Life Ins. Co.*, S.D.Cal. 1940, 1 F.R.D. 494, 4 Fed.Rules Serv. 33.46, Case 1.

The second sentence of the second paragraph in Rule 33, as amended, concerns the situation where a party wishes to serve interrogatories on a party after having taken his deposition, or vice versa. It has been held that an oral examination of a party, after the submission to him and answer of interrogatories, would be permitted. *Howard* v. *State Marine Corp.*, S.D.N.Y. 1940, 4 Fed.Rules Serv. 33.62, Case 1, 1 F.R.D. 499; *Stevens* v. *Minder Construction Co.*, S.D.N.Y. 1943, 3 F.R.D. 498, 7 Fed.Rules Serv. 30b.31, Case 2. But objections have been sustained to interrogatories served after the oral deposition of a party had been taken. *McNally* v. *Simons*, S.D.N.Y. 1940, 3 Fed.Rules Serv. 33.61, Case 1, 1 F.R.D. 254; *Currier* v. *Currier*, S.D.N.Y. 1942, 3 F.R.D. 21, 6 Fed.Rules Serv. 33.61, Case 1. Rule 33, as amended, permits either interrogatories after a deposition or a deposition after interrogatories. It may be quite desirable or necessary to elicit additional information by the inexpensive method of interrogatories where a deposition has already been taken. The party to be interrogated, however, may seek a protective order from the court under Rule 30(b) where the additional deposition or interrogation works a hardship or injustice on the party from whom it is sought.

### Notes of Advisory Committee on 1970 Amendment to Rules

*Subdivision (a).* The mechanics of the operation of Rule 33 are substantially revised by the proposed amendment, with a view to reducing court intervention. There is general agreement that interrogatories spawn a greater percentage of objections and motions than any other discovery device. The Columbia Survey shows that, although half of the litigants resorted to depositions and about one-third used interrogatories, about 65 percent of the objections were made with respect to interrogatories and 26 percent related to depositions. See also Speck, The Use of Discovery in United States District Courts, 60 Yale L.J. 1132, 1144, 1151 (1951); Note, 36 Minn.L.Rev. 364, 379 (1952).

The procedures now provided in Rule 33 seem calculated to encourage objections and court motions. The time periods now allowed for responding to interrogatories—15 days for answers and 10 days for objections—are too short. The Columbia Survey shows that tardy response to interrogatories is common, virtually expected. The same was reported in Speck, *supra*, 60 Yale L.J. 1132, 1144. The time pressures tend to encourage objections as a means of gaining time to answer.

The time for objections is even shorter than for answers, and the party runs the risk that if he fails to object in time he may have waived his objections. *E.g., Cleminshaw* v. *Beech Aircraft Corp.*, 21 F.R.D. 300 (D.Del. 1957); see 4 Moore's Federal Practice, ¶33.27 2d ed. 1966); 2A Barron & Holtzoff, Federal Practice and Procedure 372–373 (Wright ed. 1961). It often seems easier to object than to seek an extension of time. Unlike Rules 30(d) and 37(a), Rule 33 imposes no sanction of expenses on a party whose objections are clearly unjustified.

Rule 33 assures that the objections will lead directly to court, through its requirement that they be served with a notice of hearing. Although this procedure does preclude an out-of-court resolution of the dispute, the procedure tends to discourage informal negotiations. If answers are served and they are thought inadequate, the interrogating party may move under Rule 37(a) for an order compelling adequate answers. There is no assurance that the hearing on objections and that on inadequate answers will be heard together.

The amendment improves the procedure of Rule 33 in the following respects:

(1) The time allowed for response is increased to 30 days and this time period applies to both answers and objections, but a defendant need not respond in less than 45 days after service of the summons and complaint upon him. As is true under existing law, the responding party who believes that some parts or all of the interrogatories are objectionable may choose to seek a protective order under new Rule 26(c) or may serve objections under this rule. Unless he applies for a protective order, he is required to serve answers or objections in response to the interrogatories, subject to the sanctions provided in Rule 37(d). Answers and objections are served together, so that a response to each interrogatory is encouraged, and any failure to respond is easily noted.

(2) In view of the enlarged time permitted for response, it is no longer necessary to require leave of court for service of interrogatories. The purpose of this requirement—that defendant have time to obtain counsel before a response must be made—is adequately fulfilled by the requirement that interrogatories be served upon a party with or after service of the summons and complaint upon him.

Some would urge that the plaintiff nevertheless not be permitted to serve interrogatories with the complaint. They fear that a routine practice might be invited, whereby form interrogatories would accompany most complaints. More fundamentally, they feel that, since very general complaints are permitted in present-day pleading, it is fair that the defendant have a right to take the lead in serving interrogatories. (These views apply also to Rule 36.) The amendment of Rule 33 rejects these views, in favor of allowing both parties to go forward with discovery, each free to obtain the information he needs respecting the case.

(3) If objections are made, the burden is on the interrogating party to move under Rule 37(a) for a court order compelling answers, in the course of which the court will pass on the objections. The change in the burden of going forward does not alter the existing obligation of an objecting party to justify his objections. *E.g., Pressley* v. *Boehlke*, 33 F.R.D. 316 (W.D.N.C. 1963). If the discovering party asserts than an answer is incomplete or evasive, again he may look to Rule 37(a) for relief, and he should add this assertion to his motion to overrule objections. There is no requirement that the parties consult informally concerning their differences, but the new procedure should encourage consultation, and the court may by local rule require it.

The proposed changes are similar in approach to those adopted by California in 1961. See Calif.Code Civ.Proc. § 2030(a). The experience of the Los Angeles Superior Court is informally reported as showing that the California amendment resulted in a significant reduction in court motions concerning interrogatories. Rhode Island takes a similar approach. See R. 33, R.I.R.Civ.Proc. Official Draft, p. 74 (Boston Law Book Co.).

A change is made in subdivision (a) which is not related to the sequence of procedures. The restriction to "adverse" parties is eliminated. The courts have generally construed this restriction as precluding interrogatories unless an issue between the parties is disclosed by the pleadings—even though the parties may have conflicting interests. *E.g., Mozeika* v. *Kaufman Construction Co.*, 25 F.R.D. 233 (E.D.Pa. 1960) (plaintiff and third-party defendant); *Biddle* v. *Hutchinson*, 24 F.R.D. 256 (M.D.Pa. 1959) (codefendants). The resulting distinctions have often been highly technical. In *Schlagenhauf* v. *Holder*, 379 U.S. 104 (1964), the Supreme Court rejected a contention that examination under Rule 35 could be had only against an "opposing" party, as not in keeping "with the aims of a liberal, nontechnical application of the Federal Rules." 379 U.S. at 116. Eliminating the requirement of "adverse" parties from Rule 33 brings it into line with all other discovery rules.

A second change in subdivision (a) is the addition of the term "governmental agency" to the listing of organizations whose answers are to be made by any officer or agent of the organization. This does not involve any change in existing law. Compare the similar listing in Rule 30(b)(6).

The duty of a party to supplement his answers to interrogatories is governed by a new provision in Rule 26(e).

*Subdivision (b).* There are numerous and conflicting decisions on the question whether and to what extent interrogatories are limited to matters "of fact," or may elicit opinions, contentions, and legal conclusions. Compare, *e.g., Payer, Hewitt & Co.* v. *Bellanca Corp.*, 26 F.R.D. 219 (D.Del. 1960) (opinions bad); *Zinsky* v. *New York Central R.R.*, 36 F.R.D. 680 (N.D.Ohio 1964) (factual opinion or contention good, but legal theory bad); *United States* v. *Carter Products, Inc.*, 28 F.R.D. 373 (S.D.N.Y.1961) (factual contentions and legal theories bad) with *Taylor* v. *Sound Steamship Lines, Inc.*, 100 F.Supp. 388 (D.Conn. 1951) (opinions good), *Bynum* v. *United States*, 36 F.R.D. 14 (E.D.La. 1964) (contentions as to facts constituting negligence good). For lists of the many conflicting authorities, see 4 Moore's Federal Practice ¶33.17 (2d ed. 1966); 2A Barron & Holtzoff, *Federal Practice and Procedure* § 768 (Wright ed. 1961).

Rule 33 is amended to provide that an interrogatory is not objectionable merely because it calls for an opinion or contention that relates to fact or the application of law to fact. Efforts to draw sharp lines between facts and opinions have invariably been unsuccessful, and the clear trend of the cases is to permit "factual" opinions. As to requests for opinions or contentions that call for the application of law to fact, they can be most useful in narrowing and sharpening the issues, which is a major purpose of discovery. See *Diversified Products Corp.* v. *Sports Center Co.*, 42 F.R.D. 3 (D.Md. 1967); Moore, *supra;* Field & McKusick, *Maine Civil Practice* § 26.18 (1959). On the other hand, under the new language interrogatories may not extend to issues of "pure law," *i.e.*, legal issues unrelated to the facts of the case. *Cf. United States* v. *Maryland & Va. Milk Producers Assn., Inc.*, 22 F.R.D. 300 (D.D.C. 1958).

Since interrogatories involving mixed questions of law and fact may create disputes between the parties which are best resolved after much or all of the other discovery has been completed, the court is expressly authorized to defer an answer. Likewise, the court may delay determination until pretrial conference, if it believes that the dispute is best resolved in the presence of the judge.

The principal question raised with respect to the cases permitting such interrogatories is whether they reintroduce undesirable aspects of the prior pleading practice, whereby parties were chained to misconceived contentions or theories, and ultimate determination on the merits was frustrated. See James, *The Revival of Bills of Particulars under the Federal Rules*, 71 Harv.L.Rev. 1473 (1958). But there are few if any instances in the recorded cases demonstrating that such frustration has occurred. The general rule governing the use of answers to interrogatories is that under ordinary circumstances they do not limit proof. See *e.g., McElroy* v. *United Air Lines, Inc.*, 21 F.R.D. 100 (W.D.Mo. 1967); *Pressley* v. *Boehlke*, 33 F.R.D. 316, 317 (W.D.N.C. 1963). Although in exceptional circumstances reliance on an answer may cause such prejudice that the court will hold the answering party bound to his answer, *e.g., Zielinski* v. *Philadelphia Piers, Inc.*, 139 F.Supp. 408 (E.D.Pa. 1956), the interrogating party will ordinarily not be entitled to rely on the unchanging character of the answers he receives and cannot base prejudice on such reliance. The rule does not affect the power of a court to permit withdrawal or amendment of answers to interrogatories.

The use of answers to interrogatories at trial is made subject to the rules of evidence. The provisions governing use of depositions, to which Rule 33 presently refers, are not entirely apposite to answers to interrogatories, since deposition practice contemplates that all parties will ordinarily participate through cross-examination. See 4 Moore's *Federal Practice* ¶33.29[1] (2 ed. 1966).

Certain provisions are deleted from subdivision (b) because they are fully covered by new Rule 26(c) providing for protective orders and Rules 26(a) and 26(d). The language of the subdivision is thus simplified without any change of substance.

*Subdivision (c).* This is a new subdivision, adopted from Calif.Code Civ.Proc. § 2030(c), relating especially to interrogatories which require a party to engage in burdensome or expensive research into his own business records in order to give an answer. The subdivision gives the party an option to make the records available and place the burden of research on the party who seeks the information. "This provision, without undermining the liberal scope of interrogatory discovery, places the burden of discovery upon its potential benefitee," Louisell, *Modern California Discovery*, 124–125 (1963), and alleviates a problem which in the past has troubled Federal courts. See Speck, The Use of Discovery in United States District Courts, 60 Yale L.J. 1132, 1142–1144 (1951). The interrogating party is protected against abusive use of this provision through the requirement that the burden of ascertaining the answer be substantially the same for both sides. A respondent may not impose on an interrogating party a mass of records as to which research is feasible only for one familiar with the records. At the same time, the respondent unable to invoke this subdivision does not on that account lose the protection available to him under new Rule 26(c) against oppressive or unduly burdensome or expensive interrogatories. And even when the respondent successfully invokes the subdivision, the court is not deprived of its usual power, in appropriate cases, to require that the interrogating party reimburse the respondent for the expense of assembling his records and making them intelligible.

## Rule 34. Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes

### (a) Scope

Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

### (b) Procedure

The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

### (c) Persons not parties

This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Mar. 30, 1970, eff. July 1, 1970.)

### Notes of Advisory Committee on Rules

In England orders are made for the inspection of documents, English Rules Under the Judicature Act (The Annual Practice, 1937) O. 31, r.r. 14, et seq., or for the inspection of tangible property or for entry upon land, O. 50, r.3. Michigan provides for inspection of damaged property when such damage is the ground of the action. Mich.Court Rules Ann. (Searl, 1933) Rule 41, § 2.

Practically all states have statutes authorizing the court to order parties in possession or control of documents to permit other parties to inspect and copy them before trial. See Ragland, Discovery Before Trial (1932), Appendix, p. 267, setting out the statutes.

Compare former Equity Rule 58 (Discovery—Interrogatories—Inspection and Production of Documents—Admission of Execution or Genuineness) (fifth paragraph).

### Notes of Advisory Committee on 1946 Amendment to Rules

*Note.* The changes in clauses (1) and (2) correlate the scope of inquiry permitted under Rule 34 with that provided in Rule 26(b), and thus remove any ambiguity created by the former differences in language. As stated in *Olson Transportation Co.* v. *Socony-Vacuum Oil Co.*, E.D.Wis. 1944, 8 Fed.Rules Serv. 34.41, Case 2, ". . . Rule 34 is a direct and simple method of discovery." At the same time the addition of the words following the term "parties" makes certain that the person in whose custody, possession, or control the evidence reposes may have the benefit of the applicable protective orders stated in Rule 30(b). This change should be considered in the light of the proposed expansion of Rule 30(b).

An objection has been made that the word "designated" in Rule 34 has been construed with undue strictness in some district court cases so as to require great and impracticable specificity in the description of documents, papers, books, etc., sought to be inspected. The Committee, however, believes that no amendment is needed, and that the proper meaning of "designated" as requiring specificity has already been delineated by the Supreme Court. See *Brown* v. *United States*, 1928, 276 U.S. 134, 143, 48 S.Ct. 288 ("The subpoena . . . specifies . . . with reasonable particularity the subjects to which the documents called for related."); *Consolidated Rendering Co.* v. *Vermont*, 1908, 207 U.S. 541, 543-544, 28 S.Ct. 178 ("We see no reason why all such books, papers and correspondence which related to the subject of inquiry, and were described with reasonable detail, should not be called for and the company directed to produce them. Otherwise, the State would be compelled to designate each particular paper which it desired, which presupposes an accurate knowledge of such papers, which the tribunal desiring the papers would probably rarely, if ever, have.").

### Notes of Advisory Committee on 1970 Amendment to Rules

Rule 34 is revised to accomplish the following major changes in the existing rule: (1) to eliminate the requirement of good cause; (2) to have the rule operate extrajudicially; (3) to include testing and sampling as well as inspecting or photographing tangible things; and (4) to make clear that the rule does not preclude an independent action for analogous discovery against persons not parties.

*Subdivision (a).* Good cause is eliminated because it has furnished an uncertain and erratic protection to the parties from whom production is sought and is now rendered unnecessary by virtue of the more specific provisions added to Rule 26(b) relating to materials assembled in preparation for trial and to experts retained or consulted by parties.

The good cause requirement was originally inserted in Rule 34 as a general protective provision in the absence of experience with the specific problems that would arise thereunder. As the note to Rule 26(b)(3) on trial preparation materials makes clear, good cause has been applied differently to varying classes of documents, though not without confusion. It has often been said in court opinions that good cause requires a consideration of need for the materials and of alternative means of obtaining them, *i.e.*, something more than relevance and lack of privilege. But the overwhelming proportion of the cases in which the formula of good cause has been applied to require a special showing are those involving trial preparation. In practice, the courts have not treated documents as having a special immunity to discovery simply because of their being documents. Protection may be afforded to claims of privacy or secrecy or of undue burden or expense under what is now Rule 26(c) (previously Rule 30(b)). To be sure, an appraisal of "undue" burden inevitably entails consideration of the needs of the party seeking discovery. With special provisions added to govern trial preparation materials and experts, there is no longer any occasion to retain the requirement of good cause.

The revision of Rule 34 to have it operate extrajudicially, rather than by court order, is to a large extent a reflection of existing law office practice. The Columbia Survey shows that of the litigants seeking inspection of documents or things, only about 25 percent filed motions for court orders. This minor fraction nevertheless accounted for a significant number of motions. About half of these motions were uncontested and in almost all instances the party seeking production ultimately prevailed. Although an extrajudicial procedure will not drastically alter existing practice under Rule 34—it will conform to it in most cases—it has the potential of saving court time in a substantial though proportionately small number of cases tried annually.

The inclusion of testing and sampling of tangible things and objects or operations on land reflects a need frequently encountered by parties in preparation for trial. If the operation of a particular machine is the basis of a claim for negligent injury, it will often be necessary to test its operating parts or to sample and test the products it is producing. *Cf.* Mich.Gen.Ct.R. 310.1(1) (1963) (testing authorized).

The inclusive description of "documents" is revised to accord with changing technology. It makes clear that Rule 34 applies to electronic data compilations from which information can be obtained only with the use of detection devices, and that when the data can as a practical matter be made usable by the discovering party only through respondent's devices, respondent may be required to use his devices to translate the data into usable form. In many instances, this means that respondent will have to supply a print-out of computer data. The burden thus placed on respondent will vary from case to case, and the courts have ample power under Rule 26(c) to protect respondent against undue burden of expense, either by restricting discovery or requiring that the discovering party pay costs. Similarly, if the discovering party needs to check the electronic source itself, the court may protect respondent with respect to preservation of his records, confidentially of nondiscoverable matters, and costs.

*Subdivision (b).* The procedure provided in Rule 34 is essentially the same as that in Rule 33, as amended, and the discussion in the note appended to that rule is relevant to Rule 34 as well. Problems peculiar to Rule 34 relate to the specific arrangements that must be worked out for inspection and related acts of copying, photographing, testing, or sampling. The rule provides that a request for inspection shall set forth the items to be inspected either by item or category, describing each with reasonable particularity, and shall specify a reasonable time, place, and manner of making the inspection.

*Subdivision (c).* Rule 34 as revised continues to apply only to parties. Comments from the bar make clear that in the preparation of cases for trial it is occasionally necessary to enter land or inspect large tangible things in the possession of a person not a party, and that some courts have dismissed independent actions in the nature of bills in equity for such discovery on the ground that Rule 34 is preemptive. While an ideal solution to this problem is to provide for discovery against persons not parties in Rule 34, both the jurisdictional and procedural problems are very complex. For the present, this subdivision makes clear that Rule 34 does not preclude independent actions for discovery against persons not parties.

### CROSS REFERENCES

Consequences of failure to comply with order, see rule 37.

Perpetuation of testimony, order and examination, see rule 27.

Subpoena for production of documentary evidence, see rule 45.

Summary judgment, continuance to procure discovery opposing, see rule 56.

### FORMS

Motion for production of documents, etc., see form 24, Appendix of Forms.

## Rule 35. Physical and Mental Examination of Persons

### (a) Order for examination

When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

### (b) Report of examining physician

(1) If requested by the party against whom an order is made under Rule 35(a) or the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician setting out his findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that he is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if a physician fails or refuses to make a report the court may exclude his testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action

or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition.

(3) This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an examining physician or the taking of a deposition of the physician in accordance with the provisions of any other rule.

(As amended Mar. 30, 1970, eff. July 1, 1970.)

### Notes of Advisory Committee on Rules

Physical examination of parties before trial is authorized by statute or rule in a number of states. See Ariz.Rev.Code Ann. (Struckmeyer, 1928) § 4468; Mich.Court Rules Ann. (Searl, 1933) Rule 41, § 2; 2 N.J.Comp.Stat. (1910), N.Y.C.P.A. (1937) § 306; 1 S.D.Comp.Laws (1929) § 2716A; 3 Wash.Rev.Stat.Ann. (Remington, 1932) § 1230-1.

Mental examination of parties is authorized in Iowa. Iowa Code (1935) ch. 491-F1. See McCash, The Evolution of the Doctrine of Discovery and Its Present Status in Iowa, 20 Ia.L.Rev. 68 (1934).

The constitutionality of legislation providing for physical examination of parties was sustained in *Lyon* v. *Manhattan Railway Co.*, 142 N.Y. 298, 37 N.E. 113 (1894), and *McGovern* v. *Hope*, 63 N.J.L. 76, 42 Atl. 830 (1899). In *Union Pacific Ry. Co.* v. *Botsford*, 141 U.S. 250, 11 S.Ct. 1000, 35 L.Ed. 734 (1891), it was held that the court could not order the physical examination of a party in the absence of statutory authority. But in *Camden and Suburban Ry. Co.* v. *Stetson*, 177 U.S. 172, 20 L.Ed. 617, 44 L.Ed. 721 (1900) where there was statutory authority for such examination, derived from a state statute made operative by the conformity act, the practice was sustained. Such authority is now found in the present rule made operative by the Act of June 19, 1934, ch. 651, U.S.C., Title 28, former § 723b (now § 2072) (Rules in actions at law; Supreme Court authorized to make) and former § 723c (now § 2072) (Union of equity and action at law rules; power of Supreme Court).

### Notes of Advisory Committee on 1970 Amendment to Rules

*Subdivision (a).* Rule 35(a) has hitherto provided only for an order requiring a party to submit to an examination. It is desirable to extend the rule to provide for an order against the party for examination of a person in his custody or under his legal control. As appears from the provisions of amended Rule 37(b)(2) and the comment under that rule, an order to "produce" the third person imposes only an obligation to use good faith efforts to produce the person.

The amendment will settle beyond doubt that a parent or guardian suing to recover for injuries to a minor may be ordered to produce the minor for examination. Further, the amendment expressly includes blood examination within the kinds of examinations that can be ordered under the rule. See *Beach* v. *Beach*, 114 F.2d 479 (D.C. Cir. 1940). Provisions similar to the amendment have been adopted in at least 10 States: Calif.Code Civ.Proc. § 2032; Ida.R.Civ.P. 35; Ill.S-H Ann. c. 110A, § 215; Md.R.P. 420; Mich.Gen.Ct.R. 311; Minn.R.Civ.P. 35; Mo.Vern.Ann.R.Civ.P. 60.01; N.Dak.R.Civ.P. 35; N.Y.C.P.L. § 3121; Wyo.R.Civ.P. 35.

The amendment makes no change in the requirements of Rule 35 that, before a court order may issue, the relevant physical or mental condition must be shown to be "in controversy" and "good cause" must be shown for the examination. Thus, the amendment has no effect on the recent decision of the Supreme Court in *Schlagenhauf* v. *Holder*, 379 U.S. 104 (1964), stressing the importance of these requirements and applying them to the facts of the case. The amendment makes no reference to employees of a party. Provisions relating to employees in the State statutes and rules cited above appear to have been virtually unused.

*Subdivision (b)(1).* This subdivision is amended to correct an imbalance in Rule 35(b)(1) as heretofore written. Under that text, a party causing a Rule 35(a) examination to be made is required to furnish to the party examined, on request, a copy of the examining physician's report. If he delivers this copy, he is in turn entitled to receive from the party examined reports of all examinations of the same condition previously or later made. But the rule has not in terms entitled the examined party to receive from the party causing the Rule 35(a) examination any reports of earlier examinations of the same condition to which the latter may have access. The amendment cures this defect. See La.Stat.Ann., Civ.Proc. art. 1495 (1960); Utah R.Civ.P.35(c).

The amendment specifies that the written report of the examining physician includes results of all tests made, such as results of X-rays and cardiograms. It also embodies changes required by the broadening of Rule 35(a) to take in persons who are not parties.

*Subdivision (b)(3).* This new subdivision removes any possible doubt that reports of examination may be obtained although no order for examination has been made under Rule 35(a). Examinations are very frequently made by agreement, and sometimes before the party examined has an attorney. The courts have uniformly ordered that reports be supplied, see 4 Moore's Federal Practice ¶35.06, n.1 (2d ed. 1966); 2A Barron & Holtzoff, Federal Practice and Procedure § 823, n. 22 (Wright ed. 1961), and it appears best to fill the technical gap in the present rule.

The subdivision also makes clear that reports of examining physicians are discoverable not only under Rule 35(b) but under other rules as well. To be sure, if the report is privileged, then discovery is not permissible under any rule other than Rule 35(b) and it is permissible under Rule 35(b) only if the party requests a copy of the report of examination made by the other party's doctor. *Sher* v. *De Haven*, 199 F.2d 777 (D.C. Cir. 1952), *cert. denied* 345 U.S. 936 (1953). But if the report is unprivileged and is subject to discovery under the provisions of rules other than Rule 35(b)—such as Rules 34 or 26(b)(3) or (4)—discovery should not depend upon whether the person examined demands a copy of the report. Although a few cases have suggested the contrary, *e.g.*, *Galloway* v. *National Dairy Products Corp.*, 24 F.R.D. 362 (E.D.Pa. 1959), the better considered district court decisions hold that Rule 35(b) is not preemptive. *E.g.*, *Leszynski* v. *Russ*, 29 F.R.D. 10, 12 (D.Md. 1961) and cases cited. The question was recently given full consideration in *Buffington* v. *Wood*, 351 F.2d 292 (3d Cir. 1965), holding that Rule 35(b) is not preemptive.

### Cross References

Consequences of failure to submit to examination, see rule 37.

Perpetuation of testimony, order and examination, see rule 27.

## Rule 36. Requests for Admission of Documents

### (a) Request for admission

A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon him. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why he cannot admit or deny it.

The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pre-trial conference or at a designated time prior to trial. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

**(b) Effect of admission**

Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Mar. 30, 1970, eff. July 1, 1970.)

### Notes of Advisory Committee on Rules

Compare similar rules: Former Equity Rule 58 (last paragraph, which provides for the admission of the execution and genuineness of documents); English Rules Under the Judicature Act (The Annual Practice, 1937) O. 32; Ill.Rev.Stat. (1937) ch. 110, § 182 and Rule 18 (Ill.Rev.Stat. (1937) ch. 110, § 259.18); 2 Mass.Gen.Laws (Ter.Ed., 1932) ch. 231, § 69; Mich.Court Rules Ann. (Searl, 1933) Rule 42; N.J.Comp.Stat. (2 Cum.Supp. 1911-1924) N.Y.C.P.A. (1937) §§ 322, 323; Wis.Stat. (1935) § 327.22.

### Notes of Advisory Committee on 1946 Amendment to Rules

*Note.* The first change in the first sentence of Rule 36(a) and the addition of the new second sentence, specifying when requests for admissions may be served, bring Rule 36 in line with amended Rules 26(a) and 33. There is no reason why these rules should not be treated alike. Other provisions of Rule 36(a) give the party whose admissions are requested adequate protection.

The second change in the first sentence of the rule [subdivision (a)] removes any uncertainty as to whether a party can be called upon to admit matters of fact other than those set forth in relevant documents described in and exhibited with the request. In *Smyth* v. *Kaufman*, C.C.A.2d, 1940, 114 F.2d 40, it was held that the word "therein", now stricken from the rule [said subdivision] referred to the request and that a matter of fact not related to any document could be presented to the other party for admission or denial. The rule of this case is now clearly stated.

The substitution of the word "served" for "delivered" in the third sentence of the amended rule [said subdivision] is in conformance with the use of the word "serve" elsewhere in the rule and generally throughout the rules. See also Notes to Rules 13(a) and 33 herein. The substitution [in said subdivision] of "shorter or longer" for "further" will enable a court to designate a lesser period than 10 days for answer. This conforms with a similar provision already contained in Rule 33.

The addition of clause (1) [in said subdivision] specifies the method by which a party may challenge the propriety of a request to admit. There has been considerable difference of judicial opinion as to the correct method, if any, available to secure relief from an allegedly improper request. See Commentary, Methods of Objecting to Notice to Admit, 1942, 5 Fed.Rules Serv. 835; *International Carbonic Engineering Co.* v. *Natural Carbonic Products, Inc.*, S.D.Cal. 1944, 57 F.Supp. 248. The changes in clause (1) are merely of a clarifying and conforming nature.

The first of the added last two sentences [in said subdivision] prevents an objection to a part of a request from holding up the answer, if any, to the remainder. See similar proposed change in Rule 33. The last sentence strengthens the rule by making the denial accurately reflect the party's position. It is taken, with necessary changes, from Rule 8(b).

### Notes of Advisory Committee on 1970 Amendment to Rules

Rule 36 serves two vital purposes, both of which are designed to reduce trial time. Admissions are sought, first to facilitate proof with respect to issues that cannot be eliminated from the case, and secondly, to narrow the issues by eliminating those that can be. The changes made in the rule are designed to serve these purposes more effectively. Certain disagreements in the courts about the proper scope of the rule are resolved. In addition, the procedural operation of the rule is brought into line with other discovery procedures, and the binding effect of an admission is clarified. See generally Finman, The Request for Admissions in Federal Civil Procedure, 71 Yale L.J. 371 (1962).

*Subdivision (a).* As revised, the subdivision provides that a request may be made to admit any matter within the scope of Rule 26(b) that relate to statements or opinions of fact or of the application of law to fact. It thereby eliminates the requirement that the matters be "of fact." This change resolves conflicts in the court decisions as to whether a request to admit matters of "opinion" and matters involving "mixed law and fact" is proper under the rule. As to "opinion," compare, *e.g., Jackson Buff Corp.* v. *Marcelle,* 20 F.R.D. 139 (E.D.N.Y. 1957); *California* v. *The S.S. Jules Fribourg,* 19 F.R.D. 432 (N.D.Calif. 1955), with *e.g., Photon, Inc.* v. *Harris Intertype, Inc.,* 28 F.R.D. 327 (D.Mass. 1961); *Hise* v. *Lockwood Grader Corp.,* 153 F.Supp 276 (D.Nebr. 1957). As to "mixed law and fact" the majority of courts sustain objections, *e.g., Minnesota Mining and Mfg. Co.* v. *Norton Co.,* 36 F.R.D. 1 (N.D.Ohio 1964), but *McSparran* v. *Hanigan,* 225 F.Supp. 628 (E.D.Pa. 1963) is to the contrary.

Not only is it difficult as a practical matter to separate "fact" from "opinion," see 4 Moore's Federal Practice ¶36.04 (2d ed. 1966); *cf.* 2A Barron & Holtzoff, Federal Practice and Procedure 317 (Wright ed. 1961), but an admission on a matter of opinion may facilitate proof or narrow the issues or both. An admission of a matter involving the application of law to fact may, in a given case, even more clearly narrow the issues. For example, an admission that an employee acted in the scope of his employment may remove a major issue from the trial. In *McSparran* v. *Hanigan, supra,* plaintiff admitted that "the premises on which said accident occurred, were occupied or under the control" of one of the defendants, 225 F.Supp. at 636. This admission, involving law as well as fact, removed one of the issues from the lawsuit and thereby reduced the proof required at trial. The amended provision does not authorize requests for admissions of law unrelated to the facts of the case.

Requests for admission involving the application of law to fact may create disputes between the parties which are best resolved in the presence of the judge after much or all of the other discovery has been completed. Power is therefore expressly conferred upon the court to defer decision until a pretrial conference is held or until a designated time prior to trial. On the other hand, the court should not automatically defer decision; in many instances, the importance of the admission lies in enabling the requesting party to avoid the burdensome accumulation of proof prior to the pretrial conference.

Courts have also divided on whether an answering party may properly object to request for admission as to matters which that party regards as "in dispute." Compare, *e.g., Syracuse Broadcasting Corp.* v. *Newhouse,* 271 F.2d 910, 917 (2d Cir. 1959); *Driver* v. *Gindy Mfg. Corp.,* 24 F.R.D. 473 (E.D.Pa. 1959); with *e.g., McGonigle* v *Baxter,* 27 F.R.D. 504 (E.D.Pa. 1961); *United States* v. *Ehbauer,* 13 F.R.D. 462 (W.D.Mo. 1952). The proper response in such cases is an answer. The very purpose of the request is to ascertain whether the answering party is prepared to admit or regards the matter as presenting a genuine issue for trial. In his answer, the party may deny, or he may give his reason for inability to admit or deny the existence of a genuine issue. The party runs no risk of sanctions if the matter is genuinely in issue, since Rule 37(c) provides a sanction of costs only when there are no good reasons for a failure to admit.

On the other hand, requests to admit may be so voluminous and so framed that the answering party finds the task of identifying what is in dispute and what is not unduly burdensome. If so, the responding party may obtain a protective order under Rule 26(c). Some of the decisions sustaining objections on "disputability" grounds could have been justified by the burdensome character of the requests. See, *e.g., Syracuse Broadcasting Corp.* v. *Newhouse, supra.*

Another sharp split of authority exists on the question whether a party may base his answer on lack of information or knowledge without seeking out additional information. One line of cases has held that a party may answer on the basis of such knowledge as he has at the time he answers. *E.g., Jackson Buff Corp.* v. *Marcelle,* 20 F.R.D. 139 (E.D.N.Y. 1957); *Sladek* v. *General Motors Corp.,* 16 F.R.D. 104 (S.D.Iowa 1954). A larger group of cases, supported by commentators, has taken the view that if the responding party lacks knowledge, he must inform himself in reasonable fashion. *E.g., Hise* v. *Lockwood Grader Corp.,* 153 F.Supp. 276 (D.Nebr. 1957); *E. H. Tate Co.* v. *Jiffy Enterprises, Inc.,* 16 F.R.D. 571 (E.D.Pa. 1954); Finman, *supra,* 71 Yale L.J. 371, 404–409; 4 Moore's Federal Practice ¶36.04 (2d ed. 1966); 2A Barron & Holtzoff, Federal Practice and Procedure 509 (Wright ed. 1961).

The rule as revised adopts the majority view, as in keeping with a basic principle of the discovery rules that a reasonable burden may be imposed on the parties when its discharge will facilitate preparation for trial and ease the trial process. It has been argued against this view that one side should not have the burden of "proving" the other side's case. The revised rule requires only that the answering party make reasonable inquiry and secure such knowledge and information as are readily obtainable by him. In most instances, the investigation will be necessary either to his own case or to preparation for rebuttal. Even when it is not, the information may be close enough at hand to be "readily obtainable." Rule 36 requires only that the party state that he has taken these steps. The sanction for failure of a party to inform himself before he answers lies in the award of costs after trial, as provided in Rule 37(c).

The requirement that the answer to a request for admission be sworn is deleted, in favor of a provision that the answer be signed by the party or by his attorney. The provisions of Rule 36 make it clear that admissions function very much as pleadings do. Thus, when a party admits in part and denies in part, his admission is for purposes of the pending action only and may not be used against him in any other proceeding. The broadening of the rule to encompass mixed questions of law and fact reinforces this feature. Rule 36 does not lack a sanction for false answers; Rule 37(c) furnishes an appropriate deterrent.

The existing language describing the available grounds for objection to a request for admission is eliminated as neither necessary nor helpful. The statement that objection may be made to any request, which is "improper" adds nothing to the provisions that the party serve an answer or objection addressed to each matter and that he state his reasons for any objection. None of the other discovery rules set forth grounds for objection, except so far as all are subject to the general provisions of Rule 26.

Changes are made in the sequence of procedures in Rule 36 so that they conform to the new procedures in Rules 33 and 34. The major changes are as follows:

(1) The normal time for response to a request for admissions is lengthened from 10 to 30 days, conforming more closely to prevailing practice. A defendant need not respond, however, in less than 45 days after service of the summons and complaint upon him. The court may lengthen or shorten the time when special situations require it.

(2) The present requirement that the plaintiff wait 10 days to serve requests without leave of court is eliminated. The revised provision accords with those in Rules 33 and 34.

(3) The requirement that the objecting party move automatically for a hearing on his objection is eliminated, and the burden is on the requesting party to move for an order. The change in the burden of going forward does not modify present law on burden of persuasion. The award of expenses incurred in relation to the motion is made subject to the comprehensive provisions of Rule 37(a)(4).

(4) A problem peculiar to Rule 36 arises if the responding party serves answers that are not in conformity with the requirements of the rule—for example,

a denial is not "specific," or the explanation of inability to admit or deny is not "in detail." Rule 36 now makes no provision for court scrutiny of such answers before trial, and it seems to contemplate that defective answers bring about admissions just as effectively as if no answer had been served. Some cases have so held. *E.g., Southern Ry. Co.* v. *Crosby,* 201 F.2d 878 (4th Cir. 1953); *United States* v. *Laney,* 96 F.Supp. 482 (E.D.S.C. 1951).

Giving a defective answer the automatic effect of an admission may cause unfair surprise. A responding party who purported to deny or to be unable to admit or deny will for the first time at trial confront the contention that he has made a binding admission. Since it is not always easy to know whether a denial is "specific" or an explanation is "in detail," neither party can know how the court will rule at trial and whether proof must be prepared. Some courts, therefore, have entertained motions to rule on defective answers. They have at times ordered that amended answers be served, when the defects were technical, and at other times have declared that the matter was admitted. *E.g., Woods* v. *Stewart,* 171 F.2d 544 (5th Cir. 1948); *SEC* v. *Kaye, Real & Co.,* 122 F.Supp. 639 (S.D.N.Y. 1954); *Seib's Hatcheries, Inc.* v. *Lindley,* 13 F.R.D. 113 (W.D.Ark. 1952). The rule as revised conforms to the latter practice.

*Subdivision (b).* The rule does not now indicate the extent to which a party is bound by his admission. Some courts view admissions as the equivalent of sworn testimony *E.g., Ark.-Tenn Distributing Corp.* v. *Breidt,* 209 F.2d 359 (3d Cir. 1954); *United States* v. *Lemons,* 125 F.Supp. 686 (W.D.Ark. 1954); 4 Moore's *Federal Practice* ¶36.08 (2d ed. 1966 Supp.). At least in some jurisdictions a party may rebut his own testimony, *e.g., Alamo* v. *Del Rosario,* 98 F.2d 328 (D.C.Cir. 1938), and by analogy an admission made pursuant to Rule 36 may likewise be thought rebuttable. The courts in *Ark-Tenn* and *Lemons, supra,* reasoned in this way, although the results reached may be supported on different grounds. In *McSparran* v. *Hanigan,* 225 F.Supp. 628, 636–637 (E.D.Pa. 1963), the court held that an admission is conclusively binding, though noting the confusion created by prior decisions.

The new provisions give an admission a conclusively binding effect, for purposes only of the pending action, unless the admission is withdrawn or amended. In form and substance a Rule 36 admission is comparable to an admission in pleadings or a stipulation drafted by counsel for use at trial, rather than to an evidentiary admission of a party. Louisell, *Modern California Discovery* § 8.07 (1963); 2A Barron & Holtzoff, *Federal Practice and Procedure* § 838 (Wright ed. 1961). Unless the party securing an admission can depend on its binding effect, he cannot safely avoid the expense of preparing to prove the very matters on which he has secured the admission, and the purpose of the rule is defeated. Field & McKusick, *Maine Civil Practice* § 36.4 (1959); Finman, *supra,* 71 Yale L.J. 371, 418–426; Comment, 56 Nw.U.L.Rev. 679, 682–683 (1961).

Provision is made for withdrawal or amendment of an admission. This provision emphasizes the importance of having the action resolved on the merits, while at the same time assuring each party that justified reliance on an admission in preparation for trial will not operate to his prejudice. *Cf. Moosman* v. *Joseph P. Blitz, Inc.,* 358 F.2d 686 (2d Cir. 1966).

### CROSS REFERENCES

Expenses on refusal to admit, see rule 37.

Use of admissions on motions for summary judgment, see rule 56.

### FORMS

Request for admission under this rule, see form 25, Appendix of Forms.

## Rule 37. Failure To Make Discovery: Sanctions

**(a) Motion for order compelling discovery**

A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) *Appropriate court.* An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

(2) *Motion.* If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for and order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

(3) *Evasive or incomplete answer.* For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) *Award of expenses of motion.* If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

**(b) Failure to comply with order**

(1) *Sanctions by court in district where deposition is taken.* If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) *Sanctions by court in which action is pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including and order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

### (c) Expenses on failure to admit

If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

### (d) Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection

If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

### (e) Subpoena of person in foreign country

A subpoena may be issued as provided in Title 28 U.S.C. § 1783, under the circumstances and conditions therein stated.

### (f) Expenses against United States

Except to the extent permitted by statute, expenses and fees may not be awarded against the United States under this rule.

(As amended Dec. 29, 1948, eff. Oct. 20, 1949; Mar. 30, 1970, eff. July 1, 1970.)

### NOTES OF ADVISORY COMMITTEE ON RULES

The provisions of this rule authorizing orders establishing facts or excluding evidence or striking pleadings, or authorizing judgments of dismissal or default, for refusal to answer questions or permit inspection or otherwise make discovery, are in accord with *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322, 29 S.Ct. 370, 53 L.Ed. 530, 15 Ann.Cas. 645 (1909), which distinguishes between the justifiable use of such measures as a means of compelling the production of evidence, and their unjustifiable use, as in *Hovey* v. *Elliott*, 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215 (1897), for the mere purpose of punishing for contempt.

### NOTES OF ADVISORY COMMITTEE ON 1970 AMENDMENT TO RULES

Rule 37 provides generally for sanctions against parties or persons unjustifiably resisting discovery. Experience has brought to light a number of defects in the language of the rule as well as instances in which it is not serving the purposes for which it was designed. See Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 Col.L.Rev. 480 (1958). In addition, changes being made in other discovery rules requiring conforming amendments to Rule 37.

Rule 37 sometimes refers to a "failure" to afford discovery and at other times to a "refusal" to do so. Taking note of this dual terminology, courts have imported into "refusal" a requirement of "wilfullness." See *Roth* v. *Paramount Pictures Corp.*, 8 F.R.D. 31 (W.D.Pa. 1948); *Campbell* v. *Johnson*, 101 F.Supp. 705, 707 (S.D.N.Y. 1951). In *Societe Internationale* v. *Rogers*, 357 U.S. 197 (1958), the Supreme Court concluded that the rather random use of these two terms in Rule 37 showed no design to use them with consistently distinctive meanings, that "refused" in Rule 37(b)(2) meant simply a failure to comply, and that wilfullness was relevant only to the selection of sanctions, if any, to be imposed. Nevertheless, after the decision in *Societe*, the court in *Hinson* v. *Michigan Mutual Liability Co.*, 275 F.2d 537 (5th Cir. 1960) once again ruled that "refusal" required wilfullness. Substitution of "failure" for "refusal" throughout Rule 37 should eliminate this confusion and bring the rule into harmony with the *Societe Internationale* decision. See Rosenberg, *supra*, 58 Col.L.Rev. 480, 489–490 (1958).

*Subdivision (a).* Rule 37(a) provides relief to a party seeking discovery against one who, with or without stated objections, fails to afford the discovery sought. It has always fully served this function in relation to depositions, but the amendments being made to Rules 33 and 34 give Rule 37(a) added scope and importance. Under existing Rule 33, a party objecting to interrogatories must make a motion for court hearing on his objections. The changes now made in Rules 33 and 37(a) make it clear that the interrogating party must move to compel answers, and the motion is provided for in Rule 37(a). Existing Rule 34, since it requires a court order prior to production of documents or things or permission to enter on land, has no relation to Rule 37(a). Amendments of Rules 34 and 37(a) create a procedure similar to that provided for Rule 33.

*Subdivision (a)(1).* This is a new provision making clear to which court a party may apply for an order compelling discovery. Existing Rule 37(a) refers only to the court in which the deposition is being taken; nevertheless, it has been held that the court where the action is pending has "inherent power" to compel a party deponent to answer. *Lincoln Laboratories, Inc.* v. *Savage Laboratories, Inc.*, 27 F.R.D. 476 (D.Del. 1961). In relation to Rule 33 interrogatories and Rule 34 requests for inspection, the court where the action is pending is the appropriate enforcing tribunal. The new provision eliminates the need to resort to inherent power by spelling out the respective roles of the court where the action is pending and the court where the deposition is taken. In some instances, two courts are available to a party seeking to compel answers from a party deponent. The party seeking discovery may choose the court to which he will apply, but the court has power to remit the party to the other court as a more appropriate forum.

*Subdivision (a)(2).* This subdivision contains the substance of existing provisions of Rule 37(a) authorizing motions to compel answers to questions put at depositions and to interrogatories. New provisions authorize motions for orders compelling designation under Rules 30(b)(6) and 31(a) and compelling inspection in accordance with a request made under Rule 34. If the court denies a motion, in whole or part, it may accompany the denial with issuance of a protective order. Compare the converse provision in Rule 26(c).

*Subdivision (a)(3).* This new provision makes clear that an evasive or incomplete answer is to be considered, for purposes of subdivision (a), a failure to answer. The courts have consistently held that they have the power to compel adequate answers. *E.g.*, *Cone Mills Corp.* v. *Joseph Bancroft & Sons Co.*, 33 F.R.D. 318 (D.Del. 1963). This power is recognized and incorporated into the rule.

*Subdivision (a)(4).* This subdivision amends the provisions for award of expenses, including reasonable attorney's fees, to the prevailing party or person when a motion is made for an order compelling discovery. At present, an award of expenses is made only if the losing party or person is found to have acted without substantial justification. The change requires that expenses be awarded unless the conduct of the losing party or person is found to have been substantially justified. The test of "substantial justification" remains, but the change in language is intended to encourage judges to be more alert to abuses occurring in the discovery process.

On many occasions, to be sure, the dispute over discovery between the parties is genuine, though ultimately resolved one way or the other by the court. In such cases, the losing party is substantially justified in carrying the matter to court. But the rules should deter the abuse implicit in carrying or forcing a discovery dispute to court when no genuine dispute exists. And the potential or actual imposition of expenses is virtually the sole formal sanction in the rules to deter a party from pressing to a court hearing frivolous requests for or objections to discovery.

The present provision of Rule 37(a) that the court shall require payment if it finds that the defeated party acted without "substantial justification" may appear adequate, but in fact it has been little used. Only a handful of reported cases include an award of expenses, and the Columbia Survey found that in only one instance out of about 50 motions decided under Rule 37(a) did the court award expenses. It appears that the courts do not utilize the most important available sanction to deter abusive resort to the judiciary.

The proposed change provides in effect that expenses should ordinarily be awarded unless a court finds that the losing party acted justifiably in carrying his point to court. At the same time, a necessary flexibility is maintained, since the court retains the power to find that other circumstances make an award of expenses unjust—as where the prevailing party also acted unjustifiably. The amendment does not significantly narrow the discretion of the court, but rather presses the court to address itself to abusive practices. The present provision that expenses may be imposed upon either the party or his attorney or both is unchanged. But it is not contemplated that expenses will be imposed upon the attorney merely because the party is indigent.

*Subdivision (b).* This subdivision deals with sanctions for failure to comply with a court order. The present captions for subsections (1) and (2) entitled, "Contempt" and "Other Consequences," respectively, are confusing. One of the consequences listed in (2) is the arrest of the party, representing the exercise of the contempt power. The contents of the subsections show that the first authorizes the sanction of contempt (and no other) by the court in which the deposition is taken, whereas the second subsection authorizes a variety of sanctions, including contempt, which may be imposed by the court in which the action is pending. The captions of the subsections are changed to deflect their contents.

The scope of Rule 37(b)(2) is broadened by extending it to include any order "to provide or permit discovery," including orders issued under Rules 37(a) and 35. Various rules authorize orders for discovery—*e.g.*, Rule 35 (b)(1), Rule 26(c) as revised, Rule 37(d). See Rosenberg, *supra*, 58 Col.L.Rev. 480, 484–486. Rule 37(b)(2) should provide comprehensively for enforcement of all these orders. *Cf. Societe Internationale* v. *Rogers*, 357 U.S. 197, 207 (1958). On the other hand, the reference to Rule 34 is deleted to conform to the changed procedure in that rule.

A new subsection (E) provides that sanctions which have been available against a party for failure to comply with an order under Rule 35(a) to submit to examination will now be available against him for his failure to comply with a Rule 35(a) order to produce a third person for examination, unless he shows that he is unable to produce the person. In this context, "unable" means in effect "unable in good faith." See *Societe Internationale* v. *Rogers*, 357 U.S. 197 (1958).

Subdivision (b)(2) is amplified to provide for payment of reasonable expenses caused by the failure to obey the order. Although Rules 37(b)(2) and 37(d) have been silent as to award of expenses, courts have nevertheless ordered them on occasion. *E.g.*, *United Sheeplined Clothing Co.* v. *Arctic Fur Cap Corp.*, 165 F.Supp. 193 (S.D.N.Y.1958); *Austin Theatre, Inc.* v. *Warner Bros. Picture, Inc.*, 22 F.R.D. 302 (S.D.N.Y. 1958). The provision places the burden on the disobedient party to avoid expenses by showing that his failure is justified or that special circumstances make an award of expenses unjust. Allocating the burden in this way conforms to the changed provisions as to expenses in Rule 37(a), and is particularly appropriate when a court order is disobeyed.

An added reference to directors of a party is similar to a change made in subdivision (d) and is explained in the note to that subdivision. The added reference to persons designated by a party under Rules 30(b)(6) or

31(a) to testify on behalf of the party carries out the new procedure in those rules for taking a deposition of a corporation or other organization.

*Subdivision (c)*. Rule 37(c) provides a sanction for the enforcement of Rule 36 dealing with requests for admission. Rule 36 provides the mechanism whereby a party may obtain from another party in appropriate instances either (1) and admission, or (2) a sworn and specific denial, or (3) a sworn statement "setting forth in detail the reasons why he cannot truthfully admit or deny." If the party obtains the second or third of these responses, in proper form, Rule 36 does not provide for a pretrial hearing on whether the response is warranted by the evidence thus far accumulated. Instead, Rule 37(c) is intended to provide posttrial relief in the form of a requirement that the party improperly refusing the admission pay the expenses of the other side in making the necessary proof at trial.

Rule 37(c), as now written, addresses itself in terms only to the sworn denial and is silent with respect to the statement of reasons for an inability to admit or deny. There is no apparent basis for this distinction, since the sanction provided in Rule 37(c) should deter all unjustified failures to admit. This omission in the rule has caused confused and diverse treatment in the courts. One court has held that if a party gives inadequate reasons, he should be treated before trial as having denied the request, so that Rule 37(c) may apply. *Bertha Bldg. Corp.* v. *National Theatres Corp.*, 15 F.R.D. 339 (E.D.N.Y. 1954). Another has held that the party should be treated as having admitted the request. *Heng Hsin Co.* v. *Stern, Morgenthau & Co.*, 20 Fed.Rules Serv. 36a.52, Case 1 (S.D.N.Y. Dec. 10, 1954). Still another has ordered a new response, without indicating what the outcome should be if the new response were inadequate. *United States Plywood Corp.* v. *Hudson Lumber Co.*, 127 F.Supp. 489, 497–498 (S.D.N.Y. 1954). See generally Finman, *The Request for Admissions in Federal Civil Procedure*, 71 Yale L.J. 371, 426–430 (1962). The amendment eliminates this defect in Rule 37(c) by bringing within its scope all failures to admit.

Additional provisions in Rule 37(c) protect a party from having to pay expenses if the request for admission was held objectionable under Rule 36(a) or if the party failing to admit had reasonable ground to believe that he might prevail on the matter. The latter provision emphasizes that the true test under Rule 37(c) is not whether a party prevailed at trial but whether he acted reasonably in believing that he might prevail.

*Subdivision (d)*. The scope of subdivision (d) is broadened to include responses to requests for inspection under Rule 34, thereby conforming to the new procedures of Rule 34.

Two related changes are made in subdivision (d): the permissible sanctions are broadened to include such orders "as are just"; and the requirement that the failure to appear or respond be "wilful" is eliminated. Although Rule 37(d) in terms provides for only three sanctions, all rather severe, the courts have interpreted it as permitting softer sanctions than those which it sets forth. *E.g., Gill* v. *Stolow*, 240 F.2d 669 (2d Cir. 1957); *Saltzman* v. *Birrell*, 156 F.Supp. 538 (S.D.N.Y. 1957); 2A Barron & Holtzoff, *Federal Practice and Procedure* 554–557 (Wright ed. 1961). The rule is changed to provide the greater flexibility as to sanctions which the cases show is needed

The resulting flexibility as to sanctions eliminates any need to retain the requirement that the failure to appear or respond be "wilful." The concept of "wilful failure" is at best subtle and difficult, and the cases do not supply a bright line. Many courts have imposed sanctions without referring to wilfullness. *E.g., Milewski* v. *Schneider Transportation Co.*, 238 F.2d 397 (6th Cir. 1956); *Dictograph Products, Inc.* v. *Kentworth Corp.*, 7 F.R.D. 543 (W.D.Ky. 1947). In addition, in view of the possibility of light sanctions, even a negligent failure should come within Rule 37(d). If default is caused by counsel's ignorance of Federal practice, cf. *Dunn.* v. *Pa. R.R.*, 96 F. Supp. 597 (N.D.Ohio 1951), or by his preoccupation with another aspect of the case, *cf. Maurer-Neuer, Inc.* v. *United Packinghouse Workers*, 26 F.R.D. 139 (D.Kans. 1960), dismissal of the action and default judgment are not justified, but the imposition of expenses and fees may well be. "Wilfullness" continues to play a role, along with various other factors, in the choice of sanctions. Thus, the scheme conforms to Rule 37(b) as construed by the Supreme Court in *Societe Internationale* v. *Rogers*, 357 U.S. 197, 208 (1958).

A provision is added to make clear that a party may not properly remain completely silent even when he regards a notice to take his deposition or a set of interrogatories or requests to inspect as improper and objectionable. If he desires not to appear or not to respond, he must apply for a protective order. The cases are divided on whether a protective order must be sought. Compare *Collins* v. *Wayland*, 139 F.2d 677 (9th Cir. 1944), *cert. den.* 322 U.S. 744; *Bourgeois* v. *El Paso Natural Gas Co.*, 20 F.R.D. 358 (S.D.N.Y. 1957); *Loosly* v. *Stone*, 15 F.R.D. 373 (S.D.Ill. 1954), with *Scarlatos* v. *Kulukundis*, 21 F.R.D. 185 (S.D.N.Y. 1957); *Ross* v. *True Temper Corp.*, 11 F.R.D 307 (N.D.Ohio 1951). Compare also Rosenberg, *supra*, 58 Col.L.Rev. 480, 496 (1958) with 2A Barron & Holtzoff, Federal Practice and Procedure 530–531 (Wright ed. 1961). The party from whom discovery is sought is afforded, through Rule 26(c), a fair and effective procedure whereby he can challenge the request made. At the same time, the total non-compliance with which Rule 37(d) is concerned may impose severe inconvenience or hardship on the discovering party and substantially delay the discovery process. *Cf.* 2B Barron & Holtzoff, Federal Practice and Procedure 306–307 (Wright ed. 1961) (response to a subpoena).

The failure of an officer or managing agent of a party to make discovery as required by present Rule 37(d) is treated as the failure of the party. The rule as revised provides similar treatment for a director of a party. There is slight warrant for the present distinction between officers and managing agents on the one hand and directors on the other. Although the legal power over a director to compel his making discovery may not be as great as over officers or managing agents, *Campbell* v. *General Motors Corp.*, 13 F.R.D. 331 (S.D.N.Y. 1952), the practical differences are negligible. That a director's interests are normally aligned with those of his corporation is shown by the provisions of old Rule 26(d)(2), transferred to 32(a)(2) (deposition of director of party may be used at trial by an adverse party for any purpose) and of Rule 43(b) (director of party may be treated at trial as a hostile witness on direct examination by any adverse party). Moreover, in those rare instances when a corporation is unable through good faith efforts to compel a director to make discovery, it is unlikely that the court will impose sanctions. *Cf. Societe Internationale* v. *Rogers*, 357 U.S. 197 (1958).

*Subdivision (e)*. The change in the caption conforms to the language of 28 U.S.C. § 1783, as amended in 1964.

*Subdivision (f)*. Until recently, costs of a civil action could be awarded against the United States only when expressly provided by Act of Congress, and such provision was rarely made. See H.R.Rept.No. 1535, 89th Cong., 2d Sess., 2–3 (1966). To avoid any conflict with this doctrine, Rule 37(f) has provided that expenses and attorney's fees may not be imposed upon the United States under Rule 37. See 2A Barron & Holtzoff, *Federal Practice and Procedure* 857 (Wright ed. 1961).

A major change in the law was made in 1966, 80 Stat. 308, 28 U.S.C. § 2412 (1966), whereby a judgment for costs may ordinarily be awarded to the prevailing party in any civil action brought by or against the United States. Costs are not to include the fees and expenses of attorneys. In light of this legislative development, Rule 37(f) is amended to permit the award of expenses and fees against the United States under Rule 37, but only to the extent permitted by statute.

The amendment brings Rule 37(f) into line with present and future statutory provisions.

### AMENDMENTS

1948—The amendment effective October 1949, substituted the reference to "Title 28, U.S.C., § 1783" in subdivision (e) for the reference to "the act of July 3, 1926, ch. 762, § 1 (44 Stat. 835), U.S.C., Title 28, § 711".

### CROSS REFERENCES

Failure to attend taking of a deposition or to serve subpoena, payment of expenses, see rule 30.

## TITLE VI—TRIALS

### Rule 38. Jury Trial of Right

**(a) Right preserved**

The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

**(b) Demand**

Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

**(c) Same: Specification of issues**

In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

**(d) Waiver**

The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

**(e) Admiralty and maritime claims**

These rules shall not be construed to create a right to trial by jury of the issues in an admiralty or maritime claim within the meaning of Rule 9(h).

(As amended Feb. 28, 1966, eff. July 1, 1966.)

### NOTES OF ADVISORY COMMITTEE ON RULES

This rule provides for the preservation of the constitutional right of trial by jury as directed in the enabling act (act of June 19, 1934, 48 Stat. 1064, U.S.C., Title 28, former § 723c (now § 2072)), and it and the next rule make definite provision for claim and waiver of jury trial, following the method used in many American states and in England and the British Dominions. Thus the claim must be made at once on initial pleading or appearance under Ill.Rev.Stat. (1937) ch. 110, § 188; 6 Tenn.Code Ann. (Williams, 1934) § 8734; compare Wyo.Rev.Stat.Ann. (1931) § 89–1320 (with answer or reply); within 10 days after the pleadings are completed or the case is at issue under 2 Conn.Gen.Stat. (1930) § 5624; Hawaii Rev.Laws (1935) § 4101; 2 Mass.Gen.Laws (Ter.Ed. 1932) ch. 231, § 60; 3 Mich.Comp.Laws (1929) § 14263; Mich.Court Rules Ann. (Searl, 1933) Rule 33 (15 days); England (until 1933) O. 36, r.r. 2 and 6; and Ontario Jud.Act (1927) § 57(1) (4 days, or, where prior notice of trial, 2 days from such notice); or at a definite time varying under different codes, from 10 days before notice of trial to 10 days after notice, or, as in many, when the case is called for assignment, Ariz.Rev.Code Ann. (Struckmeyer, 1928) § 3802; Calif.Code Civ.Proc. (Deering, 1937) § 631, par. 4; Iowa Code (1935) § 10724; 4 Nev.Comp.Laws (Hillyer, 1929) § 8782; N.M.Stat.Ann. (Courtright, 1929) § 105–814; N.Y.C.P.A. (1937) § 426, subdivision 5 (applying to New York, Bronx, Richmond, Kings, and Queens Counties); R.I.Pub.Laws (1929), ch. 1327, amending R.I.Gen.Laws (1923) ch. 337, § 6; Utah Rev.Stat.Ann. (1933) § 104–23–6; 2 Wash.Rev.Stat.Ann. (Remington, 1932) § 316; England (4 days after notice of trial), Administration of Justice Act (1933) § 6 and amended rule under the Judicature Act (The Annual Practice, 1937), O. 36, r. 1; Australia High Court Procedure Act (1921) § 12, Rules, O. 33, r. 2; Alberta Rules of Ct. (1914) 172, 183, 184; British Columbia Sup.Ct.Rules (1925) O. 36, r.r. 2, 6, 11, and 16; New Brunswick Jud. Act (1927) O. 36, r.r. 2 and 5. See James, Trial by Jury and the New Federal Rules of Procedure (1936), 45 Yale L.J. 1022.

Rule 81(c) provides for claim for jury trial in removed actions.

The right to trial by jury as declared in U.S.C., Title 28, formerly § 770 (now § 1873) (Trial of issues of fact; by jury; exceptions), and similar statutes, is unaffected by this rule. This rule modifies U.S.C., Title 28, former § 773 (Trial of issues of fact; by court).

### NOTES OF ADVISORY COMMITTEE ON 1966 AMENDMENT TO RULES

See Note to Rule 9(h), supra.

### CROSS REFERENCES

Admiralty and maritime case, trial of issues of fact by jury, see section 1873 of this title.

Advisory jury, see rule 39.

Calendar to designate cases as "jury actions", see rule 79.

Declaratory judgment actions, right to jury trial, see rule 57.

Default judgment, right of trial by jury, see rule 55.

Directed verdict, motion for which is not granted not a waiver of trial by jury, see rule 50.

Juries generally, see chapter 121 of this title.

Recovery of forfeitures in actions on bonds and specialties, jury assessment of amount due, see section 1874 of this title.

Removed actions, time for service of jury demand, see rule 81.

Supreme Court, jury trial in original actions at law, see section 1872 of this title.

Trial by jury or by the court, see rule 39.

Trustees and receivers, right to jury trial in actions against, see section 959 of this title.

United States, jury trial denied in actions against, see section 2402 of this title.

### Rule 39. Trial by Jury or by the Court

**(a) By jury**

When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States.

**(b) By the court**

Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.

**(c) Advisory jury and trial by consent**

In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or, except in actions against the United States when a statute of the United States provides for trial without a jury, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

### NOTES OF ADVISORY COMMITTEE ON RULES

The provisions for express waiver of jury trial found in U.S.C., Title 28, former § 773 (Trial of issues of fact; by court) are incorporated in this rule. See rule 38, however, which extends the provisions for waiver of jury. U.S.C., Title 28, former § 772 (Trial of issues of fact; in equity in patent causes) is unaffected by this rule. When certain of the issues are to be tried by jury and others by the court, the court may determine the sequence in which such issues shall be tried. See *Liberty Oil Co.* v. *Condon Nat. Bank*, 260 U.S. 235, 43 S. Ct. 118, 67 L. Ed. 232 (1922).

A discretionary power in the courts to send issues of fact to the jury is common in state procedure. Compare Calif.Code Civ.Proc. (Deering, 1937) § 592; 1 Colo.Stat.Ann. (1935) Code Civ.Proc., ch. 12, § 191; Conn.Gen.Stat. (1930) § 5625; 2 Minn.Stat. (Mason, 1927) § 9288; 4 Mont.Rev.Codes Ann. (1935) § 9327; N.Y.C.P.A. (1937) § 430; 2 Ohio Gen.Code Ann. (Page, 1926) § 11380; 1 Okla.Stat.Ann. (Harlow, 1931) § 351; Utah Rev.Stat.Ann. (1933) § 104-23-5; 2 Wash.Rev.Stat.Ann. (Remington, 1932) § 315; Wis.Stat. (1935) § 270.07. See Equity Rule 23 (Matters Ordinarily Determinable at Law When Arising in Suit in Equity to be Disposed of Therein) and U.S.C., Title 28, former § 772 (Trial of issues of fact; in equity in patent causes); *Colleton Merc. Mfg. Co.* v. *Savannah River Lumber Co.*, 280 Fed. 358 (C.C.A.4th, 1922); *Fed. Res. Bk. of San Francisco* v. *Idaho Grimm Alfalfa Seed Growers' Ass'n*, 8 F.2d 922 (C.C.A.9th, 1925), cert. den. 270 U.S. 646, 46 S.Ct. 347, 70 L.Ed. 778 (1926); *Watt* v. *Starke*, 101 U.S. 247, 25 L.Ed. 826 (1879).

### CROSS REFERENCES

Demand for jury trial, see rule 38.

Enlargement of time after expiration of period prescribed, see rule 6.

Findings of fact required in actions tried with an advisory jury, see rule 52.

Report of masters in jury actions, see rule 53.

## Rule 40. Assignment of Cases for Trial

The district courts shall provide by rule for the placing of actions upon the trial calendar (1) without request of the parties or (2) upon request of a party and notice to the other parties or (3) in such other manner as the courts deem expedient. Precedence shall be given to actions entitled thereto by any statute of the United States.

### NOTES OF ADVISORY COMMITTEE ON RULES

U.S.C., Title 28, former § 769 (Notice of case for trial) is modified. See former Equity Rule 56 (On Expiration of Time for Depositions, Case Goes on Trial Calendar). See also former Equity Rule 57 (Continuances).

For examples of statutes giving precedence, see U.S.C., Title 28, formerly § 47 (now §§ 1253, 2101, 2325) (Injunctions as to orders of Interstate Commerce Commission); formerly § 380 (now §§ 1253, 2101, 2284) (Injunctions alleged unconstitutionality of state statutes); formerly § 380a (now §§ 1253, 2101, 2284) (Same; Constitutionality of federal statute); former § 768 (Priority of cases where a state is party); Title 15, § 28 (Antitrust laws; suits against monopolies expedited); Title 22, § 240 (Petition for restoration of property seized as munitions of war, etc.); and Title 49, § 44 (Proceedings in equity under interstate commerce laws; expedition of suits).

### CROSS REFERENCES

Adoption of local rules not inconsistent with these rules, see rule 83.

## Rule 41. Dismissal of Actions

**(a) Voluntary dismissal: effect thereof**

(1) *By Plaintiff; by Stipulation.* Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) *By Order of Court.* Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

**(b) Involuntary dismissal: effect thereof**

For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

**(c) Dismissal of counterclaim, cross-claim, or third-party claim**

The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (1) of subdivision (a) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

**(d) Costs of previously-dismissed action**

If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Dec. 4, 1967, eff. July 1, 1968.)

### NOTES OF ADVISORY COMMITTEE ON RULES

*Note to Subdivision (a).* Compare Ill.Rev.Stat. (1937) ch. 110, § 176, and English Rules Under the Judicature Act (The Annual Practice, 1937) O. 26.

Provisions regarding dismissal in such statutes as U.S.C., Title 8, § 164 (Jurisdiction of district courts in immigration cases) and U.S.C., Title 31, § 232 (Liability of persons making false claims against United States; suits) are preserved by paragraph (1).

*Note to Subdivision (b).* This provides for the equivalent of a nonsuit on motion by the defendant after the completion of the presentation of evidence by the plaintiff. Also, for actions tried without a jury, it provides the equivalent of the directed verdict practice for jury actions which is regulated by Rule 50.

### NOTES OF ADVISORY COMMITTEE ON 1946 AMENDMENT TO RULES

*Note. Subdivision (a).* The insertion of the reference to Rule 66 correlates Rule 41(a)(1) with the express provisions concerning dismissal set forth in amended Rule 66 on receivers.

The change in Rule 41(a)(1)(i) gives the service of a motion for summary judgment by the adverse party the same effect in preventing unlimited dismissal as was originally given only to the service of an answer. The omission of reference to a motion for summary judgment in the original rule was subject to criticism. 3 Moore's Federal Practice, 1938, 3037-3038, n. 12. A motion for summary judgment may be forthcoming prior to answer, and if well taken will eliminate the necessity for an answer. Since such a motion may require even more research and preparation than the answer itself, there is good reason why the service of the motion, like that of the answer, should prevent a voluntary dismissal by the adversary without court approval.

The word "generally" has been stricken from Rule 41(a)(1)(ii) in order to avoid confusion and to conform with the elimination of the necessity for special appearance by original Rule 12(b).

*Subdivision (b).* In some cases tried without a jury, where at the close of plaintiff's evidence the defendant moves for dismissal under Rule 41(b) on the ground that plaintiff's evidence is insufficient for recovery, the plaintiff's own evidence may be conflicting or present questions of credibility. In ruling on the defendant's motion, questions arise as to the function of the judge in evaluating the testimony and whether findings should be made if the motion is sustained. Three circuits hold that as the judge is the trier of the facts in such a situation his function is not the same as on a motion to direct a verdict, where the jury is the trier of the facts, and that the judge in deciding such a motion in a non-jury case may pass on conflicts of evidence and credibility, and if he performs that function of evaluating the testimony and grants the motion on the merits, findings are required. *Young* v. *United States*, C.C.A.9th, 1940, 111 F.2d 823; *Gary Theatre Co.* v. *Columbia Pictures Corporation*, C.C.A.7th, 1941, 120 F.2d 891; *Bach* v. *Friden Calculating Machine Co., Inc.*, C.C.A.6th, 1945, 148 F.2d 407. Cf. *Mateas* v. *Fred Harvey, a Corporation*, C.C.A.9th, 1945, 146 F.2d 989. The Third Circuit has held that on such a motion the function of the court is the same as on a motion to direct in a jury case, and that the court should only decide whether there is evidence which would support a judgment for the plaintiff, and, therefore, findings are not required by Rule 52. *Federal Deposit Insurance Corp.* v. *Mason*, C.C.A.3d, 1940, 115 F.2d 548; *Schad* v. *Twentieth Century-Fox Film Corp.*, C.C.A.3d, 1943, 136 F.2d 991. The added sentence in Rule 41(b) incorporates the view of the Sixth, Seventh and Ninth Circuits. See also 3 Moore's Federal Practice, 1938, Cum. Supplement § 41.03, under "Page 3045"; Commentary, The Motion to Dismiss in Non-Jury Cases, 1946, 9 Fed.Rules Serv., Comm.Pg. 41b.14.

### NOTES OF ADVISORY COMMITTEE ON 1963 AMENDMENT TO RULES

Under the present text of the second sentence of this subdivision, the motion for dismissal at the close of the plaintiff's evidence may be made in a case tried to a jury as well as in a case tried without a jury. But, when made in a jury-tried case, this motion overlaps the motion for a directed verdict under Rule 50(a), which is also available in the same situation. It has been held that the standard to be applied in deciding the Rule 41(b) motion at the close of the plaintiff's evidence in a jury-tried case is the same as that used upon a motion for a directed verdict made at the same stage; and, just as the court need not make findings pursuant to Rule 52(a) when it directs a verdict, so in a jury-tried case it may omit these findings in granting the Rule 41(b) motion. See generally *O'Brien* v. *Westinghouse Electric Corp.*, 293 F.2d 1, 5–10 (3d Cir. 1961).

As indicated by the discussion in the *O'Brien* case, the overlap has caused confusion. Accordingly, the second and third sentences of Rule 41(b) are amended to provide that the motion for dismissal at the close of the plaintiff's evidence shall apply only to nonjury cases (including cases tried with an advisory jury). Hereafter the correct motion in jury-tried cases will be the motion for a directed verdict. This involves no change of substance. It should be noted that the court upon a motion for a directed verdict may in appropriate circumstances deny that motion and grant instead a new trial, or a voluntary dismissal without prejudice under Rule 41(a)(2). See 6 Moore's Federal Practice § 59.08[5] (2d ed. 1954); cf. *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U.S. 212, 217, 67 S.Ct. 752, 91 L.Ed. 849 (1947).

The first sentence of Rule 41(b), providing for dismissal for failure to prosecute or to comply with the Rules or any order of court, and the general provisions of the last sentence remain applicable in jury as well as nonjury cases.

The amendment of the last sentence of Rule 41(b) indicates that a dismissal for lack of an indispensable party does not operate as an adjudication on the merits. Such a dismissal does not bar a new action, for it is based merely "on a plaintiff's failure to comply with a precondition requisite to the Court's going forward to determine the merits of his substantive claim." See *Costello* v. *United States*, 365 U.S. 265, 284-288, 81 S.Ct. 534, 5 L.Ed.2d 551 & n. 5 (1961); *Mallow* v. *Hinde*, 12 Wheat. (25 U.S.) 193, 6 L.Ed. 599 (1827); Clark, *Code Pleading* 602 (2d ed. 1947); Restatement of Judgments § 49, comm. a, b (1942). This amendment corrects an omission from the rule and is consistent with an earlier amendment, effective in 1948, adding "the defense of failure to join an indispensable party" to clause (1) of Rule 12(h).

NOTES OF ADVISORY COMMITTEE ON 1966 AMENDMENT TO RULES

The terminology is changed to accord with the amendment of Rule 19. See that amended rule and the Advisory Committee's Note thereto.

NOTES OF ADVISORY COMMITTEE ON 1968 AMENDMENT TO RULES

The amendment corrects an inadvertent error in the reference to amended Rule 23.

CROSS REFERENCES

Approval of court for dismissal of class action, see rule 23.

Costs, see rule 54.

Counterclaim, cross-claim or third party claim, see rules 13 and 14.

Discontinuance of civil actions arising under immigration laws, see section 1329 of Title 8, Aliens and Nationality.

Findings of fact in non-jury action, see rule 52.

Motion for directed verdict at close of evidence offered by an opponent, see rule 50.

Motion to dismiss—

For failure to state a claim upon which relief can be granted, see rule 12.

For lack of jurisdiction or improper venue, see rule 12.

Order of court for dismissal of action wherein receiver has been appointed, see rule 66.

Taxation of costs, see section 1920 of this title.

Withdrawal or discontinuance of false claim actions against United States, see section 232 of Title 31, Money and Finance.

### Rule 42. Consolidation; Separate Trials

**(a) Consolidation**

When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

**(b) Separate trials**

The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counter-claims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

(As amended Feb. 28, 1966, eff. July 1, 1966.)

NOTES OF ADVISORY COMMITTEE ON RULES

*Subdivision* (*a*) is based upon U.S.C., Title 28, former § 734 (Orders to save costs; consolidation of causes of like nature) but insofar as the statute differs from this rule, it is modified.

For comparable statutes dealing with consolidation see Ark.Dig.Stat. (Crawford & Moses, 1921) § 1081; Calif.Code Civ.Proc. (Deering, 1937) § 1048; N.M.Stat.Ann. (Courtright, 1929) § 105-828; N.Y.C.P.A. (1937) §§ 96, 96a, and 97; American Judicature Society, Bulletin XIV (1919) Art.26.

For severance or separate trials see Calif.Code Civ.Proc. (Deering, 1937) § 1048; N.Y.C.P.A. (1937) § 96; American Judicature Society, Bulletin XIV (1919) Art. 3, § 2 and Art. 10, § 10. See also the third sentence of Equity Rule 29 (Defenses—How Presented) providing for discretionary separate hearing and disposition before trial of pleas in bar or abatement, and see also Rule 12(d) of these rules for preliminary hearings of defenses and objections.

For the entry of separate judgments, see Rule 54(b) (Judgment at Various Stages).

NOTES OF ADVISORY COMMITTEE ON 1966 AMENDMENT TO RULES

In certain suits in admiralty separation for trial of the issues of liability and damages (or of the extent of liability other than damages, such as salvage and general average) has been conducive to expedition and economy, especially because of the statutory right to interlocutory appeal in admiralty cases (which is of course preserved by these Rules). While separation of issues for trial is not to be routinely ordered, it is important that it be encouraged where experience has demonstrated its worth. Cf. Weinstein, Routine Bifurcation of Negligence Trials, 14 Vand.L.Rev. 831 (1961).

In cases (including some cases within the admiralty and maritime jurisdiction) in which the parties have a constitutional or statutory right of trial by jury, separation of issues may give rise to problems. See *e.g.*, *United Air Lines, Inc.* v. *Wiener*, 286 F.2d 302 (9th Cir. 1961). Accordingly, the proposed change in Rule 42 reiterates the mandate of Rule 38 respecting preservation of the right to jury trial.

CROSS REFERENCES

Preliminary hearings of defenses and objections, see rule 12.

Separate—

Judgments, see rule 54.

Trial for parties, see rule 20.

Trials of counterclaims or cross-claims, see rule 13.

Third party claims, see rule 14.

### Rule 43. Taking of Testimony

**(a) Form**

In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an Act of Congress or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court.

**[(b), (c) Abrogated]**

**(d) Affirmation in lieu of oath**

Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.

**(e) Evidence on motions**

When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.

**(f) Interpreters**

The court may appoint an interpreter of its own selection and may fix his reasonable compensation. The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court.

(As amended Feb. 28, 1966, eff. July 1, 1966; Nov. 20, 1972; Dec. 18, 1972.)

NOTES OF ADVISORY COMMITTEE ON RULES

*Note to Subdivision* (*a*). The first sentence is a restatement of the substance of U.S.C., Title 28, former

§ 635 (Proof in common-law actions), formerly § 637 (now §§ 2072, 2073) (Proof in equity and admiralty), and former Equity Rule 46 (Trial—Testimony Usually Taken in Open Court—Rulings on Objections to Evidence). This rule abolishes in patent and trade-mark actions, the practice under former Equity Rule 48 of setting forth in affidavits the testimony in chief of expert witnesses whose testimony is directed to matters of opinion. The second and third sentences on admissibility of evidence and *Subdivision* (*b*) on contradiction and cross-examination modify U.S.C., Title 28, formerly § 725 (now § 1652) (Laws of states as rules of decision) insofar as that statute has been construed to prescribe conformity to state rules of evidence. Compare Callihan and Ferguson, *Evidence and the New Federal Rules of Civil Procedure*, 45 Yale L.J. 622 (1936), and *Same: 2*, 47 Yale L.J. 195 (1937). The last sentence modifies to the extent indicated U.S.C., Title 28, § 631 (Competency of witnesses governed by State laws).

*Note to Subdivision* (*b*). See 4 Wigmore on Evidence (2d ed., 1923) § 1885 *et seq.*

*Note to Subdivision* (*c*). See former Equity Rule 46 (Trial—Testimony Usually Taken in Open Court—Rulings on Objections to Evidence). With the last sentence compare *Dowagiac* v. *Lochren*, 143 Fed. 211 (C.C.A.8th, 1906). See also *Blease* v. *Garlington*, 92 U.S. 1, 23 L.Ed. 521 (1876); *Nelson* v. *United States*, 201 U.S. 92. 114, 26 S.Ct. 358, 50 L.Ed. 673 (1906); *Unkle* v. *Wills*, 281 Fed. 29 (C.C.A.8th 1922).

See Rule 61 for harmless error in either the admission or exclusion of evidence.

*Note to Subdivision* (*d*). See former Equity Rule 78 (Affirmation in Lieu of Oath) and U.S.C., Title 1, § 1 (Words importing singular number, masculine gender, etc.; extended application), providing for affirmation in lieu of oath.

### Supplementary Note of Advisory Committee Regarding Rules 43 and 44

*Note.* These rules have been criticized and suggested improvements offered by commentators. 1 Wigmore on Evidence, 3d ed. 1940, 200-204; Green, The Admissibility of Evidence Under the Federal Rules, 1941, 55 Harv.L.Rev. 197. Cases indicate, however, that the rule is working better than these commentators had expected. *Boerner* v. *United States*, C.C.A.2d, 1941, 117 F.2d 387, cert. den., 1941, 313 U.S. 587, 61 S.Ct. 1120; *Mosson* v. *Liberty Fast Freight Co.*, C.C.A.2d, 1942, 124 F.2d 448; *Hartford Accident & Indemnity Co.* v. *Olivier*, C.C.A.5th, 1941, 123 F.2d 709; *Anzano* v. *Metropolitan Life Ins. Co. of New York*, C.C.A.3d, 1941, 118 F.2d 430; *Franzen* v. *E. I. DuPont De Nemours & Co.*, C.C.A.3d, 1944, 146 F.2d 837; *Fakouri* v. *Cadais*, C.C.A.5th, 1945, 147 F.2d 667; *In re C. & P. Co.*, S.D.Cal. 1945, 63 F.Supp. 400, 408. But cf. *United States* v. *Aluminum Co. of America*, S.D.N.Y. 1938, 1 Fed.Rules Serv. 43a.3, Case 1; Note, 1946, 46 Col.L.Rev. 267. While consideration of a comprehensive and detailed set of rules of evidence seems very desirable, it has not been feasible for the Committee so far to undertake this important task. Such consideration should include the adaptability to federal practice of all or parts of the proposed Code of Evidence of the American Law Institute. See Armstrong, Proposed Amendments to Federal Rules of Civil Procedure, 4 F.R.D. 124, 137-138.

### Notes of Advisory Committee on 1966 Amendment to Rules

This new subdivision authorizes the court to appoint interpreters (including interpreters for the deaf), to provide for their compensation, and to tax the compensation as costs. Compare proposed subdivision (b) of Rule 28 of the Federal Rules of Criminal Procedure.

### Notes of Advisory Committee on 1972 Amendment to Rules

Rule 43, entitled Evidence, has heretofore served as the basic rule of evidence for civil cases in federal courts. Its very general provisions are superseded by the detailed provisions of the new Rules of Evidence. The original title and many of the provisions of the rule are, therefore, no longer appropriate.

*Subdivision* (*a*). The provision for taking testimony in open court is not duplicated in the Rules of Evidence and is retained. Those dealing with admissibility of evidence and competency of witnesses, however, are no longer needed or appropriate since those topics are covered at large in the Rules of Evidence. They are accordingly deleted. The language is broadened, however, to take account of acts of Congress dealing with the taking of testimony, as well as of the Rules of Evidence and any other rules adopted by the Supreme Court.

*Subdivision* (*b*). The subdivision is no longer needed or appropriate since the matters with which it deals are treated in the Rules of Evidence. The use of leading questions, both generally and in the interrogation of an adverse party or witness identified with him, is the subject of Evidence Rule 611(c). Who may impeach is treated in Evidence Rule 601 and scope of cross-examination is covered in Evidence Rule 611(b). The subdivision is accordingly deleted.

*Subdivision* (*c*). Offers of proof and making a record of excluded evidence are treated in Evidence Rule 103. The subdivision is no longer needed or appropriate and is deleted.

### References in Text

The Federal Rules of Evidence, referred to in subsec. (a), are set out in the Appendix to this title.

### Effective Date of Amendments Proposed November 20, 1972, and December 18, 1972

Amendments of this rule embraced by orders entered by the Supreme Court of the United States on November 20, 1972, and December 18, 1972, effective on the 180th day beginning after January 2, 1975, see section 3 of Pub. L. 93-595, Jan. 2, 1975, 88 Stat. 1959, set out as a note under section 2071 of this title.

### Cross References

Amendment of pleading to conform to evidence, see rule 15.

Certified public accountant as witness before master, statement of accounts as evidence, see rule 53.

Compelling giving of testimony, application of rules, see rule 81.

Depositions of witnesses in foreign country, see section 1781 of this title.

Documentary evidence, see section 1731 et seq. of this title.

Evidence—
  Generally, see section 1731 et seq. of this title.
  Hearing before master, see rule 53.

Exceptions to rulings unnecessary, see rule 46.

Harmless error in admitting or excluding evidence, see rule 61.

Interested persons, competency, see section 1822 of this title.

Notary public and other persons authorized to administer oaths required by laws of the United States, see section 2903 of Title 5, Government Organization and Employees.

Offer of judgment, see rule 68.

Perpetuation of testimony by action, see rule 27.

Pre-trial procedure, see rule 16.

Proof of official record, see rule 44.

Record made in regular course of business, see section 1732 of this title.

Record on appeal, form of testimony included in, see rule 75.

Subpoena for attendance of witnesses and obtaining evidence, see rule 45.

Transcript of evidence, filing by master with report, see rule 53.

United States, evidence to establish claim on default, see rule 55.

Witnesses generally, see section 1821 et seq. of this title.

### Rule 44. Proof of Official Record

**(a) Authentication**

(1) *Domestic.* An official record kept within the United States, or any state, district, commonwealth, territory, or insular possession thereof, or within the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied by a certificate that such officer has the custody. The certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office.

(2) *Foreign.* A foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof; or a copy thereof, attested by a person authorized to make the attestation, and accompanied by a final certification as to the genuineness of the signature and official position (i) of the attesting person, or (ii) of any foreign official whose certificate of genuineness of signature and official position relates to the attestation or is in a chain of certificates of genuiness of signature and official position relating to the attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (i) admit an attested copy without final certification or (ii) permit the foreign official record to be evidenced by an attested summary with or without a final certification.

**(b) Lack of record**

A written statement that after diligent search no record or entry of a specified tenor is found to exist in the records designated by the statement, authenticated as provided in subdivision (a)(1) of this rule in the case of a domestic record, or complying with the requirements of subdivision (a)(2) of this rule for a summary in the case of a foreign record, is admissible as evidence that the records contain no such record or entry.

**(c) Other proof**

This rule does not prevent the proof of official records or of entry or lack of entry therein by any other method authorized by law.

(As amended Feb. 28, 1966, eff. July 1, 1966.)

#### NOTES OF ADVISORY COMMITTEE ON RULES

This rule provides a simple and uniform method of proving public records, and entry or lack of entry therein, in all cases including those specifically provided for by statutes of the United States. Such statutes are not superseded, however, and proof may also be made according to their provisions whenever they differ from this rule.

Some of those statutes are:

U.S.C., Title 28, former:

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| § 661 | (Copies of department or corporation records and papers; admissibility; seal) |
| § 662 | (Same; in office of General Counsel of the Treasury) |
| § 663 | (Instruments and papers of Comptroller of Currency; admissibility) |
| § 664 | (Organization certificates of national banks; admissibility) |
| § 665 | (Transcripts from books of Treasury in suits against delinquents; admissibility) |
| § 666 | (Same; certificate by Secretary or Assistant Secretary) |
| § 670 | (Admissibility of copies of statements of demands by Post Office Department) |
| § 671 | (Admissibility of copies of post office records and statement of accounts) |
| § 672 | (Admissibility of copies of records in General Land Office) |
| § 673 | (Admissibility of copies of records, and so forth, of Patent Office) |
| § 674 | (Copies of foreign letters patent as prima facie evidence) |
| § 675 | (Copies of specifications and drawings of patents admissible) |
| § 676 | (Extracts from Journals of Congress admissible when injunction of secrecy removed) |
| § 677 | (Copies of records in offices of United States consuls admissible) |
| § 678 | (Books and papers in certain district courts) |
| § 679 | (Records in clerks' offices, western district of North Carolina) |
| § 680 | (Records in clerks' offices of former district of California) |
| § 681 | (Original records lost or destroyed; certified copy admissible) |
| § 682 | (Same; when certified copy not obtainable) |
| § 685 | (Same; certified copy of official papers) |
| § 687 | (Authentication of legislative acts; proof of judicial proceedings of State) |
| § 688 | (Proofs of records in offices not pertaining to courts) |
| § 689 | (Copies of foreign records relating to land titles) |
| § 695 | (Writings and records made in regular course of business; admissibility) |
| § 695c | (Foreign documents on record in public offices; certification) |

U.S.C., Title 1:

| | |
|---|---|
| § 112 | (Statutes at large; contents; admissibility in evidence) |
| § 113 | ("Little and Brown's" edition of laws and treaties competent evidence of Acts of Congress) |
| § 204 | (Codes and supplements as establishing prima facie the laws of United States and District of Columbia, etc.) |
| § 208 | (Copies of supplements to Code of Laws of United States and of District of Columbia Code and supplements; conclusive evidence of original) |

U.S.C., Title 5:

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| § 490 | (Records of Department of Interior; authenticated copies as evidence) |

U.S.C., Title 6:

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| § 7 | (Surety Companies as sureties; appointment of agents; service of process) |

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| U.S.C., Title 8: | |
| § 9a | (Citizenship of children of persons naturalized under certain laws; repatriation of native-born women married to aliens prior to September 22, 1922; copies of proceedings) |
| § 1443 | (Regulations for execution of naturalization laws; certified copies of papers as evidence) |
| § 1443 | (Certifications of naturalization records; authorization; admissibility as evidence) |
| U.S.C., Title 11: | |
| § 44(d),(e), (f),(g) | (Bankruptcy court proceedings and orders as evidence) |
| U.S.C., Title 15: | |
| § 127 | (Trade-mark records in Patent Office; copies as evidence) |
| U.S.C., Title 20: | |
| § 52 | (Smithsonian Institution; evidence of title to site and buildings) |
| U.S.C., Title 25: | |
| § 6 | (Bureau of Indian Affairs; seal; authenticated and certified documents; evidence) |
| U.S.C., Title 31: | |
| § 46 | (Laws governing General Accounting Office; copies of books, records, etc., thereof as evidence) |
| U.S.C., Title 38: | |
| § 11g | (Seal of Veterans' Administration; authentication of copies of records) |
| U.S.C., Title 40: | |
| § 238 | (National Archives; seal; reproduction of archives; fee; admissibility in evidence of reproductions) |
| § 270c | (Bonds of contractors for public works; right of person furnishing labor or material to copy of bond) |
| U.S.C., Title 43: | |
| §§ 57–59 | (Copies of land surveys, etc., in certain states and districts admissible as evidence) |
| § 83 | (General Land Office registers and receivers; transcripts of records as evidence) |
| U.S.C., Title 46: | |
| § 823 | (Records of Maritime Commission; copies; publication of reports; evidence) |
| U.S.C., Title 47: | |
| § 154(m) | (Federal Communications Commission; copies of reports and decisions as evidence) |
| § 412 | (Documents filed with Federal Communications Commission as public records; prima facie evidence; confidential records) |
| U.S.C., Title 49: | |
| § 14(3) | (Interstate Commerce Commission reports and decisions; printing and distribution of copies) |
| § 16(13) | (Copies of schedules, tariffs, etc., filed with Interstate Commerce Commission as evidence) |
| § 19a(i) | (Valuation of property of carriers by Interstate Commerce Commission; final published valuations as evidence) |

### SUPPLEMENTARY NOTE OF ADVISORY COMMITTEE REGARDING RULES 43 AND 44

For supplementary note of Advisory Committee on this rule, see note under rule 43.

### NOTES OF ADVISORY COMMITTEE ON 1966 AMENDMENT TO RULES

Subdivision (a)(1). These provisions on proof of official records kept within the United States are similar in substance to those heretofore appearing in Rule 44. There is a more exact description of the geographical areas covered. An official record kept in one of the areas enumerated qualifies for proof under subdivision (a)(1) even though it is not a United States official record. For example, an official record kept in one of these areas by a government in exile falls within subdivision (a)(1). It also falls within subdivision (a)(2) which may be availed of alternatively. *Cf. Banco de Espana* v. *Federal Reserve Bank*, 114 F.2d 438 (2d Cir. 1940).

Subdivision (a)(2). Foreign official records may be proved, as heretofore, by means of official publications thereof. See *United States* v. *Aluminum Co. of America*, 1 F.R.D. 71 (S.D.N.Y. 1939). Under this rule, a document that, on its face, appears to be an official publication, is admissible, unless a party opposing its admission into evidence shows that it lacks that character.

The rest of subdivision (a)(2) aims to provide greater clarity, efficiency, and flexibility in the procedure for authenticating copies of foreign official records.

The reference to attestation by "the officer having the legal custody of the record," hitherto appearing in Rule 44, has been found inappropriate for official records kept in foreign countries where the assumed relation between custody and the authority to attest does not obtain. See 2B Barron & Holtzoff, Federal Practice & Procedure § 992 (Wright ed. 1961). Accordingly it is provided that an attested copy may be obtained from any person authorized by the law of the foreign country to make the attestation without regard to whether he is charged with responsibility for maintaining the record or keeping it in his custody.

Under Rule 44 a United States foreign service officer has been called on to certify to the authority of the foreign official attesting the copy as well as the genuineness of his signature and his official position. See Schlesinger, Comparative Law 57 (2d ed. 1959); Smit, International Aspects of Federal Civil Procedure, 61 Colum.L.Rev. 1031, 1063 (1961); 22 C.F.R. § 92.41(a), (e) (1958). This has created practical difficulties. For example, the question of the authority of the foreign officer might raise issues of foreign law which were beyond the knowledge of the United States officer. The difficulties are met under the amended rule by eliminating the element of the authority of the attesting foreign official from the scope of the certifying process, and by specifically permitting use of the chain-certificate method. Under this method, it is sufficient if the original attestation purports to have been issued by an authorized person and is accompanied by a certificate of another foreign official whose certificate may in turn be followed by that of a foreign official of higher rank. The process continues until a foreign official is reached as to whom the United States foreign service official (or a diplomatic or consular officer of the foreign country assigned or accredited to the United States) has adequate information upon which to base a "final certification." See *New York Life Ins. Co.* v. *Aronson*, 38 F.Supp. 687 (W.D. Pa. 1941); 22 C.F.R. § 92.37 (1958).

The final certification (a term used in contradistinction to the certificates prepared by the foreign officials in a chain) relates to the incumbency and genuineness of signature of the foreign official who attested the copy of the record or, where the chain-certificate method is used, of a foreign official whose certificate appears in the chain, whether that certificate is the last in the chain or not. A final certification may be prepared on the basis of material on file in the consulate or any other satisfactory information.

Although the amended rule will generally facilitate proof of foreign official records, it is recognized that in some situations it may be difficult or even impossible to satisfy the basic requirements of the rule. There may be no United States consul in a particular foreign country; the foreign officials may not cooperate, peculiarities may exist or arise hereafter in the law or practice of a foreign country. See *United States* v. *Grabina*, 119 F.2d 863 (2d Cir. 1941); and, generally, Jones, International Judicial Assistance: Procedural Chaos and a Program for Reform, 62 Yale L.J. 515, 548–49 (1953). Therefore the final sentence of subdivision (a)(2) provides the court with discretion to admit an attested copy of a record without a final certification, or an attested summary of a record with or without a final certification. See Rep. of Comm. on Comparative Civ. Proc. & Prac., Proc. A.B.A., Sec. Int'l & Comp. L. 123, 130–131 (1952); Model Code of Evidence §§ 517, 519 (1942). This relaxation should be permitted only when it is shown that the party has been unable to satisfy the basic requirements of the amended rule despite his reasonable efforts. Moreover, it is specially provided that the parties must be given a reasonable opportunity in these cases to examine into the authenticity and accuracy of the copy or summary.

Subdivision (b). This provision relating to proof of lack of record is accommodated to the changes made in subdivision (a).

Subdivision (c). The amendment insures that international agreements of the United States are unaffected by the rule. Several consular conventions contain provisions for reception of copies or summaries of foreign official records. See, e.g., Consular Conv. with Italy, May 8, 1878, art. X, 20 Stat. 725, T.S. No. 178 (Dept. State 1878). See also 28 U.S.C. §§ 1740–42, 1745; *Fakouri* v. *Cadais*, 149 F.2d 321 (5th Cir. 1945), cert. denied, 326 U.S. 742 (1945); 5 Moore's Federal Practice, par. 44.05 (2d ed. 1951).

### CROSS REFERENCES

Authenticated and certified copy of Government record by Administrator of General Services admissible on evidence, see section 2112 of Title 44, Public Printing and Documents.

## Rule 44.1. Determination of Foreign Law

A party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.

(Added Feb. 28, 1966, eff. July 1, 1966, and amended Nov. 20, 1972.)

### NOTES OF ADVISORY COMMITTEE ON RULES

Rule 44.1 is added by amendment to furnish Federal courts with a uniform and effective procedure for raising and determining an issue concerning the law of a foreign country.

To avoid unfair surprise, the first sentence of the new rule requires that a party who intends to raise an issue of foreign law shall give notice thereof. The uncertainty under Rule 8(a) about whether foreign law must be pleaded—compare *Siegelman* v. *Cunard White Star, Ltd.*, 221 F.2d 189 (2d Cir. 1955), and *Pedersen* v. *United States*, 191 F.Supp. 95 (D.Guam 1961), with *Harrison* v. *United Fruit Co.*, 143 F.Supp. 598 (S.D.N.Y. 1956)—is eliminated by the provision that the notice shall be "written" and "reasonable." It may, but need not be, incorporated in the pleadings. In some situations the pertinence of foreign law is apparent from the outset; accordingly the necessary investigation of that law will have been accomplished by the party at the pleading stage, and the notice can be given conveniently in the pleadings. In other situations the pertinence of foreign law may remain doubtful until the case is further developed. A requirement that notice of foreign law be given only through the medium of the pleadings would tend in the latter instances to force the party to engage in a peculiarly burdensome type of investigation which might turn out to be unnecessary; and correspondingly the adversary would be forced into a possible wasteful investigation. The liberal provisions for amendment of the pleadings afford help if the pleadings are used as the medium of giving notice of the foreign law; but it seems best to permit a written notice to be given outside of and later than the pleadings, provided the notice is reasonable.

The new rule does not attempt to set any definite limit on the party's time for giving the notice of an issue of foreign law; in some cases the issue may not become apparent until the trial and notice then given may still be reasonable. The stage which the case has reached at the time of the notice, the reason proffered by the party for his failure to give earlier notice, and the importance to the case as a whole of the issue of foreign law sought to be raised, are among the factors which the court should consider in deciding a question of the reasonableness of a notice. If notice is given by one party it need not be repeated by any other and serves as a basis for presentation of material on the foreign law by all parties.

The second sentence of the new rule describes the materials to which the court may resort in determining an issue of foreign law. Heretofore the district courts, applying Rule 43(a), have looked in certain cases to State law to find the rules of evidence by which the content of foreign-country law is to be established. The State laws vary; some embody procedures which are inefficient, time consuming and expensive. See, generally, Nussbaum, Proving the Law of Foreign Countries, 3 Am.J.Comp.L. 60 (1954). In all events the ordinary rules of evidence are often inapposite to the problem of determining foreign law and have in the past prevented examination of material which could have provided a proper basis for the determination. The new rule permits consideration by the court of any relevant material, including testimony, without regard to its admissibility under Rule 43. Cf. N.Y.Civ.Prac.Law & Rules, R. 4511 (effective Sept. 1, 1963); 2 Va.Code Ann. tit. 8, § 8-273; 2 W.Va.Code Ann. § 5711.

In further recognition of the peculiar nature of the issue of foreign law, the new rule provides that in determining this law the court is not limited by material presented by the parties; it may engage in its own research and consider any relevant material thus found. The court may have at its disposal better foreign law materials than counsel have presented, or may wish to reexamine and amplify material that has been presented by counsel in partisan fashion or in insufficient detail. On the other hand, the court is free to insist on a complete presentation by counsel.

There is no requirement that the court give formal notice to the parties of its intention to engage in its own research on an issue of foreign law which has been raised by them, or of its intention to raise and determine independently an issue not raised by them. Ordinarily the court should inform the parties of material it has found diverging substantially from the material which they have presented; and in general the court should give the parties an opportunity to analyze and counter new points upon which it proposes to rely. See Schlesinger, Comparative Law 142 (2d ed. 1959); Wyzanski, A Trial Judge's Freedom and Responsibility, 65 Harv.L.Rev. 1281, 1296 (1952); cf. *Siegelman* v. *Cunard White Star, Ltd.*, supra, 221 F.2d at 197. To require, however, that the court give formal notice from time to time as it proceeds with its study of the foreign law would add an element of undesirable rigidity to the procedure for determining issues of foreign law.

The new rule refrains from imposing an obligation on the court to take "judicial notice" of foreign law because this would put an extreme burden on the court in many cases; and it avoids use of the concept of "judicial notice" in any form because of the uncertain meaning of that concept as applied to foreign law. See, e.g., Stern, Foreign Law in the Courts: Judicial Notice and Proof, 45 Calif.L.Rev. 23, 43 (1957). Rather the rule provides flexible procedures for presenting and utilizing material on issues of foreign law by which a sound result can be achieved with fairness to the parties.

Under the third sentence, the court's determination of an issue of foreign law is to be treated as a ruling on a question of "law," not "fact," so that appellate review will not be narrowly confined by the "clearly erroneous" standard of Rule 52(a). *Cf. Uniform Judicial Notice of Foreign Law Act* § 3; Note, 72 Harv.L.Rev. 318 (1958).

The new rule parallels Article IV of the Uniform Interstate and International Procedure Act, approved by the Commissioners on Uniform State Laws in 1962, except that section 4.03 of Article IV states that "[t]he court, not the jury" shall determine foreign law. The new rule does not address itself to this problem, since the Rules refrain from allocating functions as between the court and the jury. See Rule 38(a). It has long been thought, however, that the jury is not the appropriate body to determine issues of foreign law. See, e.g., Story, Conflict of Laws, § 638 (1st ed. 1834, 8th ed. 1883); 1 Greenleaf, Evidence, § 486 (1st ed. 1842, 16th ed. 1899); 4 Wigmore, Evidence § 2558 (1st ed. 1905); 9 id. § 2558 (3d ed. 1940). The majority of the States have committed such issues to determination by the court. See Article 5 of the Uniform Judicial Notice of Foreign Law Act, adopted by twenty-six states, 9A U.L.A. 318 (1957) (Suppl. 1961, at 134); N.Y.Civ.Prac.Law & Rules, R. 4511 (effective Sept. 1, 1963); Wigmore, *loc. cit.* And Federal courts that have considered the problem in recent years have reached the same conclusion without reliance on statute. See *Janson* v. *Swedish American Line*, 185 F.2d 212, 216 (1st Cir. 1950); *Bank of Nova Scotia* v. *San Miguel*, 196 F.2d 950, 957, n. 6 (1st Cir. 1952); *Liechti* v. *Roche*, 198 F.2d 174 (5th Cir. 1952); *Daniel Lumber Co.* v. *Empresas Hondurenas, S.A.*, 215 F.2d 465 (5th Cir. 1954).

### NOTES OF ADVISORY COMMITTEE ON 1972 AMENDMENTS TO RULES

Since the purpose of the provision is to free the judge, in determining foreign law, from any restrictions imposed by evidence rules, a general reference to the Rules of Evidence is appropriate and is made.

### REFERENCES IN TEXT

The Federal Rules of Evidence, referred to in text, are set out in the Appendix to this title.

### EFFECTIVE DATE OF AMENDMENT PROPOSED NOVEMBER 20, 1972

Amendment of this rule embraced by the order entered by the Supreme Court of the United States on November 20, 1972, effective on the 180th day beginning after January 2, 1973, see section 3 of Pub. L. 93-595, Jan. 2, 1975, 88 Stat. 1959, set out as a note under section 2071 of this title.

## Rule 45. Subpoena

### (a) For attendance of witnesses; form; issuance

Every subpoena shall be issued by the clerk under the seal of the court, shall state the name of the court and the title of the action, and shall command each person to whom it is directed to attend and give testimony at a time and place therein specified. The clerk shall issue a subpoena, or a subpoena for the production of documentary evidence, signed and sealed but otherwise in blank, to a party requesting it, who shall fill it in before service.

### (b) For production of documentary evidence

A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

### (c) Service

A subpoena may be served by the marshal, by his deputy, or by any other person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and by tendering to him the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States or an officer or agency thereof, fees and mileage need not be tendered.

### (d) Subpoena for taking depositions; place of examination

(1) Proof of service of a notice to take a deposition as provided in Rules 30(b) and 31(a) constitutes a sufficient authorization for the issuance by the clerk of the district court for the district in which the deposition is to be taken of subpoenas for the persons named or described therein. The subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents or tangible things which constitute or contain matters within the scope of the examination permitted by Rule 26(b), but in that event the subpoena will be subject to the provisions of Rule 26(c) and subdivision (b) of this rule.

The person to whom the subpoena is directed may, within 10 days after the service thereof or on or before the time specified in the subpoena for compliance if such time is less than 10 days after service, serve upon the attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials except pursuant to an order of the court from which the subpoena was issued. The party serving the subpoena may, if objection has been made, move upon notice to the deponent for an order at any time before or during the taking of the deposition.

(2) A resident of the district in which the deposition is to be taken may be required to attend an examination only in the county wherein he resides or is employed or transacts his business in person, or at such other convenient place as is fixed by an order of court. A nonresident of the district may be required to attend only in the county wherein he is served with a subpoena, or within 40 miles from the place of service, or at such other convenient place as is fixed by an order of court.

### (e) Subpoena for a hearing or trial

(1) At the request of any party subpoenas for attendance at a hearing or trial shall be issued by the clerk of the district court for the district in which the hearing or trial is held. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the district, or at any place without the district that is within 100 miles of the place of the hearing or trial specified in the subpoena; and, when a statute of the United States provides therefor, the court upon proper applica-

**tion and cause shown may authorize the service of a subpoena at any other place.**

**(2) A subpoena directed to a witness in a foreign country shall issue under the circumstances and in the manner and be served as provided in Title 28, U.S.C., § 1783.**

**(f) Contempt**

**Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued.**

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Mar. 30, 1970, eff. July 1, 1970.)

### NOTES OF ADVISORY COMMITTEE ON RULES

This rule applies to subpoenas *ad testificandum* and *duces tecum* issued by the district courts for attendance at a hearing or a trial, or to take depositions. It does not apply to the enforcement of subpoenas issued by administrative officers and commissions pursuant to statutory authority. The enforcement of such subpoenas by the district courts is regulated by appropriate statutes. Many of these statutes do not place any territorial limits on the validity of subpoenas so issued, but provide that they may be served anywhere within the United States. Among such statutes are the following:

U.S.C., Title 7, §§ 222 and 511n (Secretary of Agriculture)

U.S.C., Title 15, § 49 (Federal Trade Commission)

U.S.C., Title 15, §§ 77v(b), 78u(c), 79r(d) (Securities and Exchange Commission)

U.S.C., Title 16, §§ 797(g) and 825f (Federal Power Commission)

U.S.C., Title 19, § 1333(b) (Tariff Commission)

U.S.C., Title 22, §§ 268, 270d and 270e (International Commissions, etc.)

U.S.C., Title 26, § 1114 (Tax Court)

U.S.C., Title 26, § 1523(a) (Internal Revenue Officers)

U.S.C., Title 29, § 161 (Labor Relations Board)

U.S.C., Title 33, § 506 (Secretary of Army)

U.S.C., Title 35, § 24 (Patent Office proceedings)

U.S.C., Title 38, § 133 (Veterans' Administration)

U.S.C., Title 41, § 39 (Secretary of Labor)

U.S.C., Title 45, § 157 Third. (h) (Board of Arbitration under Railway Labor Act)

U.S.C., Title 45, § 222(b) (Investigation Commission under Railroad Retirement Act of 1935)

U.S.C., Title 46, § 1124(b) (Maritime Commission)

U.S.C., Title 47, § 409(c) and (d) (Federal Communications Commission)

U.S.C., Title 49, § 12(2) and (3) (Interstate Commerce Commission)

U.S.C., Title 49, § 173a (Secretary of Commerce)

*Note to Subdivisions (a) and (b).* These simplify the form of subpoena as provided in U.S.C., Title 28, former § 655 (Witnesses; subpoena; form; attendance under); and broaden U.S.C., Title 28, former § 636 (Production of books and writings) to include all actions, and to extend to any person. With the provision for relief from an oppressive or unreasonable subpoena *duces tecum*, compare N.Y.C.P.A. (1937) § 411.

*Note to Subdivision (c).* This provides for the simple and convenient method of service permitted under many state codes; e.g., N.Y.C.P.A. (1937) §§ 220, 404, J.Ct.Act, § 191; 3 Wash.Rev.Stat.Ann. (Remington, 1932) § 1218. Compare Equity Rule 15 (Process, by Whom Served).

For statutes governing fees and mileage of witnesses see:

U.S.C., Title 28, former:

| | |
|---|---|
| § 600a | (Per diem; mileage) |
| § 600c | (Amount per diem and mileage for witnesses; subsistence) |
| § 600d | (Fees and mileage in certain states) |
| § 601 | (Witnesses; fees; enumeration) |
| § 602 | (Fees and mileage of jurors and witnesses) |
| § 603 | (No officer of court to have witness fees) |

*Note to Subdivision (d).* The method provided in paragraph (1) for the authorization of the issuance of subpoenas has been employed in some districts. See *Henning* v. *Boyle*, 112 Fed. 397 (S.D.N.Y., 1901). The requirement of an order for the issuance of a subpoena *duces tecum* is in accordance with U.S.C., Title 28, former § 647 (Deposition under *dedimus potestatem;* subpoena *duces tecum*). The provisions of paragraph (2) are in accordance with common practice. See U.S.C., Title 28, former § 648 (Deposition under *dedimus potestatem;* witnesses, when required to attend); N.Y.C.P.A. (1937) § 300; 1 N.J.Rev.Stat. (1937) 2:27-174.

*Note to Subdivision (e).* The first paragraph continues the substance of U.S.C., Title 28, former § 654 (Witnesses; subpoenas; may run into another district). Compare U.S.C., Title 11, § 69 (Referees in bankruptcy; contempts before) (production of books and writings) which is not affected by this rule. For examples of statutes which allow the court, upon proper application and cause shown, to authorize the clerk of the court to issue a subpoena for a witness who lives in another district and at a greater distance than 100 miles from the place of the hearing or trial, see:

U.S.C., Title 15:

| | |
|---|---|
| § 23 | (Suits by United States; subpoenas for witnesses) (under antitrust laws). |

U.S.C., Title 38:

| | |
|---|---|
| § 445 | (Actions on claims; jurisdiction; parties; procedure; limitation; witnesses; definitions) (Veterans; insurance contracts). |

The second paragraph continues the present procedure applicable to certain witnesses who are in foreign countries. See U.S.C., Title 28, formerly § 711 (now § 1783) (Letters rogatory to take testimony of witness, addressed to court of foreign country; failure of witness to appear; subpoena) and former § 713 (Service of subpoena on witness in foreign country).

*Note to Subdivision (f).* Compare former Equity Rule 52 (Attendance of Witnesses Before Commissioner, Master, or Examiner).

### NOTES OF ADVISORY COMMITTEE ON 1946 AND 1948 AMENDMENTS TO RULES

*Note. Subdivision (b).* The added words, "or tangible things" in subdivision (b) merely makes the rule for the subpoena duces tecum at the trial conform to that of subdivision (d) for the subpoena at the taking of depositions. The insertion of the words "or modify" in clause (1) affords desirable flexibility.

*Subdivision (d).* The added last sentence of amended subdivision (d)(1) properly gives the subpoena for documents or tangible things the same scope as provided in Rule 26(b), thus promoting uniformity. The requirement in the last sentence of original Rule 45(d)(1)—to the effect that leave of court should be obtained for the issuance of such a subpoena—has been omitted. This requirement is unnecessary and oppressive on both counsel and court, and it has been criticized by district judges. There is no satisfactory reason for a differentiation between a subpoena for the production of documentary evidence by a witness at a trial (Rule 45(a)) and for the production of the same evidence at the taking of a deposition. Under this amendment, the person subpoenaed may obtain the protection afforded by any of the orders permitted under Rule 30(b) or Rule 45(b). See Application of Zenith Radio Corp., (E.D.Pa. 1941), 4 Fed.Rules Serv. 30b.21, Case 1, 1 F.R.D. 627; *Fox* v. *House*, (E.D.Okla.) 1939, 29 F.Supp. 673; *United States of America for the Use of Tilo Roofing Co., Inc.* v. *J. Slotnik Co.*, (D.Conn. 1944), 3 F.R.D. 408.

The changes in subdivision (d)(2) give the court the same power in the case of residents of the district as is conferred in the case of non-residents, and permit the court to fix a place for attendance which may be more convenient and accessible for the parties than that specified in the rule.

### NOTES OF ADVISORY COMMITTEE ON 1970 AMENDMENT TO RULES

At present, when a subpoena duces tecum is issued to a deponent, he is required to produce the listed materials at the deposition, but is under no clear compulsion to permit their inspection and copying. This results in confusion and uncertainty before the time the deposition is taken, with no mechanism provided whereby the court can resolve the matter. Rule 45(d)(1), as revised, makes clear that the subpoena authorizes inspection and copying of the materials produced. The deponent is afforded full protection since he can object, thereby forcing the party serving the supoena to obtain a court order if he wishes to inspect and copy. The procedure is thus analogous to that provided in Rule 34.

The changed references to other rules conform to changes made in those rules. The deletion of words in the clause describing the proper scope of the subpoena conforms to a change made in the language of Rule 34. The reference to Rule 26(b) is unchanged but encompasses new matter in that subdivision. The changes make it clear that the scope of discovery through a subpoena is the same as that applicable to Rule 34 and the other discovery rules.

### CROSS REFERENCES

Motion for order for production of documents, see rule 34.

Scope of deposition on oral examination, see rule 26.

Subpoenas in civil cases brought by United States under anti-trust laws, see section 23 of Title 15, Commerce and Trade.

## Rule 46. Exceptions Unnecessary

Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

### NOTES OF ADVISORY COMMITTEE ON RULES

Abolition of formal exceptions is often provided by statute. See Ill.Rev.Stat. (1937), ch. 110, § 204; Neb.Comp.Stat. (1929) § 20–1139; N.M.Stat.Ann. (Courtright, 1929) § 105–830; 2 N.D.Comp.Laws Ann. (1913) § 7653; Ohio Code Ann. (Throckmorton, 1936) § 11560; 1 S.D.Comp.Laws (1929) § 2542; Utah Rev.Stat.Ann. (1933) §§ 104–39–2, 104–24–18; Va.Rules of Court, Rule 22, 163 Va. v, xii (1935); Wis.Stat. (1935) § 270.39. Compare N.Y.C.P.A. (1937) §§ 583, 445, and 446, all as amended by L. 1936, ch. 915. Rule 51 deals with objections to the court's instructions to the jury.

U.S.C., Title 28, former § 776 (Bill of exceptions; authentication; signing of by judge) and former § 875 (Review of findings in cases tried without a jury) are superseded insofar as they provide for formal exceptions, and a bill of exceptions.

### CROSS REFERENCES

Form and admissibility of evidence, see rule 43.

Harmless error, see rule 61.

Objections to instructions, see rule 51.

### FEDERAL RULES OF CRIMINAL PROCEDURE

Bills of exceptions abolished, see note of advisory committee under rule 39, Title 18, Appendix, Crimes and Criminal Procedure.

Exceptions unnecessary, see rule 51.

## Rule 47. Jurors

**(a) Examination of jurors**

The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper.

**(b) Alternate jurors**

The court may direct that not more than six jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each side is entitled to 1 peremptory challenge in addition to those otherwise allowed by law if 1 or 2 alternate jurors are to be impanelled, 2 preemptory challenges if 3 or 4 alternate jurors are to be impanelled, and 3 peremptory challenges if 5 or 6 alternate jurors are to be impanelled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by law shall not be used against an alternate juror.

(As amended Feb. 28, 1966, eff. July 1, 1966.)

### NOTES OF ADVISORY COMMITTEE ON RULES

*Note to Subdivision (a).* This permits a practice found very useful by Federal trial judges. For an example of a state practice in which the examination by the court is supplemented by further inquiry by counsel, see Rule 27 of the Code of Rules for the District Courts of Minnesota, 186 Minn. xxxiii (1932), 3 Minn.Stat. (Mason, supp. 1936) Appendix, 4, p. 1062.

*Note to Subdivision (b).* The provision for an alternate juror is one often found in modern state codes. See N.C.Code (1935) § 2330(a); Ohio Gen.Code Ann. (Page, Supp. 1926–1935) § 11419–47; Pa.Stat.Ann. (Purdon, Supp. 1936) Title 17, § 1153; compare U.S.C., Title 28, former § 417a (Alternate jurors in criminal trials); 1 N.J.Rev.Stat. (1937) 2:91A–1, 2:91A–2, 2:91A–3.

Provisions for qualifying, drawing, and challenging of jurors are found in U.S.C., Title 28, former:

| | |
|---|---|
| § 411 | (Qualifications and exemptions) |
| § 412 | (Manner of drawing) |
| § 413 | (Apportioned in district) |
| § 415 | (Not disqualified because of race or color) |
| § 416 | (Venire; service and return) |
| § 417 | (Talesmen for petit jurors) |
| § 418 | (Special juries) |
| § 423 | (Jurors not to serve more than once a year) |
| § 424 | (Challenges) |

and D. C. Code (1930) Title 18, §§ 341-360 (Juries and Jury Commission) and Title 6, § 366 (Peremptory challenges.

#### NOTES OF ADVISORY COMMITTEE ON 1966 AMENDMENT TO RULES

The revision of this subdivision brings it into line with the amendment of Rule 24(c) of the Federal Rules of Criminal Procedure. That rule previously allowed four alternate jurors, as contrasted with the two allowed in civil cases, and the amendments increase the number of a maximum of six in all cases. The Advisory Committee's Note to amended Criminal Rule 24(c) points to experience demonstrating that four alternates may not be enough in some lengthy criminal trials; and the same may be said of civil trials. The Note adds:

"The words 'or are found to be' are added to the second sentence to make clear that an alternate juror may be called in the situation where it is first discovered during the trial that a juror was unable or disqualified to preform his duties at the time he was sworn."

#### CROSS REFERENCES

Challenges of jurors, see section 1870 of this title.

Jury trial of right, see rule 38.

Manner of drawing trial jurors, see section 1864 of this title.

Qualifications of jurors, see section 1861 of this title.

#### FEDERAL RULES OF CRIMINAL PROCEDURE

Trial jurors, see rule 24, Title 18, Appendix, Crimes and Criminal Procedure.

### Rule 48. Juries of Less Than Twelve—Majority Verdict

The parties may stipulate that the jury shall consist of any number less than twelve or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury.

#### NOTES OF ADVISORY COMMITTEE ON RULES

For provisions in state codes, compare Utah Rev.Stat.Ann. (1933) § 48-O-5 (In civil cases parties may agree in open court on lesser number of jurors); 2 Wash.Rev.Stat.Ann. (Remington, 1932) § 323 (Parties may consent to any number of jurors not less than three).

#### CROSS REFERENCES

Advisory jury, see rule 39.

Jury trial of right, see rule 38.

Right to jury trial, see U.S. Const. Amend. VII.

### Rule 49. Special Verdicts and Interrogatories

**(a) Special verdicts.**

The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

**(b) General verdict accompanied by answer to interrogatories**

The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When the answers are consistent with each other but one or more is consistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

(As amended Jan. 21, 1963, eff. July 1, 1963.)

#### NOTES OF ADVISORY COMMITTEE ON RULES

The Federal courts are not bound to follow state statutes authorizing or requiring the court to ask a jury to find a special verdict or to answer interrogatories. *Victor American Fuel Co.* v. *Peccarich*, 209 Fed. 568 (C.C.A.8th, 1913) cert. den. 232 U.S. 727, 34 S.Ct. 603, 58 L.Ed. 817 (1914); *Spokane and I. E. R. Co.* v. *Campbell*, 217 Fed. 518 (C.C.A.9th, 1914), affd. 241 U.S. 497, 36 S.Ct. 683, 60 L.Ed. 1125 (1916); Simkins, *Federal Practice* (1934) § 186. The power of a territory to adopt by statute the practice under *Subdivision (b)* has been sustained. *Walker* v. *New Mexico and Southern Pacific R. R.*, 165 U.S. 593, 17 S.Ct. 421, 41 L.Ed. 837 (1897); *Southwestern Brewery and Ice Co.* v. *Schmidt*, 226 U.S. 162, 33 S.Ct. 68, 57 L.Ed. 170 (1912).

Compare Wis.Stat. (1935) §§ 270.27, 270.28 and 270.30 Green, A New Development in Jury Trial (1927), 13 A.B.A.J. 715; Morgan, A Brief History of Special Verdicts and Special Interrogatories, 1923, 32 Yale L.J. 575.

The provisions of U.S.C., Title 28, formerly § 400(3) (now §§ 2201, 2202) (Declaratory judgments authorized; procedure) permitting the submission of issues of fact to a jury are covered by this rule.

#### NOTES OF ADVISORY COMMITTEE ON 1963 AMENDMENT TO RULES

This amendment conforms to the amendment of Rule 58. See the Advisory Committee's Note to Rule 58, as amended.

#### CROSS REFERENCES

Advisory jury, see rule 39.

New trial, see rule 59.

### Rule 50. Motion for a Directed Verdict and for Judgment Notwithstanding the Verdict

#### (a) Motion for directed verdict: when made; effect

A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

#### (b) Motion for judgment notwithstanding the verdict

Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

#### (c) Same: conditional rulings on grant of motion

(1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment notwithstanding the verdict.

#### (d) Same: denial of motion

If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

(As amended Jan. 21, 1963, eff. July 1, 1963.)

#### NOTES OF ADVISORY COMMITTEE ON RULES

*Note to Subdivision (a).* The present federal rule is changed to the extent that the formality of an express reservation of rights against waiver is no longer necessary. See *Sampliner* v. *Motion Picture Patents Co.,* 254 U.S. 233, 41 S.Ct. 79, 65 L.Ed. 240 (1920); *Union Indemnity Co.* v. *United States,* 74 F.2d 645 (C.C.A.6th, 1935). The requirement that specific grounds for the motion for a directed verdict must be stated settles a conflict in the federal cases. See Simkins, Federal Practice (1934) § 189.

*Note to Subdivision (b).* For comparable state practice upheld under the conformity act, see *Baltimore and Carolina Line* v. *Redman,* 295 U.S. 654, 55 S.Ct. 890, 79 L.Ed. 1636 (1935); compare *Slocum* v. *New York Life Ins. Co.,* 228 U.S. 364, 33 S.Ct. 523, 57 L.Ed. 879, Ann.Cas. 1914D, 1029 (1913).

See *Northern Ry. Co.* v. *Page,* 274 U.S. 65, 47 S.Ct. 491, 71 L.Ed. 929 (1927), following the Massachusetts practice of alternative verdicts, explained in Thorndike, *Trial by Jury in United States Courts,* 26 Harv.L.Rev. 732 (1913). See also Thayer, Judicial Administration, 63 U. of Pa.L.Rev. 585, 600–601, and note 32 (1915); Scott, Trial by Jury and the Reform of Civil Procedure, 31 Harv.L.Rev. 669, 685 (1918); Comment, 34 Mich.L.Rev. 93, 98 (1935).

#### NOTES OF ADVISORY COMMITTEE ON 1963 AMENDMENT TO RULES

Subdivision (a). The practice, after the court has granted a motion for a directed verdict, of requiring the jury to express assent to a verdict they did not reach by their own deliberations serves no useful purpose and may give offense to the members of the jury. See 2B Barron & Holtzoff, Federal Practice and Procedure § 1072, at 367 (Wright ed. 1961); Blume, Origin and Development of the Directed Verdict, 48 Mich.L.Rev. 555, 582–85, 589–90 (1950). The final sentence of the subdivision, added by amendment, provides that the court's order granting a motion for a directed verdict is effective in itself, and that no action need be taken by the foreman or other members of the jury. See Ariz.R.Civ.P. 50(c); cf. Fed.R.Crim.P. 29 (a). No change is intended in the standard to be applied in deciding the motion. To assure this interpretation, and in the interest of simplicity, the traditional term, "directed verdict," is retained.

Subdivision (b). A motion for judgment notwithstanding the verdict will not lie unless it was preceded by a motion for a directed verdict made at the close of all the evidence.

The amendment of the second sentence of this subdivision sets the time limit for making the motion for judgment n.o.v. at 10 days after the entry of judgment, rather than 10 days after the reception of the verdict. Thus the time provision is made consistent with that contained in Rule 59(b) (time for motion for new trial) and Rule 52(b) (time for motion to amend findings by the court).

Subdivision (c) deals with the situation where a party joins a motion for a new trial with his motion for judgment n.o.v. or prays for a new trial in the alternative, and the motion for judgment n.o.v. is granted. The procedure to be followed in making rulings on the motion for the new trial, and the consequences of the rulings thereon, were partly set out in *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243, 253, 61 S.Ct. 189, 85 L.Ed. 147 (1940), and have been further elaborated in later cases. See *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U.S. 212, 67 S.Ct. 752, 91 L.Ed. 849 (1947); *Globe Liquor Co., Inc.* v. *San Roman*, 332 U.S. 571, 68 S.Ct. 246, 92 L.Ed. 177 (1948); *Fountain* v. *Filson*, 336 U.S. 681, 69 S.Ct. 754, 93 L.Ed. 971 (1949); *Johnson* v. *New York, N.H. & H.R.R. Co.*, 344 U.S. 48, 73 S.Ct. 125, 97 L.Ed. 77 (1952). However, courts as well as counsel have often misunderstood the procedure, and it will be helpful to summarize the proper practice in the text of the rule. The amendments do not alter the effects of a jury verdict or the scope of appellate review.

In the situation mentioned, subdivision (c)(1) requires that the court make a "conditional" ruling on the new-trial motion, i.e., a ruling which goes on the assumption that the motion for judgment n.o.v. was erroneously granted and will be reversed or vacated; and the court is required to state its grounds for the conditional ruling. Subdivision (c)(1) then spells out the consequences of a reversal of the judgment in the light of the conditional ruling on the new-trial motion.

If the motion for new trial has been conditionally granted, and the judgment is reversed, "the new trial shall proceed unless the appellate court has otherwise ordered." The party against whom the judgment n.o.v. was entered below may, as appellant, besides seeking to overthrow that judgment, also attack the conditional grant of the new trial. And the appellate court, if it reverses the judgment n.o.v., may in an appropriate case also reverse the conditional grant of the new trial and direct that judgment be entered on the verdict. See *Bailey* v. *Slentz*, 189 F.2d 406 (10th Cir. 1951); *Moist Cold Refrigerator Co.* v. *Lou Johnson Co.*, 249 F.2d 246 (9th Cir. 1957), cert. denied, 356 U.S. 968, 78 S.Ct. 1008, 2 L.Ed.2d 1074 (1958); *Peters* v. *Smith*, 221 F.2d 721 (3d Cir.1955); *Dailey* v. *Timmer*, 292 F.2d 824 (3d Cir. 1961), explaining *Lind* v. *Schenley Industries, Inc.*, 278 F.2d 79 (3d Cir.), cert. denied, 364 U.S. 835, 81 S.Ct. 58, 5 L.Ed.2d 60 (1960); *Cox* v. *Pennsylvania R.R.*, 120 A.2d 214 (D.C.Mun.Ct.App. 1956); 3 Barron & Holtzoff. Federal Practice and Procedure § 1302.1 at 346–47 (Wright ed. 1958); 6 Moore's Federal Practice ¶ 59.16 at 3915 n. 8a (2d ed. 1954).

If the motion for a new trial has been conditionally denied, and the judgment is reversed, "subsequent proceedings shall be in accordance with the order of the appellate court." The party in whose favor judgment n.o.v. was entered below may, as appellee, besides seeking to uphold that judgment, also urge on the appellate court that the trial court committed error in conditionally denying the new trial. The appellee may assert this error in his brief, without taking a cross-appeal. *Cf. Patterson* v. *Pennsylvania R.R.*, 238 F.2d 645, 650 (6th Cir. 1956); *Hughes* v. *St. Louis Nat. L. Baseball Club, Inc.*, 359 Mo. 993, 997, 224 S.W.2d 989, 992 (1949). If the appellate court concludes that the judgment cannot stand, but accepts the appellee's contention that there was error in the conditional denial of the new trial, it may order a new trial in lieu of directing the entry of judgment upon the verdict.

Subdivision (c)(2), which also deals with the situation where the trial court has granted the motion for judgment n.o.v., states that the verdict-winner may apply to the trial court for a new trial pursuant to Rule 59 after the judgment n.o.v. has been entered against him. In arguing to the trial court in opposition to the motion for judgment n.o.v., the verdict-winner may, and often will, contend that he is entitled, at the least, to a new trial, and the court has a range of discretion to grant a new trial or (where plaintiff won the verdict) to order a dismissal of the action without prejudice instead of granting judgment n.o.v. See *Cone* v. *West Virginia Pulp & Paper Co.*, *supra*, 330 U.S. at 217, 218 67 S.Ct. at 755, 756, 91 L.Ed. 849. Subdivision (c)(2) is a reminder that the verdict-winner is entitled, even after entry of judgment n.o.v. against him, to move for a new trial in the usual course. If in these circumstances the motion is granted, the judgment is superseded.

In some unusual circumstances, however, the grant of the new-trial motion may be only conditional, and the judgment will not be superseded. See the situation in *Tribble* v. *Bruin*, 279 F.2d 424 (4th Cir. 1960) (upon a verdict for plaintiff, defendant moves for and obtains judgment n.o.v.; plaintiff moves for a new trial on the ground of inadequate damages; trial court might properly have granted plaintiff's motion, conditional upon reversal of the judgment n.o.v.).

Even if the verdict-winner makes no motion for a new trial, he is entitled upon his appeal from the judgment n.o.v. not only to urge that that judgment should be reversed and judgment entered upon the verdict, but that errors were committed during the trial which at the least entitle him to a new trial.

Subdivision (d) deals with the situation where judgment has been entered on the jury verdict, the motion for judgment n.o.v. and any motion for a new trial having been denied by the trial court. The verdict-winner, as appellee, besides seeking to uphold the judgment, may urge upon the appellate court that in case the trial court is found to have erred in entering judgment on the verdict, there are grounds for granting him a new trial instead of directing the entry of judgment for his opponent. In appropriate cases the appellate court is not precluded from itself directing that a new trial be had. See *Weade* v. *Dichmann, Wright & Pugh, Inc.*, 337 U.S. 801, 69 S.Ct. 1326, 93 L.Ed. 1704 (1949). Nor is it precluded in proper cases from remanding the case for a determination by the trial court as to whether a new trial should be granted. The latter course is advisable where the grounds urged are suitable for the exercise of trial court discretion.

Subdivision (d) does not attempt a regulation of all aspects of the procedure where the motion for judgment n.o.v. and any accompanying motion for a new trial are denied, since the problems have not been fully canvassed in the decisions and the procedure is in some respects still in a formative stage. It is, however, designed to give guidance on certain important features of the practice.

### Cross References

Grounds for new trial, see rule 59.

Involuntary dismissal at end of plaintiff's case, see rule 41.

### Federal Rules of Criminal Procedure

Motions for directed verdict abolished in criminal cases, see rule 29, Title 18, Appendix, Crimes and Criminal Procedure.

## Rule 51. Instructions to Jury: Objection

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

### Notes of Advisory Committee on Rules

Supreme Court Rule 8 requires exceptions to the charge of the court to the jury which shall distinctly state the several matters of law in the charge to which exception is taken. Similar provisions appear in the rules of the various Circuit Courts of Appeals.

### CROSS REFERENCES

Formal exceptions unnecessary, see rule 46.
Motion for directed verdict, see rule 50.

## Rule 52. Findings by the Court

### (a) Effect

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

### (b) Amendment

Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963.)

### NOTES OF ADVISORY COMMITTEE ON RULES

See former Equity Rule 70½, as amended Nov. 25, 1935 (Findings of Fact and Conclusions of Law), and U.S.C., Title 28, former § 764 (Opinion, findings, and conclusions in action against United States) which are substantially continued in this rule. The provisions of U.S.C., Title 28, former § 773 (Trial of issues of fact; by court) and former § 875 (Review in cases tried without a jury) are superseded insofar as they provide a different method of finding facts and a different method of appellate review. The rule stated in the third sentence of *Subdivision* (*a*) accords with the decisions on the scope of the review in modern federal equity practice. It is applicable to all classes of findings in cases tried without a jury whether the finding is of a fact concerning which there was conflict of testimony, or of a fact deduced or inferred from uncontradicted testimony. See *Silver King Coalition Mines, Co.* v. *Silver King Consolidated Mining Co.*, 204 Fed. 166 (C.C.A.8th, 1913), cert. den. 229 U.S. 624, 33 S.Ct. 1051, 57 L.Ed. 1356 (1913); *Warren* v. *Keep*, 155 U.S. 265, 15 S.Ct. 83, 39 L.Ed. 144 (1894); *Furrer* v. *Ferris*, 145 U.S. 132, 12 S.Ct. 821, 36 L.Ed. 649 (1892); *Tilghman* v. *Proctor*, 125 U.S. 136, 149, 8 S.Ct. 894, 31 L.Ed. 664 (1888); *Kimberly* v. *Arms*, 129 U.S. 512, 524, 9 S.Ct. 355, 32 L.Ed. 764 (1889). Compare *Kaeser & Blair, Inc.*, v. *Merchants' Ass'n*, 64 F.2d 575, 576 (C.C.A.6th, 1933); *Dunn* v. *Trefry*, 260 Fed. 147, 148 (C.C.A.1st, 1919).

In the following states findings of fact are required in all cases tried without a jury (waiver by the parties being permitted as indicated at the end of the listing): Arkansas, Civ.Code (Crawford, 1934) § 364; California, Code Civ.Proc. (Deering, 1937) §§ 632, 634; Colorado, 1 Stat.Ann. (1935) Code Civ.Proc. §§ 232, 291 (in actions before referees or for possession of and damages to land); Connecticut, Gen.Stats. §§ 5660, 5664; Idaho, 1 Code Ann. (1932) §§ 7-302 through 7-305; Massachusetts (equity cases), 2 Gen.Laws (Ter.Ed., 1932) ch. 214, § 23; Minnesota, 2 Stat. (Mason, 1927) § 9311; Nevada, 4 Comp.Laws (Hillyer, 1929) § 8783-8784; New Jersey, Sup.Ct. Rule 113, 2 N.J.Misc. 1197, 1239 (1924); New Mexico, Stat.Ann. (Courtright, 1929) § 105-813; North Carolina, Code (1935) § 569; North Dakota, 2 Comp.Laws Ann. (1913) § 7641; Oregon, 2 Code Ann. (1930) § 2-502; South Carolina, Code (Michie, 1932) § 649; South Dakota, 1 Comp.Laws (1929) §§ 2525-2526; Utah, Rev.Stat.Ann. (1933) § 104-26-2, 104-26-3; Vermont (where jury trial waived), Pub.Laws (1933) § 2069; Washington, 2 Rev.Stat.Ann. (Remington, 1932) § 367; Wisconsin, Stat. (1935) § 270.33. The parties may waive this requirement for findings in California, Idaho, North Dakota, Nevada, New Mexico, Utah, and South Dakota.

In the following states the review of findings of fact in all non-jury cases, including jury waived cases, is assimilated to the equity review: Alabama, Code Ann. (Michie, 1928) §§ 9498, 8599; California, Code Civ.Proc. (Deering, 1937) § 956a; but see 20 Calif.Law Rev. 171 (1932); Colorado, *Johnson* v. *Kountze*, 21 Colo. 486, 43 Pac. 445 (1895), semble; Illinois, *Baker* v. *Hinricks*, 359 Ill. 138, 194 N.E. 284 (1934), *Weininger* v. *Metropolitan Fire Ins. Co.*, 359 Ill. 584, 195 N.E. 420, 98 A.L.R. 169 (1935); Minnesota, *State Bank of Gibbon* v. *Walter*, 167 Minn. 37, 38, 208 N.W. 423 (1926), *Waldron* v. *Page*, 191 Minn. 302, 253 N.W. 894 (1934); New Jersey, N.J.Comp.Stat. (2 Cum.Supp. 1911-1924) Title 163, § 303, as interpreted in *Bussy* v. *Hatch*, 95 N.J.L. 56, 111 A. 546 (1920); New York, *York Mortgage Corporation* v. *Clotar Const. Corp.*, 254 N.Y. 128, 133, 172 N.E. 265 (1930); North Dakota, Comp.Laws Ann. (1913) § 7846, as amended by N.D.Laws 1933, ch. 208, *Milnor Holding Co.* v. *Holt*, 63 N.D. 362, 370, 248 N.W. 315 (1933); Oklahoma, *Wichita Mining and Improvement Co.* v. *Hale*, 20 Okla. 159, 167, 94 Pac. 530 (1908); South Dakota, *Randall* v. *Burk Township*, 4 S.D. 337, 57 N.W. 4 (1893); Texas, *Custard* v. *Flowers*, 14 S.W.2d 109 (1929); Utah, Rev.Stat.Ann. (1933) § 104-41-5; Vermont, *Roberge* v. *Troy*, 105 Vt. 134, 163 Atl. 770 (1933); Washington, 2 Rev.Stat.Ann. (Remington, 1932) §§ 309—316; *McCullough* v. *Puget Sound Realty Associates*, 76 Wash. 700, 136 Pac. 1146 (1913), but see *Cornwall* v. *Anderson*, 85 Wash. 369, 148 Pac. 1 (1915); West Virginia, *Kinsey* v. *Carr*, 60 W.Va. 449, 55 S.E. 1004 (1906), semble; Wisconsin, Stat. (1935) § 251.09; *Campbell* v. *Sutliff,—T1 193 Wis. 370, 214 N.W. 374 (1927), Gessler* v. *Erwin Co.*, 182 Wis. 315, 193 N.W. 363 (1924).

For examples of an assimilation of the review of findings of fact in cases tried without a jury to the review at law as made in several states, see Clark and Stone, Review of Findings of Fact, 4 U. of Chi.L.Rev. 190, 215 (1937).

### NOTES OF ADVISORY COMMITTEE ON 1946 AMENDMENT TO RULES

*Note. Subdivision* (*a*). The amended rule makes clear that the requirement for findings of fact and conclusions of law thereon applies in a case with an advisory jury. This removes an ambiguity in the rule as originally stated, but carries into effect what has been considered its intent. 3 Moore's Federal Practice, 1938, 3119. *Hurwitz* v. *Hurwitz*, App.D.C. 1943, 78 U.S.App.D.C. 66, 136 F.2d 796.

The two sentences added at the end of Rule 52(a) eliminate certain difficulties which have arisen concerning findings and conclusions. The first of the two sentences permits findings of fact and conclusions of law to appear in an opinion or memorandum of decision. See, e.g., *United States* v. *One 1941 Ford Sedan*, S.D.Tex. 1946, 65 F.Supp 84. Under original Rule 52(a) some courts have expressed the view that findings and conclusions could not be incorporated in an opinion. *Detective Comics, Inc.* v. *Bruns Publication*, S.D.N.Y. 1939, 28 F.Supp. 399; *Pennsylvania Co. for Insurance on Lives & Granting Annuities* v. *Cincinnati & L. E. R. Co.*, S.D.Ohio 1941, 43 F.Supp. 5; *United States* v. *Aluminum Co. of America*, S.D.N.Y. 1941, 2 F.R.D. 224, 5 Fed.Rules Serv. 52a.11, Case 3; see also s.c., 44 F.Supp. 97. But, to the contrary, see *Wellman* v. *United States*, D.Mass. 1938, 25 F.Supp. 868; *Cook* v. *United States*, D.Mass. 1939, 26 F.Supp. 253; *Proctor* v. *White*, D.Mass. 1939, 28 F.Supp. 161; *Green Valley Creamery, Inc.* v. *United States*, C.C.A.1st, 1939, 108 F.2d 342. See also *Matton Oil Transfer Corp.* v. *The Dynamic*, C.C.A.2d, 1941, 123 F.2d 999; *Carter Coal Co.* v. *Litz*, C.C.A.4th, 1944, 140 F.2d 934; *Woodruff* v. *Heiser*, C.C.A.10th, 1945, 150 F.2d 869; *Coca-Cola Co.* v. *Busch*, E.D.Pa. 1943, 7 Fed.Rules Serv. 59b.2, Case 4; Oglebay, Some Developments in Bankruptcy Law, 1944, 18 J. of Nat'l Ass'n of Ref. 68, 69. Findings of fact aid in the process of judgment and in defining for future cases the precise limitations of the issues and the determination thereon. Thus they not only aid the appellate court on review, *Hurwitz* v. *Hurwitz*, App.D.C. 1943, 78 U.S.App.D.C. 66, 136 F.2d 796, but they are an important factor in the proper application of the doctrines of res judicata and estoppel by judgment Nordbye, Improvements in Statement of Findings of Fact and Conclusions of Law, 1 F.R.D. 25, 26-27; *United States* v. *Forness*, C.C.A.2d, 1942, 125 F.2d 928; cert. den., 1942, 316 U.S. 694, 62 S.Ct. 1293. These findings should represent the judge's own determination and not the long, often argumentative statements of successful counsel. *United States* v. *Forness*, supra; *United States* v. *Crescent Amusement Co.*, 1944, 323 U.S. 173, 65 S.Ct. 254. Consequently, they should be a part of the judge's opinion and decision, either stated therein or stated separately. *Matton Oil Transfer Corp.* v. *The Dynamic*, supra. But the judge need only make brief, definite, pertinent findings and conclusions upon the contested matters; there is no necessity for overelaboration of detail or particularization of facts. *United States* v. *Forness*, supra; *United States* v. *Crescent Amusement Co.*, supra. See also *Petterson Lighterage & Towing Corp.* v. *New York Central R. Co.*, C.C.A.2d, 1942, 126 F.2d 992; *Brown Paper Mill Co., Inc.* v. *Irwin*, C.C.A.8th, 1943, 134 F.2d 337; *Allen Bradley Co.* v. *Local Union No. 3*, I.B.E.W., C.C.A.2d, 1944, 145 F.2d 215, rev'd on other grounds, 1945, 325 U.S. 797, 65 S.Ct. 1533; *Young* v. *Murphy*, N.D.Ohio 1946, 9 Fed.Rules Serv. 52a.11, Case 2.

The last sentence of Rule 52(a) as amended will remove any doubt that findings and conclusions are unnecessary upon decision of a motion, particularly one under Rule 12 or Rule 56, except as provided in amended Rule 41(b). As so holding, see *Thomas* v. *Peyser*, App.D.C. 1941, 118 F.2d 369; *Schad* v. *Twentieth Century-Fox Corp.*, C.C.A.3d, 1943, 136 F.2d 991; *Prudential Ins. Co. of America* v. *Goldstein*, E.D.N.Y. 1942, 43 F.Supp. 767; *Somers Coal Co.* v. *United States*, N.D.Ohio 1942, 2 F.R.D. 532, 6 Fed.Rules Serv. 52a.1, Case 1; *Pen-Ken Oil & Gas Corp.* v. *Warfield Natural Gas Co.*, E.D.Ky. 1942, 2 F.R.D. 355, 5 Fed.Rules Serv. 52a.1, Case 3; also Commentary, Necessity of Findings of Fact, 1941, 4 Fed.Rules Serv. 936.

### NOTES OF ADVISORY COMMITTEE ON 1963 AMENDMENT TO RULES

This amendment conforms to the amendment of Rule 58. See the Advisory Committee's Note to Rule 58, as amended.

### CROSS REFERENCES

Advisory jury, see rule 39.

Extension of time to apply for amendment of findings, limitation on, see rule 6.

Master's report, inclusion of findings of fact and conclusions of law, see rule 53.

Motion for new trial, amendment of findings on, see rule 59.

Special verdicts, making of findings on, see rule 49.

Stay of proceedings to enforce judgment pending disposition of motion to amend, see rule 62.

## Rule 53. Masters

### (a) Appointment and compensation

Each district court with the concurrence of a majority of all the judges thereof may appoint one or more standing masters for its district, and the court in which any action is pending may appoint a special master therein. As used in these rules the word "master" includes a referee, an auditor, an examiner, a commissioner, and an assessor. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct. The master shall not retain his report as security for his compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.

### (b) Reference

A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it.

### (c) Powers

The order of reference to the master may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order. He may require the production before him or evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. He may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may himself examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in Rule 43(c) for a court sitting without a jury.

### (d) Proceeding

(1) *Meetings.* When a reference is made, the clerk shall forthwith furnish the master with a

copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the master shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within 20 days after the date of the order of reference and shall notify the parties or their attorneys. It is the duty of the master to proceed with all reasonable diligence. Either party, on notice to the parties and master, may apply to the court for an order requiring the master to speed the proceedings and to make his report. If a party fails to appear at the time and place appointed, the master may proceed ex parte or, in his discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

(2) *Witnesses.* The parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas as provided in Rule 45. If without adequate excuse a witness fails to appear or give evidence, he may be punished as for a contempt and be subjected to the consequences, penalties, and remedies provided in Rules 37 and 45.

(3) *Statement of Accounts.* When matters of accounting are in issue before the master, he may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the master may require a different form of statement to be furnished, or the accounts or specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as he directs.

**(e) Report**

(1) *Contents and Filing.* The master shall prepare a report upon the matters submitted to him by the order of reference and, if required to make findings of fact and conclusions of law, he shall set them forth in the report. He shall file the report with the clerk of the court and in an action to be tried without a jury, unless otherwise directed by the order of reference, shall file with it a transcript of the proceedings and of the evidence and the original exhibits. The clerk shall forthwith mail to all parties notice of the filing.

(2) *In Non-Jury Actions.* In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

(3) *In Jury Actions.* In an action to be tried by a jury the master shall not be directed to report the evidence. His findings upon the issues submitted to him are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon any objections in point of law which may be made to the report.

(4) *Stipulation as to Findings.* The effect of a master's report is the same whether or not the parties have consented to the reference; but, when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

(5) *Draft Report.* Before filing his report a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

(As amended Feb. 28, 1966, eff. July 1, 1966.)

### Notes of Advisory Committee on Rules

*Note to Subdivision (a).* This is a modification of former Equity Rule 68 (Appointment and Compensation of Masters).

*Note to Subdivision (b).* This is substantially the first sentence of former Equity Rule 59 (Reference to Master—Exceptional, Not Usual) extended to actions formerly legal. See *Ex parte Peterson* 253 U.S. 300, 40 S.Ct. 543, 64 L.Ed. 919 (1920).

*Note to Subdivision (c).* This is former Equity Rules 62 (Powers of Master) and 65 (Claimants Before Master Examinable by Him) with slight modifications. Compare former Equity Rules 49 (Evidence Taken Before Examiners, Etc.) and 51 (Evidence Taken Before Examiners, Etc.).

*Note to Subdivision (d).* (1) This is substantially a combination of the second sentence of former Equity Rule 59 (Reference to Master—Exceptional, Not Usual) and former Equity Rule 60 (Proceedings Before Master). Compare former Equity Rule 53 (Notice of Taking Testimony Before Examiner, Etc.).

(2) This is substantially former Equity Rule 52 (Attendance of Witnesses Before Commissioner, Master, or Examiner).

(3) This is substantially former Equity Rule 63 (Form of Accounts Before Master).

*Note to Subdivision (e).* This contains the substance of former Equity Rules 61 (Master's Report—Documents Identified but not Set Forth), 61½ (Master's Report—Presumption as to Correctness—Review), and 66 (Return of Master's Report—Exceptions—Hearing), with modifications as to the form and effect of the report and for inclusion of reports by auditors, referees, and examiners, and references in actions formerly legal. Compare former Equity Rules 49 (Evidence Taken Before Examiners, Etc.) and 67 (Costs on Exceptions to Master's Report). See *Camden* v. *Stuart*, 144 U.S. 104, 12 S.Ct. 585, 36 L.Ed. 363 (1892); *Ex parte Peterson*, 253 U.S. 300, 40 S.Ct. 543, 64 L.Ed. 919 (1920).

### Notes of Advisory Committee on 1966 Amendment to Rules

These changes are designed to preserve the admiralty practice whereby difficult computations are referred to a commissioner or assessor, especially after an interlocutory judgment determining liability. As to separation of issues for trial see Rule 42(b).

### Cross References

Adoption of master's findings by court, see rule 52.

Clerks of courts, ineligible to appointment as master, see section 957 of this title.

Default judgment, reference to determine account or amount of damages, see rule 55.

Pre-trial determination as to preliminary reference, see rule 16.

Referees in bankruptcy, eligibility to appointment as, see section 63 of Title 11, Bankruptcy.

Report, judgment not required to recite, see rule 54.

Three-Judge Court, appointment of master by single judge, see section 2284 of this title.

United States magistrates, fees for attending to any reference, see section 633 of this title.

## TITLE VII—JUDGMENT

### Rule 54. Judgments; Costs

**(a) Definition; Form**

"Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

**(b) Judgment upon multiple claims or involving multiple parties**

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

**(c) Demand for judgment**

A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

**(d) Costs**

Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Apr. 17, 1961, eff. July 19, 1961.)

#### NOTES OF ADVISORY COMMITTEE ON RULES

*Note to Subdivision (a).* The second sentence is derived substantially from former Equity Rule 71 (Form of Decree).

*Note to Subdivision (b).* This provides for the separate judgment of equity and code practice. See Wis.Stat. (1935) § 270.54; Compare N.Y.C.P.A. (1937) § 476.

*Note to Subdivision (c).* For the limitation on default contained in the first sentence, see 2 N.D.Comp.Laws Ann. (1913) § 7680; N.Y.C.P.A. (1937) § 479. Compare English Rules Under the Judicature Act (The Annual Practice, 1937) O. 13, r.r. 3-12. The remainder is a usual code provision. It makes clear that a judgment should give the relief to which a party is entitled, regardless of whether it is legal or equitable or both. This necessarily includes the deficiency judgment in foreclosure cases formerly provided for by Equity Rule 10 (Decree for Deficiency in Foreclosures, Etc.).

*Note to Subdivision (d).* For the present rule in common law actions, see *Ex parte Peterson*, 253 U.S. 300, 40 S.Ct. 543, 64 L.Ed. 919 (1920); Payne, *Costs in Common Law Actions in the Federal Courts* (1935), 21 Va.L.Rev. 397.

The provisions as to costs in actions in *forma pauperis* contained in U.S.C., Title 28, former §§ 832—836 are unaffected by this rule. Other sections of U.S.C., Title 28, which are unaffected by this rule are: former §§ 815 (Costs; plaintiff not entitled to, when), 821 (Costs; infringement of patent; disclaimer), 825 (Costs; several actions), 829 (Costs; attorney liable for, when), and 830 (Costs; bill of; taxation).

The provisions of the following and similar statutes as to costs against the United States and its officers and agencies are specifically continued:

U.S.C., Title 15, §§ 77v(a), 78aa, 79y (Securities and Exchange Commission)
U.S.C., Title 16, § 825p (Federal Power Commission)
U.S.C., Title 26, §§ 3679(d) and 3745(d) (Internal revenue actions)
U.S.C., Title 26, § 3770(b)(2) (Reimbursement of costs of recovery against revenue officers)
U.S.C., Title 28, former § 817 (Internal revenue actions)
U.S.C., Title 28, former § 836 (United States—actions in *forma pauperis*)
U.S.C., Title 28, former § 842 (Actions against revenue officers)
U.S.C., Title 28, former § 870 (United States—in certain cases)
U.S.C., Title 28, former § 906 (United States—foreclosure actions)
U.S.C., Title 47, § 401 (Communications Commission)

The provisions of the following and similar statutes as to costs are unaffected:

U.S.C., Title 7, § 210(f) (Actions for damages based on an order of the Secretary of Agriculture under Stockyards Act)
U.S.C., Title 7, § 499g(c) (Appeals from reparations orders of Secretary of Agriculture under Perishable Commodities Act)
U.S.C., Title 8, § 45 (Action against district attorneys in certain cases)
U.S.C., Title 15, § 15 (Actions for injuries due to violation of antitrust laws)
U.S.C., Title 15, § 72 (Actions for violation of law forbidding importation or sale of articles at less than market value or wholesale prices)
U.S.C., Title 15, § 77k (Actions by persons acquiring securities registered with untrue statements under Securities Act of 1933)
U.S.C., Title 15, § 78i(e) (Certain actions under the Securities Exchange Act of 1934)
U.S.C., Title 15, § 78r (Similar to 78i(e))
U.S.C., Title 15, § 96 (Infringement of trade-mark—damages)
U.S.C., Title 15, § 99 (Infringement of trade-mark—injunctions)
U.S.C., Title 15, § 124 (Infringement of trade-mark—damages)
U.S.C., Title 19, § 274 (Certain actions under customs law)
U.S.C., Title 30, § 32 (Action to determine right to possession of mineral lands in certain cases)
U.S.C., Title 31, §§ 232 and 234 (Action for making false claims upon United States)
U.S.C., Title 33, § 926 (Actions under Harbor Workers' Compensation Act)
U.S.C., Title 35, § 67 (Infringement of patent—damages)
U.S.C., Title 35, § 69 (Infringement of patent—pleading and proof)
U.S.C., Title 35, § 71 (Infringement of patent—when specification too broad)

- U.S.C., Title 45, § 153p (Actions for non-compliance with an order of National R. R. Adjustment Board for payment of money)
- U.S.C., Title 46, § 38 (Action for penalty for failure to register vessel)
- U.S.C., Title 46, § 829 (Action based on non-compliance with an order of Maritime Commission for payment of money)
- U.S.C., Title 46, § 941 (Certain actions under Ship Mortgage Act)
- U.S.C., Title 46, § 1227 (Actions for damages for violation of certain provisions of the Merchant Marine Act, 1936)
- U.S.C., Title 47, § 206 (Actions for certain violations of Communications Act of 1934)
- U.S.C., Title 49, § 16(2) (Action based on non-compliance with an order of I. C. C. for payment of money)

### NOTES OF ADVISORY COMMITTEE ON 1946 AMENDMENT TO RULES

*Note.* The historic rule in the federal courts has always prohibited piecemeal disposal of litigation and permitted appeals only from final judgments except in those special instances covered by statute. *Hohorst* v. *Hamburg-American Packet Co.*, 1893, 148 U.S. 262, 13 S.Ct. 590; *Rexford* v. *Brunswick-Balke-Collender Co.*, 1913, 228 U.S. 339, 33 S.Ct. 515; *Collins* v. *Miller*, 1920, 252 U.S. 364, 40 S.Ct. 347. Rule 54(b) was originally adopted in view of the wide scope and possible content of the newly created "civil action" in order to avoid the possible injustice of a delay in judgment of a distinctly separate claim to await adjudication of the entire case. It was not designed to overturn the settled federal rule stated above, which, indeed, has more recently been reiterated in *Catlin* v. *United States*, 1945, 324 U.S. 229, 65 S.Ct. 631. See also *United States* v. *Florian*, 1941, 312 U.S. 656, 61 S.Ct. 713, rev'g, and restoring the first opinion in, *Florian* v. *United States*, C.C.A.7th, 1940, 114 F.2d 990; *Reeves* v. *Beardall*, 1942, 316 U.S. 283, 62 S.Ct. 1085.

Unfortunately, this was not always understood, and some confusion ensued. Hence situations arose where district courts made a piecemeal disposition of an action and entered what the parties thought amounted to a judgment, although a trial remained to be had on other claims similar or identical with those disposed of. In the interim the parties did not know their ultimate rights, and accordingly took an appeal, thus putting the finality of the partial judgment in question. While most appellate courts have reached a result generally in accord with the intent of the rule, yet there have been divergent precedents and division of views which have served to render the issues more clouded to the parties appellant. It hardly seems a case where multiplicity of precedents will tend to remove the problem from debate. The problem is presented and discussed in the following cases: *Atwater* v. *North American Coal Corp.*, C.C.A.2d, 1940, 111 F.2d 125; *Rosenblum* v. *Dingfelder*, C.C.A.2d, 1940, 111 F.2d 406; *Audi-Vision, Inc.* v. *RCA Mfg. Co., Inc.*, C.C.A.2d, 1943, 136 F.2d 621; *Zalkind* v. *Scheinman*, C.C.A.2d, 1943, 139 F.2d 895; *Oppenheimer* v. *F. J. Young & Co., Inc.*, C.C.A.2d, 1944, 144 F.2d 387; *Libbey-Owens-Ford Glass Co.* v. *Sylvania Industrial Corp.*, C.C.A.2d, 1946, 154 F.2d 814, cert. den., 1946, 66 S.Ct. 1353; *Zarati Steamship Co.* v. *Park Bridge Corp.*, C.C.A.2d, 1946, 154 F.2d 377; *Baltimore and Ohio R. Co.* v. *United Fuel Gas Co.*, C.C.A.4th, 1946, 154 F.2d 545; *Jefferson Electric Co.* v. *Sola Electric Co.*, C.C.A.7th, 1941, 122 F.2d 124; *Leonard* v. *Socony-Vacuum Oil Co.*, C.C.A.7th, 1942, 130 F.2d 535; *Markham* v. *Kasper*, C.C.A.7th, 1945, 152 F.2d 270; *Hanney* v. *Franklin Fire Ins. Co. of Philadelphia*, C.C.A.9th, 1944, 142 F.2d 864; *Toomey* v. *Toomey*, App.D.C. 1945, 80 U.S.App.D.C. 77, 149 F.2d 19.

In view of the difficulty thus disclosed, the Advisory Committee in its two preliminary drafts of proposed amendments attempted to redefine the original rule with particular stress upon the interlocutory nature of partial judgments which did not adjudicate all claims arising out of a single transaction or occurrence. This attempt appeared to meet with almost universal approval from those of the profession commenting upon it, although there were, of course, helpful suggestions for additional changes in language or clarification of detail. But cf. Circuit Judge Frank's dissenting opinion in *Libbey-Owens-Ford Glass Co.* v. *Sylvania Industrial Corp.*, supra, n. 21 of the dissenting opinion. The Committee, however, became convinced on careful study of its own proposals that the seeds of ambiguity still remained, and that it had not completely solved the problem of piecemeal appeals. After extended consideration, it concluded that a retention of the older federal rule was desirable, and that this rule needed only the exercise of a discretionary power to afford a remedy in the infrequent harsh case to provide a simple, definite, workable rule. This is afforded by amended Rule 54(b). It re-establishes an ancient policy with clarity and precision. For the possibility of staying execution where not all claims are disposed of under Rule 54(b), see amended Rule 62(h).

### NOTES OF ADVISORY COMMITTEE ON 1961 AMENDMENT TO RULES

This rule permitting appeal, upon the trial court's determination of "no just reason for delay," from a judgment upon one or more but less than all the claims in an action, has generally been given a sympathetic construction by the courts and its validity is settled. *Reeves* v. *Beardall*, 316 U.S. 283 (1942); *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427 (1956); *Cold Metal Process Co.* v. *United Engineering & Foundry Co.*, 351 U.S. 445 (1956).

A serious difficulty has, however, arisen because the rule speaks of claims but nowhere mentions parties. A line of cases has developed in the circuits consistently holding the rule to be inapplicable to the dismissal, even with the requisite trial court determination, of one or more but less than all defendants jointly charged in an action, i.e. charged with various forms of concerted or related wrongdoing or related liability. See *Mull* v. *Ackerman*, 279 F.2d 25 (2d Cir. 1960); *Richards* v. *Smith*, 276 F.2d 652 (5th Cir. 1960); *Hardy* v. *Bankers Life & Cas. Co.*, 222 F.2d 827 (7th Cir. 1955); *Steiner* v. *20th Century-Fox Film Corp.*, 220 F.2d 105 (9th Cir. 1955). For purposes of Rule 54(b) it was arguable that there were as many "claims" as there were parties defendant and that the rule in its present text applied where less than all of the parties were dismissed, cf. *United Artists Corp.* v. *Masterpiece Productions, Inc.*, 221 F.2d 213, 215 (2d Cir. 1955); *Bowling Machines, Inc.* v. *First Nat. Bank*, 283 F.2d 39 (1st Cir. 1960); but the Courts of Appeals are now committed to an opposite view.

The danger of hardship through delay of appeal until the whole action is concluded may be at least as serious in the multiple-parties situations as in multiple-claims cases, see *Pabellon* v. *Grace Line, Inc.*, 191 F.2d 169, 179 (2d Cir. 1951), cert. denied, 342 U.S. 893 (1951), and courts and commentators have urged that Rule 54(b) be changed to take in the former. See *Reagan* v. *Traders & General Ins. Co.*, 255 F.2d 845 (5th Cir. 1958); *Meadows* v. *Greyhound Corp.*, 235 F.2d 233 (5th Cir. 1956); *Steiner* v. *20th Century-Fox Film Corp.*, supra; 6 Moore's Federal Practice ¶ 54.34[2] (2d ed. 1953); 3 Barron & Holtzoff, *Federal Practice & Procedure* § 1193.2 (Wright ed. 1958); *Developments in the Law—Multiparty Litigation*, 71 Harv.L.Rev. 874, 981 (1958); Note, 62 Yale L.J. 263, 271 (1953); Ill.Ann.Stat. ch. 110, § 50(2) (Smith-Hurd 1956). The amendment accomplishes this purpose by referring explicitly to parties.

There has been some recent indication that interlocutory appeal under the provisions of 28 U.S.C. § 1292(b), added in 1958, may now be available for the multiple-parties cases here considered. See *Jaftex Corp.* v. *Randolph Mills, Inc.*, 282 F.2d 508 (2d Cir. 1960). The Rule 54(b) procedure seems preferable for those cases, and § 1292(b) should be held inapplicable to them when the rule is enlarged as here proposed. See *Luckenbach Steamship Co., Inc.*, v. *H. Muehlstein*

*& Co., Inc.*, 280 F.2d 755, 757 (2d Cir. 1960); 1 Barron & Holtzoff, supra, § 58.1, p. 321 (Wright ed. 1960).

### CROSS REFERENCES

Amendment or alteration of judgment—

Stay of proceedings pending disposition of motion for, see rule 62.

Time for service of motion, see rule 59.

Appellate court directing entry of judgment, see section 2106 of this title.

Attachment of property of person disobeying judgment for specific acts, see rule 70.

Bills of review abolished, see rule 60.

Certified copy of satisfaction of judgment, registration, see section 1963 of this title.

Civil docket, entry of judgment in, see rule 79.

Contempt by disobeying judgment directing performance of specific acts, see rule 70.

Copies, clerk to keep correct copy of every final judgment, see rule 79.

Costs—

Absent defendant, setting aside judgment and pleading on payment of, see section 1655 of this title.

Admiralty, taxation, see section 1925 of this title.

Admissions on genuineness of documents or truth of factual matters, expenses on failure to make, see rule 37.

Affidavits, see sections 1915 and 1924 of this title.

Agencies of United States, see section 2408 of this title.

Amount in controversy, removal of action against carrier to district court, see section 1445 of this title.

Appeal, in forma pauperis proceeding, see section 1915 of this title.

Briefs, taxation of printing as, see section 1923 of this title.

Certiorari, delay by petition for writ, see section 2103 of this title.

Claimant in proceedings to condemn or forfeit property seized, see section 2465 of this title.

Clerk of court of appeals, payment into Treasury, see section 711 of this title.

Contempt of witness in foreign country failing to respond to subpoena, see section 1784 of this title.

Copies of papers, taxation as, see section 1920 of this title.

Counsel's liability for excessive, see section 1927 of this title.

Default judgment including, see rule 55.

Delay of entry of judgment for taxing of, see rule 58.

Denial of to plaintiff where plaintiff recovers less than $10,000, see sections 1331 and 1332 of this title.

Dismissal for lack of jurisdiction, see section 1919 of this title.

District court, see section 1918 of this title.

Docket fees, see sections 1920, 1922 and 1923 of this title.

Exemplification of papers, taxation, see section 1920 of this title.

Fees, taxation as, see section 1920 of this title.

Filing and inclusion of bill of costs in judgment or decree, see section 1920 of this title.

Fine and forfeitures for violating act of Congress, see section 1918 of this title.

Forma pauperis proceeding, see section 1915 of this title.

Garnishment by United States, see section 2405 of this title.

Jurisdiction of district court, amount in controversy, see section 1332 of this title.

Maritime cases, taxation, see section 1925 of this title.

Offer of judgment affecting, see rule 68.

Patent infringement action, see section 1928 of this title.

Previously dismissed action, see rule 41.

Removal of causes, bond to accompany petition for removal, see section 1446 of this title.

Seamen's suits, see section 1916 of this title.

Security not required of United States, see section 2408 of this title.

Stay of execution and enforcement of judgment to obtain certiorari from Supreme Court, see section 2101 of this title.

Summary judgment, affidavits presented in bad faith, see rule 56.

Taxation, see sections 1920 and 1921 of this title.

United States, liability for, see section 2412 of this title.

United States marshal's fees, see section 1921 of this title.

Verification of bill of, see section 1924 of this title.

Witness fees, taxation as, see sections 1920 and 1922 of this title.

Counterclaim or cross-claim judgment on, see rule 13.

Court of Claims judgment finding plaintiff indebted to United States as judgment of district court, see section 2508 of this title.

Court record of judgment lost or destroyed, enforcement where United States is interested, see section 1735 of this title.

Declaratory judgment, see rule 57 and sections 2201 and 2202 of this title.

Default judgment, see rule 55.

Docketing judgment to constitute lien, see section 1962 of this title.

Entry of judgment—

New judgment on motion for new trial, see rule 59.

On verdict by clerk, see rule 58.

Extension of time for relief from judgment, see rule 6.

Finality of judgment unaffected by motion for relief, see rule 60.

Garnishment by United States against corporation, see section 2405 of this title.

Index to be kept by clerk of every judgment, see rule 79.

Indexing of judgment to constitute lien, see section 1962 of this title.

Interest on judgments, see sections 1961 and 2411.

Interrogatories, entry of judgment on, see rule 58.

Judge to approve form of judgment, see rule 58.

Lien, judgment as, see section 1962.

Modification of judgment, errors not affecting substantial rights not ground for, see rule 61.

Motion for judgment in action by United States against delinquents for public money, see section 2407 of this title.

New trial, stay of proceedings to enforce judgment on motion for, see rule 62.

Notation in docket as entry of judgment, see rule 58.

Offer of judgment, see rule 68.

Opening judgment on motion for new trial, see rule 59.

Pleading judgment, see rule 9.

Possession, enforcement of judgment directing delivery, see rule 70.

Recording judgment to constitute lien, see section 1962 of this title.

Registration of judgment, see sections 1962 and 1963 of this title.

Relief from judgment, grounds for, see rule 60.

Removal of causes, attachment or sequestration to hold goods or estate of defendant to answer judgment, see section 1450 of this title.

Reopening judgment after verdict on motion for directed verdict, see rule 50.

Sales under judgment, see section 1961 et seq. of this title.

Security on stay of proceedings to enforce judgment, see rule 62.

Special verdict, entry of judgment on, see rule 58.

State law, staying enforcement of judgment in accordance to, see rule 62.

- Stay of—
  - Judgment on less than all of multiple claims, see rule 62.
  - Proceedings to enforce judgment, see rule 62.
- Stipulation for stay of execution of process in rem issued in admiralty case, see section 2464 of this title.
- Summary judgment—
  - Procedure generally, see rule 56.
  - Single judge of Three-Judge Court not to enter, see section 2284 of this title.
- Suspension of judgment by motion for relief, see rule 60.
- Third party tort liability to United States for hospital and medical care, see section 2651 et seq. of Title 42, The Public Health and Welfare.
- Time—
  - Entry of judgment, see rule 58.
  - Extension of, for relief from judgment, see rule 6.
  - Motion for relief from judgment, see rule 60.
  - Motion to alter or amend judgment, extension of, see rule 6.
  - Proceedings to enforce judgment, see rule 62.
- United States—
  - Payment of judgments against, see section 2414 of this title.
  - Stay of judgment against, see rule 62.
  - Tort claims against, judgment as bar to action against employee, see section 2676.
- Vacation of judgment, errors not affecting substantial rights not ground for, see rule 61.
- Verdict submitted on written interrogatories to jury, judgment on, see rule 49.
- Writs of coram nobis, coram vobis and audita querela abolished, see rule 60.

## Rule 55. Default

### (a) Entry

When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default.

### (b) Judgment

Judgment by default may be entered as follows:

(1) *By the Clerk.* When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if he has been defaulted for failure to appear and if he is not an infant or incompetent person.

(2) *By the Court.* In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

### (c) Setting aside default

For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

### (d) Plaintiffs, counterclaimants, cross-claimants

The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).

### (e) Judgment against the United States

No judgment by default shall be entered against the United States or an officer or agency thereof unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.

### NOTES OF ADVISORY COMMITTEE ON RULES

This represents the joining of the equity decree *pro confesso* (former Equity Rules 12 (Issue of Subpoena—Time for Answer), 16 (Defendant to Answer—Default—Decree *Pro Confesso*), 17 (Decree *Pro Confesso* to be Followed by Final Decree—Setting Aside Default), 29 (Defenses—How Presented), 31 (Reply—When Required—When Cause at Issue)) and the judgment by default now governed by U.S.C., Title 28, former § 724 (Conformity act). For dismissal of an action for failure to comply with these rules or any order of the court, see rule 41(b).

*Note to Subdivision* (*a*). The provision for the entry of default comes from the Massachusetts practice, 2 Mass.Gen.Laws (Ter.Ed., 1932) ch. 231, § 57. For affidavit of default, see 2 Minn.Stat. (Mason, 1927) § 9256.

*Note to Subdivision* (*b*). The provision in paragraph (1) for the entry of judgment by the clerk when plaintiff claims a sum certain is found in the N.Y.C.P.A. (1937) § 485, in Calif.Code Civ.Proc. (Deering, 1937) § 585(1), and in Conn.Practice Book (1934) § 47. For provisions similar to paragraph (2), compare Calif.Code, *supra*, § 585(2); N.Y.C.P.A. (1937) § 490; 2 Minn.Stat. (Mason, 1927) § 9256(3); 2 Wash.Rev.Stat.Ann. (Remington, 1932) § 411(2). U.S.C., Title 28, § 785 (Action to recover forfeiture in bond) and similar statutes are preserved by the last clause of paragraph (2).

*Note to Subdivision* (*e*). This restates substantially the last clause of U.S.C., Title 28, former § 763 (Action against the United States under the Tucker Act). As this rule governs in all actions against the United States, U.S.C., Title 28, former § 45 (Practice and procedure in certain cases under the interstate commerce laws) and similar statutes are modified insofar as they contain anything inconsistent therewith.

### SUPPLEMENTARY NOTE OF ADVISORY COMMITTEE REGARDING THIS RULE

*Note.* The operation of Rule 55(b) (Judgment) is directly affected by the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. Appendix, § 501 et seq. Section 200 of the Act [50 U.S.C. Appendix, § 520] imposes specific requirements which must be fulfilled before a default judgment can be entered, e.g., *Ledwith* v. *Storkan*, D.Neb. 1942, 6 Fed.Rules Serv. 60b.24, Case 2, 2 F.R.D. 539, and also provides for the vacation of a judgment in certain circumstances. See discussion in Commentary, Effect of Conscription Legislation on the Federal Rules, 1940, 3 Fed.Rules Serv. 725; 3 Moore's Federal Practice, 1938, Cum.Supplement § 55.02.

### CROSS REFERENCES

Demand for judgment, see rule 54.

Failure to serve answers to interrogatories, entry of default judgment, see rule 37.

Relief awarded on default, see rule 54.

Summons as notice to defendant, judgment by default will be entered on failure to appear and defend, see rule 4.

### Rule 56. Summary Judgment

**(a) For claimant**

A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

**(b) For defending party**

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

**(c) Motion and proceedings thereon**

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

**(d) Case not fully adjudicated on motion**

If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

**(e) Form of affidavits; further testimony; defense required**

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

**(f) When affidavits are unavailable**

Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

**(g) Affidavits made in bad faith**

Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963.)

#### NOTES OF ADVISORY COMMITTEE ON RULES

This rule is applicable to all actions, including those against the United States or an officer or agency thereof.

Summary judgment procedure is a method for promptly disposing of actions in which there is no genuine issue as to any material fact. It has been extensively used in England for more than 50 years and has been adopted in a number of American states. New York, for example, has made great use of it. During the first nine years after its adoption there, the records of New York county alone show 5,600 applications for summary judgments. Report of the Commission on the Administration of Justice in New York State (1934), p. 383. See also Third Annual Report of the Judicial Council of the State of New York (1937), p. 30.

In England it was first employed only in cases of liquidated claims, but there has been a steady enlargement of the scope of the remedy until it is now used in actions to recover land or chattels and in all other actions at law, for liquidated or unliquidated claims, except for a few designated torts and breach of promise of marriage. English Rules Under the Judicature Act (The Annual Practice, 1937) O. 3, r. 6; Orders 14, 14A, and 15; see also O. 32, r. 6, authorizing an application for judgment at any time upon admissions. In Michigan (3 Comp.Laws (1929) § 14260) and Illinois (Ill.Rev.Stat. (1937) ch. 110, §§ 181, 259.15, 259.16), it is not limited to liquidated demands. New York (N.Y.R.C.P. (1937) Rule 113; see also Rule 107) has brought so many classes of actions under the operation of the rule that the Commission on Administration of Justice in New York State (1934) recommend that all restrictions be removed and that the remedy be available "in any action" (p. 287). For the history and nature of the summary judgment procedure and citations of state statutes, see Clark and Samenow, The Summary Judgment (1929), 38 Yale L.J. 423.

*Note to Subdivision (d).* See Rule 16 (Pre-Trial Procedure; Formulating Issues) and the *Note* thereto.

*Note to Subdivisions (e) and (f).* These are similar to rules in Michigan. Mich.Court Rules Ann. (Searl, 1933) Rule 30.

### NOTES OF ADVISORY COMMITTEE ON 1946 AMENDMENT TO RULES

*Note. Subdivision (a).* The amendment allows a claimant to move for a summary judgment at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party. This will normally operate to permit an earlier motion by the claimant than under the original rule, where the phrase "at any time after the pleading in answer thereto has been served" operates to prevent a claimant from moving for summary judgment, even in a case clearly proper for its exercise, until a formal answer has been filed. Thus in *Peoples Bank* v. *Federal Reserve Bank of San Francisco,* N.D.Cal. 1944, 58 F.Supp. 25, the plaintiff's counter-motion for a summary judgment was stricken as premature, because the defendant had not filed an answer. Since Rule 12(a) allows at least 20 days for an answer, that time plus the 10 days required in Rule 56(c) means that under original Rule 56(a) a minimum period of 30 days necessarily has to elapse in every case before the claimant can be heard on his right to a summary judgment. An extension of time by the court or the service of preliminary motions of any kind will prolong that period even further. In many cases this merely represents unnecessary delay. See *United States* v. *Adler's Creamery, Inc.,* (C.C.A.2d, 1939), 107 F.2d 987. The changes are in the interest of more expeditious litigation. The 20-day period, as provided, gives the defendant an opportunity to secure counsel and determine a course of action. But in a case where the defendant himself makes a motion for summary judgment within that time, there is no reason to restrict the plaintiff and the amended rule so provides.

*Subdivision (c).* The amendment of Rule 56(c), by the addition of the final sentence, resolves a doubt expressed in *Sartor* v. *Arkansas Natural Gas Corp.,* 1944, 321 U.S. 620, 64 S.Ct. 724. See also Commentary, Summary Judgment as to Damages, 1944, 7 Fed.Rules Serv. 974; *Madeirense Do Brasil S/A* v. *Stulman-Emrick Lumber Co.,* (C.C.A.2d, 1945) 147 F.2d 399, cert. den., 1945, 325 U.S. 861, 65 S.Ct. 1201. It makes clear that although the question of recovery depends on the amount of damages, the summary judgment rule is applicable and summary judgment may be granted in a proper case. If the case is not fully adjudicated it may be dealt with as provided in subdivision (d) of Rule 56, and the right to summary recovery determined by a preliminary order, interlocutory in character, and the precise amount of recovery left for trial.

*Subdivision (d).* Rule 54(a) defines "judgment" as including a decree and "any order from which an appeal lies." Subdivision (d) of Rule 56 indicates clearly, however, that a partial summary "judgment" is not a final judgment, and, therefore, that it is not appealable, unless in the particular case some statute allows an appeal from the interlocutory order involved. The partial summary judgment is merely a pretrial adjudication that certain issues shall be deemed established for the trial of the case. This adjudication is more nearly akin to the preliminary order under Rule 16, and likewise serves the purpose of speeding up litigation by eliminating before trial matters wherein there is no genuine issue of fact. See *Leonard* v. *Socony-Vacuum Oil Co.,* C.C.A.7th, 1942, 130 F.2d 535; *Biggins* v. *Oltmer Iron Works,* C.C.A.7th, 1946, 154 F.2d 214; 3 Moore's Federal Practice, 1938. 3190–3192. Since interlocutory appeals are not allowed, except where specifically provided by statute, see 3 Moore, op. cit. supra, 3155–3156, this interpretation is in line with that policy, *Leonard* v. *Socony-Vacuum Oil Co.,* supra. See also *Audi Vision, Inc.,* v. *RCA Mfg. Co.,* C.C.A.2d, 1943, 136 F.2d 621; *Toomey* v. *Toomey,* App.D.C. 1945, 80 U.S.App.D.C. 77, 149 F.2d 19; *Biggins* v. *Oltmer Iron Works,* supra; *Catlin* v. *United States,* 1945, 324 U.S. 229, 65 S.Ct. 631.

### NOTES OF ADVISORY COMMITTEE ON 1963 AMENDMENT TO RULES

Subdivision (c). By the amendment "answers to interrogatories" are included among the materials which may be considered on motion for summary judgment. The phrase was inadvertently omitted from the rule, see 3 Barron & Holtzoff, Federal Practice and Procedure 159–60 (Wright ed. 1958), and the courts have generally reached by interpretation the result which will hereafter be required by the text of the amended rule. See Annot., 74 A.L.R.2d 984 (1960).

Subdivision (e). The words "answers to interrogatories" are added in the third sentence of this subdivision to conform to the amendment of subdivision (c).

The last two sentences are added to overcome a line of cases, chiefly in the Third Circuit, which has impaired the utility of the summary judgment device. A typical case is as follows: A party supports his motion for summary judgment by affidavits or other evidentiary matters sufficient to show that there is no genuine issue as to a material fact. The adverse party, in opposing the motion, does not produce any evidentiary matter, or produces some but not enough to establish that there is a genuine issue for trial. Instead, the adverse party rests on averments of his pleadings which on their face present an issue. In this situation Third Circuit cases have taken the view that summary judgment must be denied, at least if the averments are "well-pleaded," and not suppositious, conclusory, or ultimate. See *Frederick Hart & Co., Inc.* v. *Recordgraph Corp.,* 169 F.2d 580 (3d Cir. 1948); *United States ex rel. Kolton* v. *Halpern,* 260 F.2d 590 (3d Cir. 1958); *United States ex rel. Nobles* v. *Ivey Bros. Constr. Co., Inc.,* 191 F.Supp. 383 (D.Del. 1961); *Jamison* v. *Pennsylvania Salt Mfg. Co.,* 22 F.R.D. 238 (W.D.Pa. 1958); *Bunny Bear, Inc.* v. *Dennis Mitchell Industries,* 139 F.Supp. 542 (E.D.Pa. 1956); *Levy* v. *Equitable Life Assur. Society,* 18 F.R.D. 164 (E.D.Pa. 1955).

The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial. The Third Circuit doctrine, which permits the pleadings themselves to stand in the way of granting an otherwise justified summary judgment, is incompatible with the basic purpose of the rule. See 6 Moore's Federal Practice 2069 (2d ed. 1953); 3 Barron & Holtzoff, supra, § 1235.1.

It is hoped that the amendment will contribute to the more effective utilization of the salutary device of summary judgment.

The amendment is not intended to derogate from the solemnity of the pleadings. Rather it recognizes that, despite the best efforts of counsel to make his pleadings accurate, they may be overwhelmingly contradicted by the proof available to his adversary.

Nor is the amendment designed to affect the ordinary standards applicable to the summary judgment motion. So, for example: Where an issue as to a material fact cannot be resolved without observation of the demeanor of witnesses in order to evaluate their credibility, summary judgment is not appropriate. Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented. And summary judgment may be inappropriate where the party opposing it shows under subdivision (f) that he cannot at the time present facts essential to justify his opposition.

### CROSS REFERENCES

Dismissal of action prior to service of motion for summary judgment, see rule 41.

Findings of fact and conclusions of law unnecessary, see rule 52.

Injunctions, single judge not to enter summary judgment, see section 2284 of this title.

Motions treated as for summary judgment—
Dismiss for failure of pleading to state a claim upon which relief can be granted, see rule 12.
Judgment on the pleadings, see rule 12.

### Rule 57. Declaratory Judgments

The procedure for obtaining a declaratory judgment pursuant to Title 28, U.S.C., § 2201, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.

(As amended Dec. 29, 1948, eff. Oct. 20, 1949.)

#### Notes of Advisory Committee on Rules

The fact that a declaratory judgment may be granted "whether or not further relief is or could be prayed" indicates that declaratory relief is alternative or cumulative and not exclusive or extraordinary. A declaratory judgment is appropriate when it will "terminate the controversy" giving rise to the proceeding. Inasmuch as it often involves only an issue of law on undisputed or relatively undisputed facts, it operates frequently as a summary proceeding, justifying docketing the case for early hearing as on a motion, as provided for in California (Code Civ.Proc. (Deering, 1937) § 1062a), Michigan (3 Comp.Laws (1929) § 13904), and Kentucky (Codes (Carroll, 1932) Civ.Pract. § 639a–3).

The "controversy" must necessarily be "of a justiciable nature, thus excluding an advisory decree upon a hypothetical state of facts." *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 325, 56 S.Ct. 466, 473, 80 L.Ed. 688, 699 (1936). The existence or nonexistence of any right, duty, power, liability, privilege, disability, or immunity or of any fact upon which such legal relations depend, or of a status, may be declared. The petitioner must have a practical interest in the declaration sought and all parties having an interest therein or adversely affected must be made parties or be cited. A declaration may not be rendered if a special statutory proceeding has been provided for the adjudication of some special type of case, but general ordinary or extraordinary legal remedies, whether regulated by statute or not, are not deemed special statutory proceedings.

When declaratory relief will not be effective in settling the controversy, the court may decline to grant it. But the fact that another remedy would be equally effective affords no ground for declining declaratory relief. The demand for relief shall state with precision the declaratory judgment desired, to which may be joined a demand for coercive relief, cumulatively or in the alternative; but when coercive relief only is sought but is deemed ungrantable or inappropriate, the court may *sua sponte*, if it serves a useful purpose, grant instead a declaration of rights. *Hasselbring* v. *Koepke*, 263 Mich. 466, 248 N.W. 869, 93 A.L.R. 1170 (1933). Written instruments, including ordinances and statutes, may be construed before or after breach at the petition of a properly interested party, process being served on the private parties or public officials interested. In other respects the Uniform Declaratory Judgment Act affords a guide to the scope and function of the Federal act. Compare *Aetna Life Insurance Co.* v. *Haworth*, 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617, 108 A.L.R. 1000 (1937); *Nashville, Chattanooga & St. Louis Ry.* v. *Wallace*, 288 U.S. 249, 53 S.Ct. 345, 77 L.Ed. 730, 87 A.L.R. 1191 (1933); *Gully, Tax Collector* v. *Interstate Natural Gas Co.*, 82 F.2d 145 (C.C.A.5th, 1936); *Ohio Casualty Ins. Co.* v. *Plummer*, 13 F.Supp. 169 (S.D.Tex., 1935); Borchard, Declaratory Judgments (1934), *passim*.

#### Amendments

1948—The amendment effective October 1949 substituted the reference to "Title 28, U.S.C., § 2201" in the first sentence for the reference to "Section 274(d) of the Judicial Code, as amended, U.S.C., Title 28, § 400".

#### Cross References

Answers to written interrogatories to jury, see rule 49.

Assignment of cases for trial, see rule 40.

Creation of remedy and further relief in declaratory judgment actions, see sections 2201 and 2202 of this title.

Jury trial and advisory jury, see rules 38 and 39.

### Rule 58. Entry of Judgment

Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a). Entry of the judgment shall not be delayed for taxing of costs. Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963.)

#### Notes of Advisory Committee on Rules

See Wis.Stat. (1935) § 270.31 (judgment entered forthwith on verdict of jury unless otherwise ordered), § 270.65 (where trial is by the court, entered by direction of the court), § 270.63 (entered by clerk on judgment on admitted claim for money). Compare 1 Idaho Code Ann. (1932) § 7-1101, and 4 Mont.Rev.Codes Ann. (1935) § 9403, which provides that judgment in jury cases be entered by clerk within 24 hours after verdict unless court otherwise directs. Conn. Practice Book (1934) § 200, provides that all judgments shall be entered within one week after rendition. In some States such as Washington, 2 Rev.Stat.Ann. (Remington, 1932) § 431, in jury cases the judgment is entered two days after the return of verdict to give time for making motion for new trial; § 435 (*ibid.*), provides that all judgments shall be entered by the clerk, subject to the court's direction.

#### Notes of Advisory Committee on 1946 Amendment to Rules

*Note.* The reference to Rule 54(b) is made necessary by the amendment of that rule.

Two changes have been made in Rule 58 in order to clarify the practice. The substitution of the more inclusive phrase "all relief be denied" for the words "there be no recovery", makes it clear that the clerk shall enter the judgment forthwith in the situations specified without awaiting the filing of a formal judgment approved by the court. The phrase "all relief be denied" covers cases such as the denial of a bankrupt's discharge and similar situations where the relief sought is refused but there is literally no denial of a "recovery".

The addition of the last sentence in the rule emphasizes that judgments are to be entered promptly by the clerk without waiting for the taxing of costs. Certain district court rules, for example, Civil Rule 22 of the Southern District of New York—until its annulment Oct. 1, 1945, for conflict with this rule—and the like rule of the Eastern District of New York, are expressly in conflict with this provision, although the federal law is of long standing and well settled. *Fowler* v. *Hamill*, 1891, 139 U.S. 549, 11 S.Ct. 663; *Craig* v. *The Hartford*, C.C.Cal. 1856, Fed.Cas.No. 3,333; *Tuttle* v. *Claflin*, C.C.A.2d, 1895, 60 Fed. 7, cert. den., 1897, 166 U.S. 721, 17 S.Ct. 992; *Prescott & A. C. Ry. Co.* v. *Atchison, T. & S. F.R. Co.*, C.C.A.2d, 1897, 84 Fed. 213; *Stallo* v. *Wagner*, C.C.A.2d, 1917, 245 Fed. 636, 639–40; *Brown* v. *Parker*, C.C.A.8th, 1899, 97 Fed. 446; *Allis-Chalmers* v. *United States*, C.C.A.7th, 1908, 162 Fed. 679. And this applies even though state law is to the contrary. *United States* v. *Nordbye*, C.C.A.8th, 1935, 75 F.2d 744, 746, cert. den., 1935, 296 U.S. 572, 56 S.Ct. 103. Inasmuch as it has been held that failure of the clerk thus enter judgment is a "misprision" "not to be excused, *The Washington*, C.C.A.2d, 1926, 16 F.2d 206, such a district court rule may have serious consequences for a district court clerk. Rules of this sort also provide for delay in entry of the judgment contrary to Rule 58. See *Commissioner of Internal Revenue* v. *Bedford's Estate*, 1945, 325 U.S. 283, 65 S.Ct. 1157.

### Notes of Advisory Committee on 1963 Amendment to Rules

Under the present rule a distinction has sometimes been made between judgments on general jury verdicts, on the one hand, and, on the other, judgments upon decisions of the court that a party shall recover only money or costs or that all relief shall be denied. In the first situation, it is clear that the clerk should enter the judgment without awaiting a direction by the court unless the court otherwise orders. In the second situation it was intended that the clerk should similarly enter the judgment forthwith upon the court's decision; but because of the separate listing in the rule, and the use of the phrase "upon receipt . . . of the direction," the rule has sometimes been interpreted as requiring the clerk to await a separate direction of the court. All these judgments are usually uncomplicated, and should be handled in the same way. The amended rule accordingly deals with them as a single group in clause (1) (substituting the expression "only a sum certain" for the present expression "only money"), and requires the clerk to prepare, sign, and enter them forthwith, without awaiting court direction, unless the court makes a contrary order. (The clerk's duty is ministerial and may be performed by a deputy clerk in the name of the clerk. See 28 U.S.C. § 956; cf. *Gilbertson* v. *United States*, 168 Fed. 672 (7th Cir. 1909).) The more complicated judgments described in clause (2) must be approved by the court before they are entered.

Rule 58 is designed to encourage all reasonable speed in formulating and entering the judgment when the case has been decided. Participation by the attorneys through the submission of forms of judgment involves needless expenditure of time and effort and promotes delay, except in special cases where counsel's assistance can be of real value. See *Matteson* v. *United States*, 240 F.2d 517, 518–19 (2d Cir. 1956). Accordingly, the amended rule provides that attorneys shall not submit forms of judgment unless directed to do so by the court. This applies to the judgments mentioned in clause (2) as well as clause (1).

Hitherto some difficulty has arisen, chiefly where the court has written an opinion or memorandum containing some apparently directive or dispositive words, e.g., "the plaintiff's motion [for summary judgment] is granted," see *United States* v. *F. & M. Schaefer Brewing Co.*, 356 U.S. 227, 229, 78 S.Ct. 674, 2 L.Ed.2d 721 (1958). Clerks on occasion have viewed these opinions or memoranda as being in themselves a sufficient basis for entering judgment in the civil docket as provided by Rule 79(a). However, where the opinion or memorandum has not contained all the elements of a judgment, or where the judge has later signed a formal judgment, it has become a matter of doubt whether the purported entry of judgment was effective, starting the time running for postverdict motions and for the purpose of appeal. See id.; and compare *Blanchard* v. *Commonwealth Oil Co.*, 294 F.2d 834 (5th Cir. 1961); *United States* v. *Higginson*, 238 F.2d 439 (1st Cir. 1956); *Danzig* v. *Virgin Isle Hotel, Inc.*, 278 F.2d 580 (3d Cir. 1960); *Sears* v. *Austin*, 282 F.2d 340 (9th Cir. 1960), with *Matteson* v. *United States*, supra; *Erstling* v. *Southern Bell Tel. & Tel. Co.*, 255 F.2d 93 (5th Cir. 1958); *Barta* v. *Oglala Sioux Tribe*, 259 F.2d 553 (8th Cir. 1958), cert. denied, 358 U.S. 932, 79 S.Ct. 320, 3 L.Ed.2d 304 (1959); *Beacon Fed. S. & L. Assn.* v. *Federal Home L. Bank Bd.*, 266 F.2d 246 (7th Cir.), cert. denied, 361 U.S. 823, 80 S.Ct. 70, 4 L.Ed.2d 67 (1959); *Ram* v. *Paramount Film D. Corp.*, 278 F.2d 191 (4th Cir. 1960).

The amended rule eliminates these uncertainties by requiring that there be a judgment set out on a separate document—distinct from any opinion or memorandum—which provides the basis for the entry of judgment. That judgments shall be on separate documents is also indicated in Rule 79(b); and see General Rule 10 of the U.S. District Courts for the Eastern and Southern Districts of New York; *Ram* v. *Paramount Film D. Corp.*, supra, at 194.

See the amendment of Rule 79(a) and the new specimen forms of judgment, Forms 31 and 32.

See also Rule 55(b)(1) and (2) covering the subject of judgments by default.

### Cross References

General verdict accompanied by answers to interrogatories by jury, see rule 49.

Judgment for particular claim or counterclaim, see rule 54.

Notation of entry of judgment, see rule 79.

Notice of entry of judgment, see rule 77.

Time for new trial, see rule 59.

## Rule 59. New Trials; Amendment of Judgments

### (a) Grounds

A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

### (b) Time for motion

A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

### (c) Time for serving affidavits

When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

### (d) On initiative of court

Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

**(e) Motion to alter or amend a judgment**

A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Feb. 28, 1966, eff. July 1, 1966.)

### NOTES OF ADVISORY COMMITTEE ON RULES

This rule represents an amalgamation of the petition for rehearing of former Equity Rule 69 (Petition for Rehearing) and the motion for new trial of U.S.C., Title 28, formerly § 391 (now § 2111) (New trials; harmless error), made in the light of the experience and provision of the code States. Compare Calif.Code Civ.Proc. (Deering, 1937) §§ 656–663a, U.S.C., Title 28, formerly § 391 (now § 2111) (New trials; harmless error) is thus substantially continued in this rule. U.S.C., Title 28, former § 840 (Executions; stay on conditions) is modified insofar as it contains time provisions inconsistent with *Subdivision* (*b*). For the effect of the motion for new trial upon the time for taking an appeal see *Morse* v. *United States*, 270 U.S. 151, 46 S.Ct. 241, 70 L.Ed. 518 (1926); *Aspen Mining and Smelting Co.* v. *Billings*, 150 U.S. 31, 14 S.Ct. 4, 37 L.Ed. 986 (1893).

For partial new trials which are permissible under *Subdivision* (*a*), see *Gasoline Products Co., Inc.*, v. *Champlin Refining Co.*, 283 U.S. 494, 51 S.Ct. 513, 75 L.Ed. 1188 (1931); *Schuerholz* v. *Roach*, 58 F.2d 32 (C.C.A.4th, 1932); *Simmons* v. *Fish*, 210 Mass. 563, 97 N.E. 102, Ann.Cas.1912D, 588 (1912) (sustaining and recommending the practice and citing Federal cases and cases in accord from about sixteen States and *contra* from three States). The procedure in several States provides specifically for partial new trials. Ariz.Rev.Code Ann. (Struckmeyer, 1928) § 3852; Calif.Code Civ.Proc. (Deering, 1937) §§ 657, 662; Ill.Rev.Stat. (1937) ch. 110, § 216 (par. (f)); Md.Ann.Code (Bagby, 1924) Art. 5, §§ 25, 26; Mich.Court Rules Ann. (Searl, 1933) Rule 47, § 2; Miss.Sup.Ct. Rule 12, 161 Miss. 903, 905 (1931); N.J.Sup.Ct. Rules 131, 132, 147, 2 N.J.Misc. 1197, 1246–1251, 1255 (1924); 2 N.D.Comp.Laws Ann. (1913), § 7844, as amended by N.D.Laws 1927, ch. 214.

### NOTES OF ADVISORY COMMITTEE ON 1946 AMENDMENT TO RULES

*Note. Subdivision* (*b*). With the time for appeal to a circuit court of appeals reduced in general to 30 days by the proposed amendment of Rule 73(a), the utility of the original "except" clause, which permits a motion for a new trial on the ground of newly discovered evidence to be made before the expiration of the time for appeal, would have been seriously restricted. It was thought advisable, therefore, to take care of this matter in another way. By amendment of Rule 60(b), newly discovered evidence is made the basis for relief from a judgment, and the maximum time limit has been extended to one year. Accordingly the amendment of Rule 59(b) eliminates the "except" clause and its specific treatment of newly discovered evidence as a ground for a motion for new trial. This ground remains, however, as a basis for a motion for new trial served not later than 10 days after the entry of judgment. See also Rule 60(b).

As to the effect of a motion under subdivision (b) upon the running of appeal time, see amended Rule 73(a) and Note.

*Subdivision* (*e*). This subdivision has been added to care for a situation such as that arising in *Boaz* v. *Mutual Life Ins. Co. of New York*, C.C.A.8th, 1944, 146 F.2d 321, and makes clear that the district court possesses the power asserted in that case to alter or amend a judgment after its entry. The subdivision deals only with alteration or amendment of the original judgment in a case and does not relate to a judgment upon motion as provided in Rule 50(b). As to the effect of a motion under subdivision (e) upon the running of appeal time, see amended Rule 73(a) and Note.

The title of rule 59 has been expanded to indicate the inclusion of this subdivision.

### NOTES OF ADVISORY COMMITTEE ON 1966 AMENDMENT TO RULES

By narrow interpretation of Rule 59(b) and (d), it has been held that the trial court is without power to grant a motion for a new trial, timely served, by an order made more than 10 days after the entry of judgment, based upon a ground not stated in the motion but perceived and relied on by the trial court sua sponte. *Freid* v. *McGrath*, 133 F.2d 350 (D.C.Cir. 1942); *National Farmers Union Auto. & Cas. Co.* v. *Wood*, 207 F.2d 659 (10th Cir. 1953); *Bailey* v. *Slentz*, 189 F.2d 406 (10th Cir. 1951); *Marshall's U.S. Auto Supply, Inc.* v. *Cashman*, 111 F.2d 140 (10th Cir. 1940), cert. denied, 311 U.S. 667 (1940); but see *Steinberg* v. *Indemnity Ins. Co.*, 36 F.R.D. 253 (E.D.La. 1964).

The result is undesirable. Just as the court has power under Rule 59(d) to grant a new trial of its own initiative within the 10 days, so it should have power, when an effective new trial motion has been made and is pending, to decide it on grounds thought meritorious by the court although not advanced in the motion. The second sentence added by amendment to Rule 59(d) confirms the court's power in the latter situation, with provision that the parties be afforded a hearing before the power is exercised. See 6 Moore's Federal Practice, par. 59.09[2] (2d ed. 1953).

In considering whether a given ground has or has not been advanced in the motion made by the party, it should be borne in mind that the particularity called for in stating the grounds for a new trial motion is the same as that required for all motions by Rule 7(b)(1). The latter rule does not require ritualistic detail but rather a fair indication to court and counsel of the substance of the grounds relied on. See *Lebeck* v. *William A. Jarvis Co.*, 250 F.2d 285 (3d Cir. 1957); *Tsai* v. *Rosenthal*, 297 F.2d 614 (8th Cir. 1961); *General Motors Corp.* v. *Perry*, 303 F.2d 544 (7th Cir. 1962); *cf.* *Grimm* v. *California Spray-Chemical Corp.*, 264 F.2d 145 (9th Cir. 1959); *Cooper* v. *Midwest Feed Products Co.*, 271 F.2d 177 (8th Cir. 1959).

### CROSS REFERENCES

Answers to written interrogatories inconsistent with general verdict, as ground for ordering new trial, see rule 49.

Court of Claims, grounds for new trial, see section 2515 of this title.

Disability of judge preventing performance of duties as ground for new trial, see rule 63.

Extension of time for motion, see rule 6.

Harmless error not ground for new trial, see rule 61.

Joinder of motion with motion to set aside verdict or judgment on motion for directed verdict, see rule 50.

Motion to amend findings or make additional findings, see rule 52.

Stay of execution or proceedings to enforce judgment on motion for new trial, see rule 62.

## Rule 60. Relief From Judgment or Order

**(a) Clerical mistakes**

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

**(b) Mistake; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.**

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949.)

### NOTES OF ADVISORY COMMITTEE ON RULES

*Note to Subdivision (a).* See former Equity Rule 72 (Correction of Clerical Mistakes in Orders and Decrees); Mich.Court Rules Ann. (Searl, 1933) Rule 48, § 3; 2 Wash.Rev.Stat.Ann. (Remington, 1932) § 464(3); Wyo.Rev.Stat.Ann. (Courtright, 1931) § 89-2301(3). For an example of a very liberal provision for the correction of clerical errors and for amendment after judgment, see Va.Code Ann. (Michie, 1936) §§ 6329, 6333.

*Note to Subdivision (b).* Application to the court under this subdivision does not extend the time for taking an appeal, as distinguished from the motion for new trial. This section is based upon Calif.Code Civ.Proc. (Deering, 1937) § 473. See also N.Y.C.P.A. (1937) § 108; 2 Minn.Stat. (Mason, 1927) § 9283.

For the independent action to relieve against mistake, etc., see Dobie, Federal Procedure, pages 760-765, compare 639; and Simkins, Federal Practice, ch. CXXI (pp. 820-830) and ch. CXXII (pp. 831-834), compare § 214.

### NOTES OF ADVISORY COMMITTEE ON 1946 AMENDMENT TO RULES

*Note. Subdivision (a).* The amendment incorporates the view expressed in *Perlman* v. *322 West Seventy-Second Street Co., Inc.*, C.C.A.2d, 1942, 127 F.2d 716; 3 Moore's Federal Practice, 1938, 3276, and further permits correction after docketing, with leave of the appellate court. Some courts have thought that upon the taking of an appeal the district court lost its power to act. See *Schram* v. *Safety Investment Co.*, E.D.Mich. 1942, 45 F.Supp. 636; also *Miller* v. *United States*, C.C.A.7th, 1940, 114 F.2d 267.

*Subdivision (b).* When promulgated, the rules contained a number of provisions, including those found in Rule 60(b), describing the practice by a motion to obtain relief from judgments, and these rules, coupled with the reservation in Rule 60(b) of the right to entertain a new action to relieve a party from a judgment, were generally supposed to cover the field. Since the rules have been in force, decisions have been rendered that the use of bills of review, coram nobis, or audita querela, to obtain relief from final judgments is still proper, and that various remedies of this kind still exist although they are not mentioned in the rules and the practice is not prescribed in the rules. It is obvious that the rules should be complete in this respect and define the practice with respect to any existing rights or remedies to obtain relief from final judgments. For extended discussion of the old common law writs and equitable remedies, the interpretation of Rule 60, and proposals for change, see Moore and Rogers, Federal Relief from Civil Judgments, 1946, 55 Yale L.J. 623. See also 3 Moore's Federal Practice, 1938, 3254 et seq.; Commentary, Effect of Rule 60b on Other Methods of Relief From Judgment, 1941, 4 Fed.Rules Serv. 942, 945; *Wallace* v. *United States*, C.C.A.2d, 1944, 142 F.2d 240, cert. den., 1944, 323 U.S. 712, 65 S.Ct. 37.

The reconstruction of Rule 60(b) has for one of its purposes a clarification of this situation. Two types of procedure to obtain relief from judgments are specified in the rules as it is proposed to amend them. One procedure is by motion in the court and in the action in which the judgment was rendered. The other procedure is by a new or independent action to obtain relief from a judgment, which action may or may not be begun in the court which rendered the judgment. Various rules, such as the one dealing with a motion for new trial and for amendment of judgments, Rule 59, one for amended findings, Rule 52, and one for judgment notwithstanding the verdict, Rule 50(b), and including the provisions of Rule 60(b) as amended, prescribe the various types of cases in which the practice by motion is permitted. In each case there is a limit upon the time within which resort to a motion is permitted, and this time limit may not be enlarged under Rule 6(b). If the right to make a motion is lost by the expiration of the time limits fixed in these rules, the only other procedural remedy is by a new or independent action to set aside a judgment upon those principles which have heretofore been applied in such an action. Where the independent action is resorted to, the limitations of time are those of laches or statutes of limitations. The Committee has endeavored to ascertain all the remedies and types of relief heretofore available by coram nobis, coram vobis, audita querela, bill of review, or bill in the nature of a bill of review. See Moore and Rogers, Federal Relief from Civil Judgments, 1946, 55 Yale L.J. 623, 659-682. It endeavored then to amend the rules to permit, either by motion or by independent action, the granting of various kinds of relief from judgments which were permitted in the federal courts prior to the adoption of these rules, and the amendment concludes with a provision abolishing the use of bills of review and the other common law writs referred to, and requiring the practice to be by motion or by independent action.

To illustrate the operation of the amendment, it will be noted that under Rule 59(b) as it now stands, without amendment, a motion for new trial on the ground of newly discovered evidence is permitted within ten days after the entry of the judgment, or after that time upon leave of the court. It is proposed to amend Rule 59(b) by providing that under that rule a motion for new trial shall be served not later than ten days after the entry of the judgment, whatever the ground be for the motion, whether error by the court or newly discovered evidence. On the other hand, one of the purposes of the bill of review in equity was to afford relief on the ground of newly discovered evidence long after the entry of the judgment. Therefore, to permit relief by a motion similar to that heretofore obtained on bill of review, Rule 60(b) as amended permits an application for relief to be made by motion, on the ground of newly discovered evidence, within one year after judgment. Such a motion under Rule 60(b) does not affect the finality of the judgment, but a motion under Rule 59, made within 10 days, does affect finality and the running of the time for appeal.

If these various amendments, including principally those to Rule 60(b), accomplish the purpose for which they are intended, the federal rules will deal with the practice in every sort of case in which relief from final judgments is asked, and prescribe the practice. With reference to the question whether, as the rules now exist, relief by coram nobis, bills of review, and so forth, is permissible, the generally accepted view is that the remedies are still available, although the precise relief obtained in a particular case by use of these ancillary remedies is shrouded in ancient lore and mystery. See *Wallace* v. *United States*, C.C.A.2d, 1944, 142 F.2d 240, cert. den., 1944, 323 U.S. 712, 65 S.Ct. 37; *Fraser* v. *Doing*, App.D.C. 1942, 130 F.2d 617; *Jones* v. *Watts, C.C.A.5th, 1944, 142 F.2d 575; Preveden* v. *Hahn*, S.D.N.Y. 1941, 36 F.Supp. 952; *Cavallo* v. *Agwilines, Inc.*, S.D.N.Y. 1942, 6 Fed.Rules Serv. 60b.31, Case 2, 2 F.R.D. 526; *McGinn* v. *United States*, D.Mass. 1942, 6 Fed.Rules Serv. 60b.51, Case 3, 2 F.R.D. 562; *City of Shattuck, Oklahoma ex rel. Versluis* v. *Oliver*, W.D.Okla. 1945, 8 Fed.Rules Serv. 60b.31, Case 3; Moore and Rogers, Federal Relief from Civil Judgments, 1946, 55 Yale L.J. 623, 631–653; 3 Moore's Federal Practice, 1938, 3254 et seq.; Commentary, Effect of Rule 60b on Other Methods of Relief from Judgment, op. cit. supra. Cf. *Norris* v. *Camp*, C.C.A.10th, 1944, 144 F.2d 1; *Reed* v. *South Atlantic Steamship Co. of Delaware*, D.Del. 1942, 2 F.R.D. 475, 6 Fed.Rules Serv. 60b.31, Case 1; *Laughlin* v. *Berens*, D.D.C. 1945, 8 Fed.Rules Serv. 60b.51, Case 1, 73 W.L.R. 209.

The transposition of the words "the court" and the addition of the word "and" at the beginning of the first sentence are merely verbal changes. The addition of the qualifying word "final" emphasizes the character of the judgments, orders or proceedings from which Rule 60(b) affords relief; and hence interlocutory judgments are not brought within the restrictions of the rule, but rather they are left subject to the complete power of the court rendering them to afford such relief from them as justice requires.

The qualifying pronoun "his" has been eliminated on the basis that it is too restrictive, and that the subdivision should include the mistake or neglect of others which may be just as material and call just as much for supervisory jurisdiction as where the judgment is taken against the party through *his* mistake, inadvertence, etc.

Fraud, whether intrinsic or extrinsic, misrepresentation, or other misconduct of an adverse party are express grounds for relief by motion under amended subdivision (b). There is no sound reason for their exclusion. The incorporation of fraud and the like within the scope of the rule also removes confusion as to the proper procedure. It has been held that relief from a judgment obtained by extrinsic fraud could be secured by motion within a "reasonable time," which might be after the time stated in the rule had run. *Fiske* v. *Buder*, (C.C.A.8th, 1942), 125 F.2d 841; see also inferentially *Bucy* v. *Nevada Construction Co.*, (C.C.A.9th, 1942), 125 F.2d 213. On the other hand, it has been suggested that in view of the fact that fraud was omitted from original Rule 60(b) as a ground for relief, an independent action was the only proper remedy. Commentary, Effect of Rule 60b on Other Methods of Relief From Judgment, 1941, 4 Fed.Rules Serv. 942, 945. The amendment settles this problem by making fraud an express ground for relief by motion; and under the saving clause, fraud may be urged as a basis for relief by independent action insofar as established doctrine permits. See Moore and Rogers, Federal Relief from Civil Judgments, 1946, 55 Yale L.J. 623, 653–659; 3 Moore's Federal Practice, 1938, 3267 et seq. And the rule expressly does not limit the power of the court, when fraud has been perpetrated upon it, to give relief under the saving clause. As an illustration of this situation, see *Hazel-Atlas Glass Co.* v. *Hartford Empire Co.*, 1944, 322 U.S. 238, 64 S.Ct. 997.

The time limit for relief by motion in the court and in the action in which the judgment was rendered has been enlarged from six months to one year.

It should be noted that Rule 60(b) does not assume to define the substantive law as to the grounds for vacating judgments, but merely prescribes the practice in proceedings to obtain relief. It should also be noted that under § 200(4) of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. Appendix, § 501 et seq. [§ 520(4)], a judgment rendered in any action or proceeding governed by the section may be vacated under certain specified circumstances upon proper application to the court.

### AMENDMENTS

1948—The amendment effective October 1949 substituted the reference to "Title 28, U.S.C., § 1655" in the next to the last sentence of subdivision (b), for the reference to "Section 57 of the Judicial Code, U.S.C., Title 28, § 118".

### CROSS REFERENCES

Enlargement of time under this rule prohibited, see rule 6.

Power of court unaffected by expiration of term, see rule 6.

Stay of proceedings pending disposition of motion under this rule, see rule 62.

Time for motion for new trial, see rule 59.

## Rule 61. Harmless Error

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

### NOTES OF ADVISORY COMMITTEE ON RULES

A combination of U.S.C., Title 28, former § 391 (now § 2111) (New trials; harmless error) and former § 777 (Defects of form; amendments) with modifications. See *McCandless* v. *United States*, 298 U.S. 342, 56 S.Ct. 764, 80 L.Ed. 1205 (1936). Compare former Equity Rule 72 (Correction of Clerical Mistakes in Orders and Decrees); and last sentence of former Equity Rule 46 (Trial—Testimony Usually Taken in Open Court—Rulings on Objections to Evidence). For the last sentence see the last sentence of former Equity Rule 19 (Amendments Generally).

### CROSS REFERENCES

Admissibility of evidence generally, see rule 43.

Formal exceptions unnecessary, see rule 46.

Grounds for new trial, rule 59.

Harmless error on appeal or certiorari, see section 2111 of this title.

Instructions to jury, see rule 51.

Motion for judgment notwithstanding verdict, see rule 50.

Motion to vacate judgment or order, see rule 60.

Power of appellate court to affirm, modify, reverse, and remand case, see section 2106 of this title.

FEDERAL RULES OF CRIMINAL PROCEDURE

Grounds for new trial, see rule 33, Title 18, Appendix, Crimes and Criminal Procedure.

Harmless and plain error, see rule 52.

### Rule 62. Stay of Proceedings to Enforce a Judgment

**(a) Automatic stay; exceptions—Injunctions, receiverships, and patent accountings**

Except as stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry. Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action, or a judgment or order directing an accounting in an action for infringement of letters patent, shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal. The provisions of subdivision (c) of this rule govern the suspending, modifying, restoring, or granting of an injunction during the pendency of an appeal.

**(b) Stay on motion for new trial or for judgment**

In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60, or of a motion for judgment in accordance with a motion for a directed verdict made pursuant to Rule 50, or of a motion for amendment to the findings or for additional findings made pursuant to Rule 52(b).

**(c) Injunction pending appeal**

When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party. If the judgment appealed from is rendered by a district court of three judges specially constituted pursuant to a statute of the United States, no such order shall be made except (1) by such court sitting in open court or (2) by the assent of all the judges of such court evidenced by their signatures to the order.

**(d) Stay upon appeal**

When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.

**(e) Stay in favor of the United States or agency thereof**

When an appeal is taken by the United States or an officer or agency thereof or by direction of any department of the Government of the United States and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required from the appellant.

**(f) Stay according to State law**

In any state in which a judgment is a lien upon the property of the judgment debtor and in which the judgment debtor is entitled to a stay of execution, a judgment debtor is entitled, in the district court held therein, to such stay as would be accorded him had the action been maintained in the courts of that state.

**(g) Power of appellate court not limited**

The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.

**(h) Stay of judgment as to multiple claims or multiple parties**

When a court has ordered a final judgment under the conditions stated in Rule 54(b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Apr. 17, 1961, eff. July 19, 1961.)

NOTES OF ADVISORY COMMITTEE ON RULES

*Note to Subdivision (a).* The first sentence states the substance of the last sentence of U.S.C., Title 28, former § 874 (Supersedeas). The remainder of the subdivision states the substance of the last clause of U.S.C., Title 28, former § 227 (Appeals in proceedings for injunctions; receivers; and admiralty), and of former § 227a (now §§ 1292, 2107) (Appeals in suits in equity for infringement of letters patent for inventions; stay of proceedings for accounting), but extended to include final as well as interlocutory judgments.

*Note to Subdivision (b).* This modifies U.S.C., Title 28, former § 840 (Executions; stay on conditions).

*Note to Subdivision (c).* Compare former Equity Rule 74 (Injunction Pending Appeal); and *Cumberland Telephone and Telegraph Co.* v. *Louisiana Public Service Commission*, 260 U.S. 212, 43 S.Ct. 75, 67 L.Ed. 217 (1922). See Simkins, Federal Practice (1934) § 916 in regard to the effect of appeal on injunctions and the giving of bonds. See U.S.C., Title 6 (Official and Penal Bonds) for bonds by surety companies. For statutes providing for a specially constituted district court of three judges, see:

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| U.S.C., Title 7: | |
| § 217 | (Proceedings for suspension of orders of Secretary of Agriculture under Stockyards Act)—by reference. |
| § 499k | (Injunctions; application of injunction laws governing orders of Interstate Commerce Commission to orders of Secretary of Agriculture under Perishable Commodities Act)—by reference. |
| U.S.C., Title 15: | |
| § 28 | (Antitrust laws; suits against monopolies expedited) |
| U.S.C., Title 28, former: | |
| § 47 | (Injunctions as to orders of Interstate Commerce Commission, etc.) |

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| § 380 | (Injunctions; alleged unconstitutionality of State statutes.) |
| § 380a | (Same; constitutionality of federal statute) |
| U.S.C., Title 49: | |
| § 44 | (Suits in equity under interstate commerce laws; expedition of suits) |

*Note to Subdivision (d).* This modifies U.S.C., Title 28, former § 874 (Supersedeas). See Rule 36(2), Rules of the Supreme Court of the United States, which governs supersedeas bonds on direct appeals to the Supreme Court, and Rule 73(d), of these rules, which governs supersedeas bonds on appeals to a circuit court of appeals. The provisions governing supersedeas bonds in both kinds of appeals are substantially the same.

*Note to Subdivision (e).* This states the substance of U.S.C., Title 28, formerly § 870 (now § 2408) (Bond; not required of the United States).

*Note to Subdivision (f).* This states the substance of U.S.C., Title 28, former § 841 (Executions; stay of one term) with appropriate modification to conform to the provisions of Rule 6(c) as to terms of court.

### Notes of Advisory Committee on 1946 Amendment to Rules

*Note. Subdivision (a).* [This subdivision not amended]. Sections 203 and 204 of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. Appendix, § 501 et seq. [§§ 523, 524], provide under certain circumstances for the issuance and continuance of a stay of execution of any judgment or order entered against a person in military service. See *Bowsman* v. *Peterson*, D.Neb. 1942, 45 F.Supp. 741. Section 201 of the Act [50 U.S.C. App. § 521] permits under certain circumstances the issuance of a stay of any action or proceeding at any stage thereof, where either the plaintiff or defendant is a person in military service. See also Note to Rule 64 herein.

*Subdivision (b).* This change was necessary because of the proposed addition to Rule 59 of subdivision (e).

*Subdivision (h).* In proposing to revise Rule 54(b), the Committee thought it advisable to include a separate provision in Rule 62 for stay of enforcement of a final judgment in cases involving multiple claims.

### Amendments

1961—The amendment adopted Apr. 17, 1961, eliminated words "on some but not all of the claims presented in the action" which followed "final judgment".

1948—The amendment effective October 1949 deleted at the end of subdivision (g) the following language which originally appeared after the word "entered": "and these rules do not supersede the provisions of Section 210 of the Judicial Code, as amended, U.S.C., Title 28, former § 47a, or of other statutes of the United States to the effect that stays pending appeals to the Supreme Court may be granted only by that court or a justice thereof."

### Cross References

Deposit of bonds or notes of United States in lieu of surety, see section 15 of Title 6, Surety Bonds.

Execution, see rule 69.

Security not required of United States, see section 2408 of this title.

## Rule 63. Disability of a Judge

**If by reason of death, sickness, or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules after a verdict is returned or findings of fact and conclusions of law are filed, then any other judge regularly sitting in or assigned to the court in which the action was tried may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial.**

### Notes of Advisory Committee on Rules

This rule adapts and extends the provisions of U.S.C., Title 28, former § 776 (Bill of exceptions; authentication; signing of by judge) to include all duties to be performed by the judge after verdict or judgment. The statute is therefore superseded.

### Cross References

Findings of fact and conclusions of law, see rule 52.

New trial, see rule 59.

### Federal Rules of Criminal Procedure

Disability of judge, see rule 25, Title 18, Appendix, Crimes and Criminal Procedure.

# TITLE VIII—PROVISIONAL AND FINAL REMEDIES AND SPECIAL PROCEEDINGS

## Rule 64. Seizure of Person or Property

**At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought, subject to the following qualifications: (1) any existing statute of the United States governs to the extent to which it is applicable; (2) the action in which any of the foregoing remedies is used shall be commenced and prosecuted or, if removed from a state court, shall be prosecuted after removal, pursuant to these rules. The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action.**

### Notes of Advisory Committee on Rules

This rule adopts the existing Federal law, except that it specifies the applicable State law to be that of the time when the remedy is sought. Under U.S.C., Title 28, former § 726 (Attachments as provided by State laws) the plaintiff was entitled to remedies by attachment or other process which were on June 1, 1872, provided by the applicable State law, and the district courts might, from time to time, by general rules, adopt such State laws as might be in force. This statute is superseded as are district court rules which are rendered unnecessary by the rule.

*Lis pendens.* No rule concerning *lis pendens* is stated, for this would appear to be a matter of substantive law affecting State laws of property. It has been held that in the absence of a State statute expressly providing for the recordation of notice of the pendency of Federal actions, the commencement of a Federal action is notice to all persons affected. *King* v. *Davis*, 137 Fed. 198 (W.D.Va., 1903). It has been held, however, that when a State statute does so provide expressly, its provisions are binding. *United States* v. *Calcasieu Timber Co.*, 236 Fed. 196 (C.C.A.5th, 1916).

For statutes of the United States on attachment, see e. g.:

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| U.S.C., Title 28, former: | |
| § 737 | (Attachment in postal suits) |
| § 738 | (Attachment; application for warrant) |
| § 739 | (Attachment; issue of warrant) |
| § 740 | (Attachment; trial of ownership of property) |

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| § 741 | (Attachment; investment of proceeds of attached property) |
| § 742 | (Attachment; publication of attachment) |
| § 743 | (Attachment; personal notice of attachment) |
| § 744 | (Attachment; discharge; bond) |
| § 745 | (Attachment; accrued rights not affected) |
| § 746 | (Attachments dissolved in conformity with State laws) |

For statutes of the United States on garnishment, see e.g.:

U.S.C., Title 28, former:

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| § 748 | (Garnishees in suits by United States against a corporation) |
| § 749 | (Same; issue tendered on denial of indebtedness) |
| § 750 | (Same; garnishee failing to appear) |

For statutes of the United States on arrest, see e.g.:

U.S.C., Title 28, former:

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| § 376 | (Writs of ne exeat) |
| § 755 | (Special bail in suits for duties and penalties) |
| § 756 | (Defendant giving bail in one district and committed in another) |
| § 757 | (Defendant giving bail in one district and committed in another; defendant held until judgment in first suit) |
| § 758 | (Bail and affidavits; taking by commissioners) |
| § 759 | (Calling of bail in Kentucky) |
| § 760 | (Clerks may take bail de bene esse) |
| § 843 | (Imprisonment for debt) |
| § 844 | (Imprisonment for debt; discharge according to State laws) |
| § 845 | (Imprisonment for debt; jail limits) |

For statutes of the United States on replevin, see, e.g.:

U.S.C., Title 28, former:

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| § 747 | (Replevy of property taken under revenue laws) |

### SUPPLEMENTARY NOTE OF ADVISORY COMMITTEE REGARDING THIS RULE

*Note.* Sections 203 and 204 of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. Appendix, § 501 et seq. [§§ 523, 524], provide under certain circumstances for the issuance and continuance of a stay of the execution of any judgment entered against a person in military service, or the vacation or stay of any attachment or garnishment directed against such person's property, money, or debts in the hands of another. See also Note to Rule 62 herein.

### CROSS REFERENCES

Execution, see rule 69.

## Rule 65. Injunctions

### (a) Preliminary injunction

(1) *Notice.* No preliminary injunction shall be issued without notice to the adverse party.

(2) *Consolidation of Hearing With Trial on Merits.* Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a)(2) shall be so construed and applied as to save the parties any rights they may have to trial by jury.

### (b) Temporary restraining order; notice; hearing; duration

A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

### (c) Security

No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof.

The provisions of Rule 65.1 apply to a surety upon a bond or undertaking under this rule.

### (d) Form and scope of injunction or restraining order

Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

**(e) Employer and employee; interpleader; constitutional cases**

**These rules do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee; or the provisions of Title 28, U.S.C. § 2361, relating to preliminary injunctions in actions of interpleader or in the nature of interpleader; or Title 28, U.S.C. § 2284, relating to actions required by Act of Congress to be heard and determined by a district court of three judges.**

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Feb. 28, 1966, eff. July 1, 1966.)

### NOTES OF ADVISORY COMMITTEE ON RULES

*Note to Subdivisions (a) and (b).* These are taken from U.S.C., Title 28, former § 381 (Injunctions; preliminary injunctions and temporary restraining orders).

*Note to Subdivision (c).* Except for the last sentence, this is substantially U.S.C., Title 28, former § 382 (Injunctions; security on issuance of). The last sentence continues the following and similar statutes which expressly except the United States or an officer or agency thereof from such security requirements: U.S.C., Title 15, §§ 77t(b), 78u(e), and 79r(f) (Securities and Exchange Commission). It also excepts the United States or an officer or agency thereof from such security requirements in any action in which a restraining order or interlocutory judgment of injunction issues in its favor whether there is an express statutory exception from such security requirements or not.

See U.S.C., Title 6 (Official and Penal Bonds) for bonds by surety companies.

*Note to Subdivision (d).* This is substantially U.S.C., Title 28, former § 383 (Injunctions; requisites of order; binding effect).

*Note to Subdivision (e).* The words "relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee" are words of description and not of limitation.

Compare former Equity Rule 73 (Preliminary Injunctions and Temporary Restraining Orders) which is substantially equivalent to the statutes.

For other statutes dealing with injunctions which are continued, see e.g.:

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| U.S.C., Title 28, former: | |
| § 46 | (Suits to enjoin orders of Interstate Commerce Commission to be against United States) |
| § 47 | (Injunctions as to orders of Interstate Commerce Commission; appeal to Supreme Court; time for taking) |
| § 378 | (Injunctions; when granted) |
| § 379 | (Injunctions; stay in State courts) |
| § 380 | (Injunctions; alleged unconstitutionality of State statutes; appeal to Supreme Court) |
| § 380a | (Injunctions; constitutionality of Federal statute; application for hearing; appeal to Supreme Court) |
| U.S.C., Title 7: | |
| § 216 | (Court proceedings to enforce orders; injunction) |
| § 217 | (Proceedings for suspension of orders) |
| U.S.C., Title 15: | |
| § 4 | (Jurisdiction of courts; duty of district attorney; procedure) |
| § 25 | (Restraining violations; procedure) |
| § 26 | (Injunctive relief for private parties; exceptions) |
| § 77t(b) | (Injunctions and prosecution of offenses) |

### NOTES OF ADVISORY COMMITTEE ON 1946 AMENDMENT TO RULES

*Note.* It has been held that in actions on preliminary injunction bonds the district court has discretion to grant relief in the same proceeding or to require the institution of a new action on the bond. *Russell* v. *Farley*, 1881, 105 U.S. 433, 466. It is believed, however, that in all cases the litigant should have a right to proceed on the bond in the same proceeding, in the manner provided in Rule 73(f) for a similar situation. The paragraph added to Rule 65(c) insures this result and is in the interest of efficiency. There is no reason why Rules 65(c) and 73(f) should operate differently. Compare § 50, sub. n of the Bankruptcy Act, 11 U.S.C. § 78, sub. n, under which actions on all bonds furnished pursuant to the Act may be proceeded upon summarily in the bankruptcy court. See 2 Collier on Bankruptcy, 14th ed. by Moore and Oglebay, 1853-1854.

### NOTES OF ADVISORY COMMITTEE ON 1966 AMENDMENT TO RULES

Subdivision (a)(2). This new subdivision provides express authority for consolidating the hearing of an application for a preliminary injunction with the trial on the merits. The authority can be exercised with particular profit when it appears that a substantial part of evidence offered on the application will be relevant to the merits and will be presented in such form as to qualify for admission on the trial proper. Repetition of evidence is thereby avoided. The fact that the proceedings have been consolidated should cause no delay in the disposition of the application for the preliminary injunction, for the evidence will be directed in the first instance to that relief, and the preliminary injunction, if justified by the proof, may be issued in the course of the consolidated proceedings. Furthermore, to consolidate the proceedings will tend to expedite the final disposition of the action. It is believed that consolidation can be usefully availed of in many cases.

The subdivision further provides that even when consolidation is not ordered, evidence received in connection with an application for a preliminary injunction for a preliminary injunction which would be admissible on the trial on the merits forms part of the trial record. This evidence need not be repeated on the trial. On the the other hand, repetition is not altogether prohibited. That would be impractical and unwise. For example, a witness testifying comprehensively on the trial who has previously testified upon the application for a preliminary injunction might sometimes be hamstrung in telling his story if he could not go over some part of his prior testimony to connect it with his present testimony. So also, some repetition of testimony may be called for where the trial is conducted by a judge who did not hear the application for the preliminary injunction. In general, however, repetition can be avoided with an increase of efficiency in the conduct of the case and without any distortion of the presentation of evidence by the parties.

Since an application for a preliminary injunction may be made in an action in which, with respect to all or part of the merits, there is a right to trial by jury, it is appropriate to add the caution appearing in the last sentence of the subdivision. In such a case the jury will have to hear all the evidence bearing on its verdict, even if some part of the evidence has already been heard by the judge alone on the application for the preliminary injunction.

The subdivision is believed to reflect the substance of the best current practice and introduces no novel conception.

Subdivision (b). In view of the possibly drastic consequence of a temporary restraining order, the opposition should be heard, if feasible, before the order is granted. Many judges have properly insisted that, when time does not permit of formal notice of the application to the adverse party, some expedient, such as telephonic notice to the attorney for the adverse party, be resorted to if this can reasonably be done. On occasion, however, temporary restraining orders have been issued without any notice when it was feasible for some fair, although informal, notice to be given. See the emphatic criticisms in *Pennsylvania Rd. Co.* v. *Transport Workers Union*, 278 F.2d 693, 694 (3d Cir. 1960); *Arvida Corp. v. Sugarman*, 259 F.2d 428, 429 (2d Cir. 1958); *Lummus Co.* v. *Commonwealth Oil Ref. Co., Inc.*, 297 F.2d 80, 83 (2d Cir. 1961), cert. denied, 368 U.S. 986 (1962).

Heretofore the first sentence of subdivision (b), in referring to a notice "served" on the "adverse party" on which a "hearing" could be held, perhaps invited the interpretation that the order might be granted without notice if the circumstances did not permit of a formal hearing on the basis of a formal notice. The subdivision is amended to make it plain that informal notice, which may be communicated to the attorney rather than the adverse party, is to be preferred to no notice at all.

Before notice can be dispensed with, the applicant's counsel must give his certificate as to any efforts made to give notice and the reasons why notice should not be required. This certificate is in addition to the requirement of an affidavit or verified complaint setting forth the facts as to the irreparable injury which would result before the opposition could be heard.

The amended subdivision continues to recognize that a temporary restraining order may be issued without any notice when the circumstances warrant.

Subdivision (c). Original Rules 65 and 73 contained substantially identical provisions for summary proceedings against sureties on bonds required or permitted by the rules. There was fragmentary coverage of the same subject in the Admiralty Rules. Clearly, a single comprehensive rule is required, and is incorporated as Rule 65.1.

### AMENDMENTS

1948—The amendment effective October 1949, changed subdivision (e) in the following respects: in the first clause the amendment substituted the words "any statute of the United States" for the words "the Act of October 15, 1914, ch. 323, §§ 1 and 20 (38 Stat. 730), U.S.C., Title 29, §§ 52 and 53, or the Act of March 23, 1932, ch. 90 (47 Stat. 70), U.S.C., Title 29, ch. 6"; in the second clause of subdivision (e) the amendment substituted the reference to "Title 28, U.S.C., § 2361" for the reference to "Section 24(26) of the Judicial Code as amended, U.S.C., Title 28, § 41(26)"; and the third clause was amended to read "Title 28, U.S.C., § 2284," etc., as at present, instead of "the Act of August 24, 1937, ch. 754, § 3, relating to actions to enjoin the enforcement of acts of Congress."

### CROSS REFERENCES

Anti-trust laws, restraining violation, see section 4 of Title 15, Commerce and Trade.

Appeals—
  District Courts to courts of appeals, see section 1292 of this title.
  Injunction pending, see rule 62.
  Interlocutory orders of district courts to courts of appeals, see section 1292 of this title.

Appellate court's power to suspend, modify or grant pending appeal, see rule 62.

Atomic Energy Act, enjoining violation of act or regulation, see section 2280 of Title 42, The Public Health and Welfare.

Bond for injunction pending appeal, see rule 62.

Clayton Act, violation of, see sections 25, 26 of Title 15, Commerce and Trade.

Copyrights, injunction against infringement, see section 101 of Title 17, Copyrights.

Fair Labor Standards Act, restraint of violations of regulations, see section 217 of Title 29, Labor.

Findings of fact and conclusions of law, necessity for, see rule 52.

Internal revenue, prohibition of suits to restrain assessment or collection, see section 7421 of Title 26, Internal Revenue Code.

Labor-Management Relations Act—
  Petition by Attorney General to enjoin strike or lockout, see section 178 of Title 29, Labor.
  Restraining unfair labor practices, see sections 160, 161 of Title 29.

Patent infringement, see section 283 of Title 35, Patents.

Securities Act, actions to restrain violations, see section 77t of Title 15, Commerce and Trade.

Securities Exchange Act, restraint of violations, see section 78u of Title 15.

Three-Judge Court, composition of, see section 2284 of this title.

Trade-marks and trade-names, infringement, see section 78u of Title 15, Commerce and Trade.

## Rule 65.1. Security: Proceedings Against Sureties

Whenever these rules, including the Supplemental Rules for Certain Admiralty and Marine Claims, require or permit the giving of security by a party, and security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the bond or undertaking may be served. His liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the sureties if their addresses are known.

(Added Feb. 28, 1966, eff. July 1, 1966.)

### NOTES OF ADVISORY COMMITTEE ON RULES

See Note to Rule 65.

## Rule 66. Receivers Appointed by Federal Courts

An action wherein a receiver has been appointed shall not be dismissed except by order of the court. The practice in the administration of estates by receivers or by other similar officers appointed by the court shall be in accordance with the practice heretofore followed in the courts of the United States or as provided in rules promulgated by the district courts. In all other respects the action in which the appointment of a receiver is sought or which is brought by or against a receiver is governed by these rules.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949.)

### NOTES OF ADVISORY COMMITTEE ON AMENDMENTS TO RULES

*Note.* The title of Rule 66 has been expanded to make clear the subject of the rule, i.e., federal equity receivers.

The first sentence added to Rule 66 prevents a dismissal by any party, after a federal equity receiver has been appointed, except upon leave of court. A party should not be permitted to oust the court and its officer without the consent of that court. See Civil Rule 31(e), Eastern District of Washington.

The second sentence added at the beginning of the rule deals with suits by or against a federal equity receiver. The first clause thereof eliminates the formal ceremony of an ancillary appointment before suit can be brought by a receiver, and is in accord with the more modern state practice, and with more expeditious and less expensive judicial administration. 2 Moore's Federal Practice, 1938, 2088–2091. For the rule necessitating ancillary appointment, see *Sterrett* v. *Second Nat. Bank*, 1918, 248 U.S. 73, 39 S.Ct. 27; *Kelley*

v. *Queeney*, W.D.N.Y. 1941, 41 F.Supp. 1015; see also *McCandless* v. *Furlaud*, 1934, 293 U.S. 67, 55 S.Ct. 42. This rule has been extensively criticized. First, Extraterritorial Powers of Receivers, 1932, 27 Ill.L.Rev. 271; Rose, Extraterritorial Actions by Receivers, 1933, 17 Minn.L.Rev. 704; Laughlin, The Extraterritorial Powers of Receivers, 1932, 45 Harv.L.Rev. 429; Clark and Moore, A New Federal Civil Procedure—II, Pleadings and Parties, 1935, 44 Yale L.J. 1291, 1312-1315; Note, 1932, 30 Mich.L.Rev. 1322. See also comment in *Bicknell* v. *Lloyd-Smith*, C.C.A.2d, 1940, 109 F.2d 527, cert. den., 1940, 311 U.S. 650, 61 S.Ct. 15. The second clause of the sentence merely incorporates the well-known and general rule that, absent statutory authorization, a federal receiver cannot be sued without leave of the court which appointed him, applied in the federal courts since *Barton* v. *Barbour*, 1881, 104 U.S. 126. See also 1 Clark on Receivers, 2d ed., § 549. Under 28 U.S.C. § 125 leave of court is unnecessary when a receiver is sued "in respect of any act or transaction of his in carrying on the business" connected with the receivership property, but such suit is subject to the general equity jurisdiction of the court in which the receiver was appointed, so far as justice necessitates.

Capacity of a state court receiver to sue or be sued in federal court is governed by Rule 17(b).

The last sentence added to Rule 66 assures the application of the rules in all matters except actual administration of the receivership estate itself. Since this implicitly carries with it the applicability of those rules relating to appellate procedure, the express reference thereto contained in Rule 66 has been stricken as superfluous. Under Rule 81(a)(1) the rules do not apply to bankruptcy proceedings except as they may be made applicable by order of the Supreme Court. Rule 66 is applicable to what is commonly known as a federal "chancery" or "equity" receiver, or similar type of court officer. It is not designed to regulate or affect receivers in bankruptcy, which are governed by the Bankruptcy Act and the General Orders. Since the Federal Rules are applicable in bankruptcy by virtue of General Orders in Bankruptcy 36 and 37 [following section 53 of Title 11, U.S.C.] only to the extent that they are not inconsistent with the Bankruptcy Act or the General Orders, Rule 66 is not applicable to bankruptcy receivers. See 1 Collier on Bankruptcy, 14th ed. by Moore and Oglebay, ¶¶ 2.23-2.36.

### AMENDMENTS

1948—The amendment effective October 1949 deleted a sentence which formerly appeared immediately following the first sentence and which read as follows: "A receiver shall have the capacity to sue in any district court without ancillary appointment; but actions against a receiver may not be commenced without leave of the court appointing him except when authorized by a statute of the United States."

### CROSS REFERENCES

Receiver suable without leave of court, see section 959 of this title.

## Rule 67. Deposit in Court

In an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or the disposition of any other thing capable of delivery, a party, upon notice to every other party, and by leave of court, may deposit with the court all or any part of such sum or thing. Money paid into court under this rule shall be deposited and withdrawn in accordance with the provisions of Title 28, U.S.C., §§ 2041, and 2042; the Act of June 26, 1934, ch. 756, § 23, as amended (48 Stat. 1236, 58 Stat. 845), U.S.C. Title 31, § 725v; or any like statute.

(As amended Dec. 29, 1948, eff. Oct. 20, 1949.)

### NOTES OF ADVISORY COMMITTEE ON RULES

This rule provides for deposit in court generally, continuing similar special provisions contained in such statutes as U.S.C., Title 28, formerly § 41(26) (now §§ 1335, 1397, 2361) (Original jurisdiction of bills of interpleader, and of bills in the nature of interpleader). See generally *Howard* v. *United States*, 184 U.S. 676, 22 S.Ct. 543, 46 L.Ed. 754 (1902); United States Supreme Court Admiralty Rules (1920), Rules 37 (Bringing Funds into Court), 41 (Funds in Court Registry), and 42 (Claims Against Proceeds in Registry). With the first sentence, compare English Rules Under the Judicature Act (The Annual Practice, 1937) O. 22, r. 1(1).

### AMENDMENTS

1948—The amendment effective October 1949 substituted the reference to "Title 28, U.S.C.A. §§ 2041, and 2042" for the reference to "Sections 995 and 996, Revised Statutes, as amended, U.S.C.A., Title 28, §§ 851, 852." The amendment also added the words "as amended" following the citation of the Act of June 26, 1934, ch. 756, § 23, and in the parenthetical citation immediately following, added the reference to "58 Stat. 845".

## Rule 68. Offer of Judgment

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior the commencement of hearings to determine the amount or extent of liability.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Feb. 28, 1966, eff. July 1, 1966.)

### NOTES OF ADVISORY COMMITTEE ON RULES

See 2 Minn. Stat. (Mason, 1927) § 9323; 4 Mont. Rev. Codes Ann. (1935) § 9770; N.Y.C.P.A. (1937) § 177.

For the recovery of costs against the United States, see Rule 54(d).

### NOTES OF ADVISORY COMMITTEE ON 1946 AMENDMENT TO RULES

*Note.* The third sentence of Rule 68 has been altered to make clear that evidence of an unaccepted offer is admissible in a proceeding to determine the costs of the action but is not otherwise admissible.

The two sentences substituted for the deleted last sentence of the rule assure a party the right to make a second offer where the situation permits—as, for example, where a prior offer was not accepted but the plaintiff's judgment is nullified and a new trial ordered, whereupon the defendant desires to make a second offer. It is implicit, however, that as long as the case continues—whether there be a first, second or third trial—and the defendant makes no further offer, his first and only offer will operate to save him the costs from the time of that offer if the plaintiff ultimately obtains a judgment less than the sum offered. In the case of successive offers not accepted, the offeror is saved the costs incurred after the making of the offer which was equal to or greater than the judgment ultimately obtained. These provisions should serve to encourage settlements and avoid protracted litigation.

The phrase "before the trial begins", in the first sentence of the rule, has been construed in *Cover* v. *Chicago Eye Shield Co.*, C.C.A.7th, 1943, 136 F.2d 374, cert. den. 1943, 320 U.S. 749, 64 S.Ct. 53.

### NOTES OF ADVISORY COMMITTEE ON 1966 AMENDMENT TO RULES

This logical extension of the concept of offer of judgment is suggested by the common admiralty practice of determining liability before the amount of liability is determined.

## Rule 69. Execution

### (a) In general

Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable. In aid of the judgment or execution, the judgment creditor or his successor in interest when that interest appears of record, may obtain discovery from any person, including the judgment debtor, in the manner provided in these rules or in the manner provided by the practice of the state in which the district court is held.

### (b) Against certain public officers

When a judgment has been entered against a collector or other officer of revenue under the circumstances stated in Title 28, U.S.C. § 2006, or against an officer of Congress in an action mentioned in the Act of March 3, 1875, ch. 130, § 8 (18 Stat. 401), U.S.C., Title 2, § 118, and when the court has given the certificate of probable cause for his act as provided in those statutes, execution shall not issue against the officer or his property but the final judgment shall be satisfied as provided in such statutes.

(As amended Dec. 29, 1948, eff. Oct. 20, 1949; Mar. 30, 1970, eff. July 1, 1970.)

### NOTES OF ADVISORY COMMITTEE ON RULES

*Note to Subdivision (a).* This follows in substance U.S.C., Title 28, former § 727 (Executions as provided by State laws) and former § 729 (Proceedings in vindication of civil rights), except that, as in the similar case of attachments (see note to Rule 64), the rule specifies the applicable State law to be that of the time when the remedy is sought, and thus renders unnecessary, as well as supersedeas, local district court rules.

Statutes of the United States on execution, when applicable, govern under this rule. Among these are:

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| U.S.C., Title 12: | |
| § 91 | (Transfers by bank and other acts in contemplation of insolvency) |
| § 632 | (Jurisdiction of United States district courts in cases arising out of foreign banking jurisdiction where Federal reserve bank a party) |
| U.S.C., Title 19: | |
| § 199 | (Judgments for customs duties, how payable) |
| U.S.C., Title 26: | |
| § 1610(a) | (Surrender of property subject to distraint) |
| U.S.C., Title 28, former: | |
| § 122 | (Creation of new district or transfer of territory; lien) |
| § 350 | (Time for making application for appeal or certiorari; stay pending application for certiorari) |
| § 489 | (District Attorneys; reports to Department of Justice) |
| § 574 | (Marshals, fees enumerated) |
| § 786 | (Judgments for duties; collected in coin) |
| § 811 | (Interest on judgments) |
| § 838 | (Executions; run in all districts of State) |
| § 839 | (Executions; run in every State and Territory) |
| § 840 | (Executions; stay on conditions), as modified by Rule 62(b). |
| § 841 | (Executions; stay of one term), as modified by Rule 62(f) |
| § 842 | (Executions; against officers of revenue in cases of probable cause), as incorporated in *Subdivision* (*b*) of this rule |
| § 843 | (Imprisonment for debt) |
| § 844 | (Imprisonment for debt; discharge according to State laws) |
| § 845 | (Imprisonment for debt; jail limits) |
| § 846 | (Fieri Facias; appraisal of goods; appraisers) |
| § 847 | (Sales; real property under order or decree) |
| § 848 | (Sales; personal property under order or decree) |
| § 849 | (Sales; necessity of notice) |
| § 850 | (Sales; death of marshall after levy or after sale) |
| § 869 | (Bond in former error and on appeal) as incorporated in Rule 73(c) |
| § 874 | (Supersedeas), as modified by Rules 62(d) and 73(d) |
| U.S.C., Title 31: | |
| § 195 | (Purchase on execution) |
| U.S.C., Title 33: | |
| § 918 | (Collection of defaulted payments) |
| U.S.C., Title 49: | |
| § 74(g) | (Causes of action arising out of Federal control of railroads; execution and other process) |

Special statutes of the United States on exemption from execution are also continued. Among these are:

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| U.S.C., Title 2: | |
| § 118 | (Actions against officers of Congress for official acts) |
| U.S.C., Title 5: | |
| § 729 | (Federal employees retirement annuities not subject to assignment, execution, levy, or other legal process) |
| U.S.C., Title 10: | |
| § 610 | (Exemption of enlisted men from arrest on civil process) |
| U.S.C., Title 22, former: | |
| § 21(h) | (Foreign service retirement and disability system; establishment; rules and regulations; annuities; nonassignable; exemption from legal process) |

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| U.S.C., Title 33: | |
| § 916 | (Assignment and exemption from claims of creditors) Longshoremen's and Harborworkers' Compensation Act) |
| U.S.C., Title 38: | |
| § 54 | (Attachment, levy or seizure of moneys due pensioners prohibited) |
| § 393 | (Army and Navy Medal of Honor Roll; pensions additional to other pensions; liability to attachment, etc.) Compare Title 34, § 365(c) (Medal of Honor Roll; special pension to persons enrolled) |
| § 618 | (Benefits exempt from seizure under process and taxation; no deductions for indebtedness to United States) |
| U.S.C., Title 43: | |
| § 175 | (Exemption from execution of homestead land) |
| U.S.C., Title 48: | |
| § 1371o | (Panama Canal and railroad retirement annuities, exemption from execution and so forth) |

### SUPPLEMENTARY NOTE OF ADVISORY COMMITTEE REGARDING THIS RULE

*Note.* With respect to the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. Appendix, § 501 et seq., see Notes to Rules 62 and 64 herein.

### NOTES OF ADVISORY COMMITTEE ON 1970 AMENDMENT TO RULES

The amendment assures that, in aid of execution on a judgment, all discovery procedures provided in the rules are available and not just discovery via the taking of a deposition. Under the present language, one court has held that Rule 34 discovery is unavailable to the judgment creditor. *M. Lowenstein & Sons, Inc.* v. *American Underwear Mfg. Co.*, 11 F.R.D. 172 (E.D.Pa. 1951). Notwithstanding the language, and relying heavily on legislative history referring to Rule 33, the Fifth Circuit has held that a judgment creditor may invoke Rule 33 interrogatories. *United States* v. *McWhirter*, 376 F.2d 102 (5th Cir. 1967). But the court's reasoning does not extend to discovery except as provided in Rules 26–33. One commentator suggests that the existing language might properly be stretched to all discovery, 7 Moore's Federal Practice ¶ 69.05[1] (2d ed. 1966), but another believes that a rules amendment is needed. 3 Barron & Holtzoff, Federal Practice and Procedure 1484 (Wright ed. 1958). Both commentators and the court in *McWhirter* are clear that, as a matter of policy, Rule 69 should authorize the use of all discovery devices provided in the rules.

### AMENDMENTS

1948—The amendment effective October 1949 substituted the citation of "Title 28, U.S.C.A., § 2006" in subdivision (b) in place of the citation to "Section 989, Revised Statutes, U.S.C.A., Title 28, § 842".

### CROSS REFERENCES

Execution against revenue officers, see section 2006 of this title.

Executions and judicial sales, see section 2001 et seq. of this title.

Executions in favor of United States, see section 2413 of this title.

Power to issue writ of execution, see section 1651 of this title.

Seizure of person or property for satisfaction of judgment, see rule 64.

Stay of execution of judgment, see rule 62.

Writ of execution for delivery of possession, see rule 70.

## Rule 70. Judgment for Specific Acts; Vesting Title

**If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party. On application of the party entitled to performance, the clerk shall issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment. The court may also in proper cases adjudge the party in contempt. If real or personal property is within the district, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a conveyance executed in due form of law. When any order or judgment is for the delivery of possession, the party in whose favor it is entered is entitled to a writ of execution or assistance upon application to the clerk.**

### NOTES OF ADVISORY COMMITTEE ON RULES

Compare former Equity Rules 7 (Process, Mesne and Final), 8 (Enforcement of Final Decrees), and 9 (Writ of Assistance). To avoid possible confusion, both old and new denominations for attachment (sequestration) and execution (assistance) are used in this rule. Compare with the provision in this rule that the judgment may itself vest title, 6 Tenn.Ann.Code (Williams, 1934), § 10594; 2 Conn.Gen.Stat. (1930), § 5455; N.M.Stat.Ann. (Courtright, 1929), § 117-117; 2 Ohio Gen.Code Ann. (Page, 1926), § 11590; and England, Supreme Court of Judicature Act (1925), § 47.

### CROSS REFERENCES

Contempts, power of court, see section 401 of Title 18, Crimes and Criminal Procedure.

Execution, see rule 69.

Power to issue writs, see section 1651 of this title.

Remedies of attachment and sequestration, see rule 64.

## Rule 71. Process in Behalf of and Against Persons Not Parties

**When an order is made in favor of a person who is not a party to the action, he may enforce obedience to the order by the same process as if he were a party; and, when obedience to an order may be lawfully enforced against a person who is not a party, he is liable to the same process for enforcing obedience to the order as if he were a party.**

### NOTES OF ADVISORY COMMITTEE ON RULES

Compare former Equity Rule 11 (Process in Behalf of and Against Persons Not Parties). Compare also *Terrell* v. *Allison*, 21 Wall. 289, 22 L.Ed. 634 (U.C., 1875); *Farmers' Loan and Trust Co.* v. *Chicago and A. Ry. Co.*, 44 Fed. 653 (C.C.Ind., 1890); *Robert Findlay Mfg. Co.* v. *Hygrade Lighting Fixture Corp.*, 288 Fed. 80 (E.D.N.Y., 1923); *Thompson* v. *Smith*, Fed.Cas.No. 13,977 (C.C.Minn., 1870).

### CROSS REFERENCES

Execution, see rule 69.

Parties generally, see rules 17 to 25.

Power to issue writs, see section 1651 of this title.

Process generally, see rule 4.

Writs of attachment, sequestration and equivalent remedies, see rule 64.

### Rule 71A. Condemnation of Property

**(a) Applicability of other rules**

The Rules of Civil Procedure for the United States District Courts govern the procedure for the condemnation of real and personal property under the power of eminent domain, except as otherwise provided in this rule.

**(b) Joinder of properties**

The plaintiff may join in the same action one or more separate pieces of property, whether in the same or different ownership and whether or not sought for the same use.

**(c) Complaint**

(1) *Caption.* The complaint shall contain a caption as provided in Rule 10(a), except that the plaintiff shall name as defendants the property, designated generally by kind, quantity, and location, and at least one of the owners of some part of or interest in the property.

(2) *Contents.* The complaint shall contain a short and plain statement of the authority for the taking, the use for which the property is to be taken, a description of the property sufficient for its identification, the interests to be acquired, and as to each separate piece of property a designation of the defendants who have been joined as owners thereof or of some interest therein. Upon the commencement of the action, the plaintiff need join as defendants only the persons having or claiming an interest in the property whose names are then known, but prior to any hearing involving the compensation to be paid for a piece of property, the plaintiff shall add as defendants all persons having or claiming an interest in that property whose names can be ascertained by a reasonably diligent search of the records, considering the character and value of the property involved and the interests to be acquired, and also those whose names have otherwise been learned. All others may be made defendants under the designation "Unknown Owners." Process shall be served as provided in subdivision (d) of this rule upon all defendants, whether named as defendants at the time of the commencement of the action or subsequently added, and a defendant may answer as provided in subdivision (e) of this rule. The court meanwhile may order such distribution of a deposit as the facts warrant.

(3) *Filing.* In addition to filing the complaint with the court, the plaintiff shall furnish to the clerk at least one copy thereof for the use of the defendants and additional copies at the request of the clerk or of a defendant.

**(d) Process**

(1) *Notice; Delivery.* Upon the filing of the complaint the plaintiff shall forthwith deliver to the clerk joint or several notices directed to the defendants named or designated in the complaint. Additional notices directed to defendants subsequently added shall be so delivered. The delivery of the notice and its service have the same effect as the delivery and service of the summons under Rule 4.

(2) *Same; Form.* Each notice shall state the court, the title of the action, the name of the defendant to whom it is directed, that the action is to condemn property, a description of his property sufficient for its identification, the interest to be taken, the authority for the taking, the uses for which the property is to be taken, that the defendant may serve upon the plaintiff's attorney an answer within 20 days after service of the notice, and that the failure so to serve an answer constitutes a consent to the taking and to the authority of the court to proceed to hear the action and to fix the compensation. The notice shall conclude with the name of the plaintiff's attorney and an address within the district in which action is brought where he may be served. The notice need contain a description of no other property than that to be taken from the defendants to whom it is directed.

(3) *Service of Notice.*

(i) Personal service. Personal service of the notice (but without copies of the complaint) shall be made in accordance with Rule 4(c) and (d) upon a defendant who resides within the United States or its territories or insular possessions and whose residence is known.

(ii) Service by Publication. Upon the filing of a certificate of the plaintiff's attorney stating that he believes a defendant cannot be personally served, because after diligent inquiry within the state in which the complaint is filed his place of residence cannot be ascertained by the plaintiff or, if ascertained, that it is beyond the territorial limits of personal service as provided in this rule, service of the notice shall be made on this defendant by publication in a newspaper published in the county where the property is located, or if there is no such newspaper, then in a newspaper having a general circulation where the property is located, once a week for not less than three successive weeks. Prior to the last publication, a copy of the notice shall also be mailed to a defendant who cannot be personally served as provided in this rule but whose place of residence is then known. Unknown owners may be served by publication in like manner by a notice addressed to "Unknown Owners."

Service by publication is complete upon the date of the last publication. Proof of publication and mailing shall be made by certificate of the plaintiff's attorney, to which shall be attached a printed copy of the published notice with the name and dates of the newspaper marked thereon.

(4) *Return; amendment.* Proof of service of the notice shall be made and amendment of the notice or proof of its service allowed in the manner provided for the return and amendment of the summons under Rule 4(g) and (h).

**(e) Appearance or answer**

If a defendant has no objection or defense to the taking of his property, he may serve a notice of appearance designating the property in which he claims to be interested. Thereafter he shall receive notice of all proceedings affecting it. If a defendant has any objection or defense to the taking of his property, he shall serve his answer within 20 days after the service of notice upon him. The answer shall identify the property in which he claims to have an interest, state the nature and extent of the interest claimed, and state all his objections and defenses to the taking of his property. A defendant waives all defenses and objections not so presented, but at the trial of the issue of just compensation, whether or not he has previously appeared or answered, he may present evidence as to the amount of the compensation to be paid for his property, and he may share in the distribution of the award. No other pleading or motion asserting any additional defense or objection shall be allowed.

**(f) Amendment of pleadings**

Without leave of court, the plaintiff may amend the complaint at any time before the trial of the issue of compensation and as many times as desired, but no amendment shall be made which will result in a dismissal forbidden by subdivision (i) of this rule. The plaintiff need not serve a copy of an amendment, but shall serve notice of the filing, as provided in Rule 5(b), upon any party affected thereby who has appeared and, in the manner provided in subdivision (d) of this rule, upon any party affected thereby who has not appeared. The plaintiff shall furnish to the clerk of the court for the use of the defendants at least one copy of each amendment, and he shall furnish additional copies on the request of the clerk or of a defendant. Within the time allowed by subdivision (e) of this rule a defendant may serve his answer to the amendment pleading, in the form and manner and with the same effect as there provided.

**(g) Substitution of parties**

If a defendant dies or becomes incompetent or transfers his interest after his joinder, the court may order substitution of the proper party upon motion and notice of hearing. If the motion and notice of hearing are to be served upon a person not already a party, service shall be made as provided in subdivision (d)(3) of this rule.

**(h) Trial**

If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the determination of that issue; but if there is no such specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix, unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it. If a commission is appointed it shall have the powers of a master provided in subdivision (c) of Rule 53 and proceedings before it shall be governed by the provisions of paragraphs (1) and (2) of subdivision (d) of Rule 53. Its action and report shall be determined by a majority and its findings and report shall have the effect, and be dealt with by the court in accordance with the practice, prescribed in paragraph (2) of subdivision (e) of Rule 53. Trial of all issues shall otherwise be by the court.

**(i) Dismissal of action**

(1) *As of Right.* If no hearing has begun to determine the compensation to be paid for a piece of property and the plaintiff has not acquired the title or a lesser interest in or taken possession, the plaintiff may dismiss the action as to that property, without an order of the court, by filing a notice of dismissal setting forth a brief description of the property as to which the action is dismissed.

(2) *By Stipulation.* Before the entry of any judgment vesting the plaintiff with title or a lesser interest in or possession of property, the action may be dismissed in whole or in part, without an order of the court, as to any property by filing a stipulation of dismissal by the plaintiff and the defendant affected thereby; and, if the parties so stipulate, the court may vacate any judgment that has been entered.

(3) *By Order of the Court.* At any time before compensation for a piece of property has been determined and paid and after motion and hearing, the court may dismiss the action as to that property, except that it shall not dismiss the action as to any part of the property of which the plaintiff has taken possession or in which the plaintiff has taken title or a lesser interest, but shall award just compensation for the possession, title or lesser interest so taken. The court at any time may drop a defendant unnecessarily or improperly joined.

(4) *Effect.* Except as otherwise provided in the notice, or stipulation of dismissal, or order of the court, any dismissal is without prejudice.

**(j) Deposit and its distribution**

The plaintiff shall deposit with the court any money required by law as a condition to the exercise of the power of eminent domain; and, although not so required, may make a deposit when permitted by statute. In such cases the court and attorneys shall expedite the proceedings for the distribution of the money so deposited and for the ascertainment and payment of just compensation. If the compensation finally awarded to any defendant exceeds the amount which has been paid to him on distribution of the deposit, the court shall enter judgment against the plaintiff and in favor of that defendant for the deficiency. If the compensation finally awarded to any defendant is less than the amount which has been paid to him, the court shall enter judgment against him and in favor of the plaintiff for the overpayment.

**(k) Condemnation under a State's power of eminent domain**

The practice as herein prescribed governs in actions involving the exercise of the power of eminent domain under the law of a state, provided that if the state law makes provision for trial of any issue by jury, or for trial of the issue of compensation by jury or commission or both, that provision shall be followed.

**(*l*) Costs**

Costs are not subject to Rule 54(d).

(Added Apr. 30, 1951, eff. Aug. 1, 1951, and amended Jan. 21, 1963, eff. July 1, 1963.)

### NOTES OF ADVISORY COMMITTEE ON RULES

**Supplementary report**

The Court will remember that at its conference on December 2, 1948, the discussion was confined to subdivision (h) of the rule (* * *), the particular question being whether the tribunal to award compensation should be a commission or a jury in cases where the Congress has not made specific provision on the subject. The Advisory Committee was agreed from the outset that a rule should not be promulgated which would overturn the decision of the Congress as to the kind of tribunal to fix compensation, provided that the system established by Congress was found to be working well. We found two instances where the Congress had specified the kind of tribunal to fix compensation. One case was the District of Columbia (U.S.C., Title 40, §§ 361-386 (now D.C. code, 1951 Ed., Title 16-619 to 16-644)) where a rather unique system exists under which the court is required in all cases to order the selection of a "jury" of five from among not less than twenty names drawn from "the special box provided by law." They must have the usual qualifications of jurors and in addition must be freeholders of the District and not in the service of the United States or the District. That system has been in effect for many years, and our inquiry revealed that it works well under the conditions prevailing in the District, and is satisfactory to the courts of the District, the legal profession and to property owners.

The other instance is that of the Tennessee Valley Authority, where the act of Congress (U.S.C., Title 16, § 831x) provides that compensation is fixed by three disinterested commissioners appointed by the court, whose award goes before the District Court for confirmation or modification. The Advisory Committee made a thorough inquiry into the practical operation of the TVA commission system. We obtained from counsel for the TVA the results of their experience, which afforded convincing proof that the commission system is preferable under the conditions affecting TVA and that the jury system would not work satisfactorily. We then, under date of February 6, 1947, wrote every Federal judge who had ever sat in a TVA condemnation case, asking his views as to whether the commission system is satisfactory and whether a jury system should be preferred. Of 21 responses from the judges 17 approved the commission system and opposed the substitution of a jury system for the TVA. Many of the judges went further and opposed the use of juries in any condemnation cases. Three of the judges preferred the jury system, and one dealt only with the TVA provision for a three judge district court. The Advisory Committee has not considered abolition of the three judge requirement of the TVA Act, because it seemed to raise a question of jurisdiction, which cannot be altered by rule. Nevertheless the Department of Justice continued its advocacy of the jury system for its asserted expedition and economy; and others favored a uniform procedure. In consequence of these divided counsels the Advisory Committee was itself divided, but in its May 1948 Report to the Court recommended the following rule as approved by a majority (* * *):

(h) Trial. If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the determination of that issue; but if there is no such specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix. Trial of all issues shall otherwise be by the court.

The effect of this was to preserve the existing systems in the District of Columbia and in TVA cases, but to provide for a jury to fix compensation in all other cases.

Before the Court's conference of December 2, 1948, the Chief Justice informed the Committee that the Court was particularly interested in the views expressed by Judge John Paul, judge of the United States District Court for the Western District of Virginia, in a letter from him to the chairman of the Advisory Committee, dated February 13, 1947. Copies of all the letters from judges who had sat in TVA cases had been made available to the Court, and this letter from Judge Paul is one of them. Judge Paul strongly opposed jury trials and recommended the commission system in large projects like the TVA, and his views seemed to have impressed the Court and to have been the occasion for the conference.

The reasons which convinced the Advisory Committee that the use of commissioners instead of juries is desirable in TVA cases were these:

1. The TVA condemns large areas of land of similar kind, involving many owners. Uniformity in awards is essential. The commission system tends to prevent discrimination and provide for uniformity in compensation. The jury system tends to lack of uniformity. Once a reasonable and uniform standard of values for the area has been settled by a commission, litigation ends and settlements result.

2. Where large areas are involved many small landowners reside at great distances from the place where a court sits. It is a great hardship on humble people to have to travel long distances to attend a jury trial. A commission may travel around and receive the evidence of the owner near his home.

3. It is impracticable to take juries long distances to view the premises.

4. If the cases are tried by juries the burden on the time of the courts is excessive.

These considerations are the very ones Judge Paul stressed in his letter. He pointed out that they applied not only to the TVA but to other large governmental projects, such as flood control, hydroelectric power, reclamation, national forests, and others. So when the representatives of the Advisory Committee appeared at the Court's conference December 2, 1948, they found it difficult to justify the proposed provision in subdivision (h) of the rule that a jury should be used to fix compensation in all cases where Congress had not specified the tribunal. If our reasons for preserving the TVA system were sound, provision for a jury in similar projects of like magnitude seemed unsound.

Aware of the apparent inconsistency between the acceptance of the TVA system and the provision for a jury in all other cases, the members of the Committee attending the conference of December 2, 1948, then suggested that in the other cases the choice of jury or commission be left to the discretion of the District Court, going back to a suggestion previously made by Committee members and reported at page 15 of the Preliminary Draft of June 1947. They called the attention of the Court to the fact that the entire Advisory Committee had not been consulted about this suggestion and proposed that the draft be returned to the Committee for further consideration, and that was done.

The proposal we now make for subdivision (h) is as follows:

(h) Trial. If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the determination of that issue; but if there is no such specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix, unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it. If a commission is appointed it shall have the powers of a master provided in subdivision (c) of Rule 53 proceedings before it shall be governed by the provisions of paragraphs (1) and (2) of subdivision (d) of Rule 53. Its action and report shall be determined by a majority and its findings and report shall have the effect, and be dealt with by the court in accordance with the practice, prescribed in paragraph (2) of subdivision (e) of Rule 53. Trial of all issues shall otherwise be by the court.

In the 1948 draft the Committee had been almost evenly divided as between jury or commission and that made it easy for us to agree on the present draft. It would be difficult to state in a rule the various conditions to control the District Court in its choice and we have merely stated generally the matters which should be considered by the District Court.

The rule as now drafted seems to meet Judge Paul's objection. In large projects like the TVA the court may decide to use a commission. In a great number of cases involving only sites for buildings or other small areas, where use of a jury is appropriate, a jury may be chosen. The District Court's discretion may also be influenced by local preference or habit, and the preference of the Department of Justice and the reasons for its preference will doubtless be given weight. The Committee is convinced that there are some types of cases in which use of a commission is preferable and others in which a jury may be appropriately used, and that it would be a mistake to provide that the same kind of tribunal should be used in all cases. We think the available evidence clearly leads to that conclusion.

When this suggestion was made at the conference of December 2, 1948, representatives of the Department of Justice opposed it, expressing opposition to the use of a commission in any case. Their principal ground for opposition to commissions was then based on the assertion that the commission system is too expensive because courts allow commissioners too large compensation. The obvious answer to that is that the compensation of commissioners ought to be fixed or limited by law, as was done in the TVA Act, and the agency dealing with appropriations—either the Administrative Office or some other interested department of the government—should correct that evil, if evil there be, by obtaining such legislation. Authority to promulgate rules of procedure does not include power to fix compensation of government employees. The Advisory Committee is not convinced that even without such legislation the commission system is more expensive than the jury system. The expense of jury trials includes not only the per diem and mileage of the jurors impaneled for a case but like items for the entire venire. In computing cost of jury trials, the salaries of court officials, judges, clerks, marshals and deputies must be considered. No figures have been given to the Committee to establish that the cost of the commission system is the greater.

We earnestly recommend the rule as now drafted for promulgation by the Court, in the public interest.

The Advisory Committee have given more time to this rule, including time required for conferences with the Department of Justice to hear statements of its representatives, than has been required by any other rule. The rule may not be perfect but if faults develop in practice they may be promptly cured. Certainly the present conformity system is atrocious.

Under state practices, just compensation is normally determined by one of three methods: by commissioners; by commissioners with a right of appeal to and trial de novo before a jury; and by a jury, without a commission. A trial to the court or to the court including a master are, however, other methods that are occasionally used. Approximately 5 states use only commissioners; 23 states use commissioners with a trial de novo before a jury; and 18 states use only the jury. This classification is advisedly stated in approximate terms, since the same state may utilize diverse methods, depending upon different types of condemnations or upon the locality of the property, and since the methods used in a few states do not permit of a categorical classification. To reject the proposed rule and leave the situation as it is would not satisfy the views of the Department of Justice. The Department and the Advisory Committee agree that the use of a commission, with appeal to a jury, is a wasteful system.

The Department of Justice has a voluminous "Manual on Federal Eminent Domain," the 1940 edition of which has 948 pages with an appendix of 73 more pages. The title page informs us the preparation of the manual was begun during the incumbency of Attorney General Cummings, was continued under Attorney General Murphy, and completed during the incumbency of Attorney General Jackson. The preface contains the following statement:

It should also be mentioned that the research incorporated in the manual would be of invaluable assistance in the drafting of a new uniform code, or rules of court, for federal condemnation proceedings, which are now greatly confused, not only by the existence of over seventy federal statutes governing condemnations for different purposes—statutes which sometimes conflict with one another—but also by the countless problems occasioned by the requirements of conformity to state law. Progress of the work has already demonstrated that the need for such reform exists.

It is not surprising that more than once Attorneys General have asked the Advisory Committee to prepare a federal rule and rescue the government from this morass.

The Department of Justice has twice tried and failed to persuade the Congress to provide that juries shall be used in all condemnation cases. The debates in Congress show that part of the opposition to the Department of Justice's bills came from representatives opposed to jury trials in all cases, and in part from a preference for the conformity system. Our present proposal opens the door for district judges to yield to local preferences on the subject. It does much for the Department's points of view. It is a great improvement over the present so-called conformity system. It does away with the wasteful "double" system prevailing in 23 states where awards by commissions are followed by jury trials.

Aside from the question as to the choice of a tribunal to award compensation, the proposed rule would afford a simple and improved procedure.

We turn now to an itemized explanation of the other changes we have made in the 1948 draft. Some of these result from recent amendments to the Judicial Code. Others result from a reconsideration by the Advisory Committee of provisions which we thought could be improved.

1. In the amended Judicial Code, the district courts are designated as "United States District Courts" instead of "District Courts of the United States," and a corresponding change has been made in the rule.

2. After the 1948 draft was referred back to the committee, the provision in subdivision (c)(2), relating to naming defendants, * * * which provided that the plaintiff shall add as defendants all persons having or claiming an interest in that property whose names can be ascertained by a search of the records to the extent commonly made by competent searchers of title in the vicinity "in light of the type and value of the property involved," the phrase in quotation marks was changed to read "in the light of the character and value of the property involved and the interests to be acquired."

The Department of Justice made a counter proposal * * * that there be substituted the words "reasonably diligent search of the records, considering the type." When the American Bar Association thereafter considered the draft, it approved the Advisory Committee's draft of this subdivision, but said that it had no objection to the Department's suggestion. Thereafter, in an effort to eliminate controversy, the Advisory Committee accepted the Department's suggestion as to (c)(2), using the word "character" instead of the word "type."

The Department of Justice also suggested that in subdivision (d)(3)(2) relating to service by publication, the search for a defendant's residence as a preliminary to publication be limited to the state in which the complaint is filed. Here again the American Bar Association's report expressed the view that the Department's suggestion was unobjectionable and the Advisory Committee thereupon adopted it.

3. Subdivision (k) of the 1948 draft is as follows:

(k) Condemnation Under a State's Power of Eminent Domain. If the action involves the exercise of the power of eminent domain under the law of a state, the practice herein prescribed may be altered to the extent necessary to observe and enforce any condition affecting the substantial rights of a litigant attached by the state law to the exercise of the state's power of eminent domain.

Occasionally condemnation cases under a state's power of eminent domain reach a United States District Court because of diversity of citizenship. Such cases are rare, but provision should be made for them.

The 1948 draft of (k) required a district court to decide whether a provision of state law specifying the tribunal to award compensation is or is not a "condition" attached to the exercise of the state's power. On reconsideration we concluded that it would be wise to redraft (k) so as to avoid that troublesome question. As to conditions in state laws which affect the substantial rights of a litigant, the district courts would be bound to give them effect without any rule on the subject. Accordingly we present two alternative revisions. One suggestion supported by a majority of the Advisory Committee is as follows:

(k) Condemnation Under a State's Power of Eminent Domain. The practice herein prescribed governs in actions involving the exercise of the power of eminent domain under the law of a state, provided that if the state law makes provision for trial of any issue by jury, or for trial of the issue of compensation by jury or commission or both, that provision shall be followed.

The other is as follows:

(k) Condemnation Under a State's Power of Eminent Domain. The practice herein prescribed governs in actions involving the exercise of the power of eminent domain under the law of a state, provided that if the state law gives a right to a trial by jury such a trial shall in any case be allowed to the party demanding it within the time permitted by these rules, and in that event no hearing before a commission shall be had.

The first proposal accepts the state law as to the tribunals to fix compensation, and in that respect leaves the parties in precisely the same situation as if the case were pending in a state court, including the use of a commission with appeal to a jury, if the state law so provides. It has the effect of avoiding any question as to whether the decisions in *Erie R. Co.* v. *Tompkins* and later cases have application to a situation of this kind.

The second proposal gives the parties a right to a jury trial if that is provided for by state law, but prevents the use of both commission and jury. Those members of the Committee who favor the second proposal do so because of the obvious objections to the double trial, with a commission and appeal to a jury. As the decisions in *Erie R. Co.* v. *Tompkins* and later cases may have a bearing on this point, and the Committee is divided, we think both proposals should be placed before the Court.

4. The provision * * * of the 1948 draft * * * prescribing the effective date of the rule was drafted before the recent amendment of the Judicial Code on that subject. On May 10, 1950, the President approved an act which amended section 2072 of Title 28, United States Code, to read as follows:

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of 90 days after they have been thus reported.

To conform to the statute now in force, we suggest a provision as follows:

Effective Date. This Rule 71A and the amendment to Rule 81(a) will take effect on August 1, 1951. Rule 71A governs all proceedings in actions brought after it takes effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court its application in a paticular action pending when the rule takes effect would not be feasible or would work injustice, in which event the former procedure applies.

If the rule is not reported to Congress by May 1, 1951, this provision must be altered.

5. We call attention to the fact that the proposed rule does not contain a provision for the procedure to be followed in order to exercise the right of the United States to take immediate possession or title, when the condemnation proceeding is begun. There are several statutes conferring such a right which are cited in the original notes to the May 1948 draft * * *. The existence of this right is taken into account in the rule. In paragraph (c)(2), * * * it is stated: "Upon the commencement of the action, the plaintiff need join as defendants only the persons having or claiming an interest in the property whose names are then known." That is to enable the United States to exercise the right to immediate title or possession without the delay involved in ascertaining the names of all interested parties. The right is also taken into account in the provision relating to dismissal (paragraph (i) subdivisions (1), (2), and (3), * * *); also in paragraph (j) relating to deposits and their distribution.

The Advisory Committee considered whether the procedure for exercising the right should be specified in the rule and decided against it, as the procedure now being followed seems to be giving no trouble, and to draft a rule to fit all the statutes on the subject might create confusion.

The American Bar Association has taken an active interest in a rule for condemnation cases. In 1944 its House of Delegates adopted a resolution which among other things resolved:

That before adoption by the Supreme Court of the United States of any redraft of the proposed rule, time and opportunity should be afforded to the bar to consider and make recommendations concerning any such redraft.

Accordingly, in 1950 the revised draft was submitted to the American Bar Association and its section of real property, probate and trust law appointed a committee to consider it. That committee was supplied with copies of the written statement from the Department of Justice giving the reasons relied on by the Department for preferring a rule to use juries in all cases. The Advisory Committee's report was approved at a meeting of the section of real property law, and by the House of Delegates at the annual meeting of September 1950. The American Bar Association report gave particular attention to the question whether juries or commissions should be used to fix compensation, approved the Advisory Committee's solution appearing in their latest draft designed to allow use of commissions in projects comparable to the TVA, and rejected the proposal for use of juries in all cases.

In November 1950 a committee of the Federal Bar Association, the chairman of which was a Special Assistant to the Attorney General, made a report which reflected the attitude of the Department of Justice on the condemnation rule.

Aside from subdivision (h) about the tribunal to award compensation the final draft of the condemnation rule here presented has the approval of the American Bar Association and, we understand, the Department of Justice, and we do not know of any opposition to it. Subdivision (h) has the unanimous approval of the Advisory Committee and has been approved by the American Bar Association. The use of commissions in TVA cases, and, by fair inference, in cases comparable to the TVA, is supported by 17 out of 20 judges who up to 1947 had sat in TVA cases. The legal staff of the TVA has virogously objected to the substitution of juries for commissions in TVA cases. We regret to report that the Department of Justice still asks that subdivision (h) be altered to provide for jury trials in all cases where Congress has not specified the tribunal. We understand that the Department approves the proposal that the system prevailing in 23 states for the "double" trial, by commission with appeal to and trial de novo before a jury, should be abolished, and also asks that on demand a jury should be substituted for a commission, in those states where use of a commission alone is now required. The Advisory Committee has no evidence that commissions do not operate satisfactorily in the case of projects comparable to the TVA.

**Original report**

General Statement. 1. Background. When the Advisory Committee was formulating its recommendations to the Court concerning rules of procedure, which subsequently became the Federal Rules of 1938, the Committee concluded at an early stage not to fix the procedure in condemnation cases. This is a matter principally involving the exercise of the federal power of eminent domain, as very few condemnation cases involving the state's power reach the United States District Courts. The Committee's reasons at that time were that inasmuch as condemnation proceedings by the United States are governed by statutes of the United States, prescribing different procedure for various agencies and departments of the government, or, in the absence of such statutes, by local state practice under the Conformity Act (40 U.S.C. sec. 258), it would be extremely difficult to draft a uniform rule satisfactory to the various agencies and departments of the government and to private parties; and that there was no general demand for a uniform rule. The Committee continued in that belief until shortly before the preparation of the April 1937 Draft of the Rules, when the officials of the Department of Justice having to do with condemnation cases urgently requested the Committee to propose rules on this subject. The Committee undertook the task and drafted a Condemnation Rule which appeared for the first time as Rule 74 of the April 1937 Draft. After the publication and distribution of this initial draft many objections were urged against it by counsel for various governmental agencies, whose procedure in condemnation cases was prescribed by federal statutes. Some of these agencies wanted to be excepted in whole or in part from the operation of the uniform rule proposed in April 1937. And the Department of Justice changed its position and stated that it preferred to have government condemnations conducted by local attorneys familiar with the state practice, which was applied under the Conformity Act where the Acts of Congress do not prescribe the practice; that it preferred to work under the Conformity Act without a uniform rule of procedure. The profession generally showed little interest in the proposed uniform rule. For these reasons the Advisory Committee in its Final Report to the Court in November 1937 proposed that all of Rule 74 be stricken and that the Federal Rules be made applicable only to appeals in condemnation cases. See note to Rule 74 of the Final Report.

Some six or seven years later when the Advisory Committee was considering the subject of amendments to the Federal Rules both government officials and the profession generally urged the adoption of some uniform procedure. This demand grew out of the volume of condemnation proceedings instituted during the war, and the general feeling of dissatisfaction with the diverse condemnation procedures that were applicable in the federal courts. A strongly held belief was that both the sovereign's power to condemn and the property owner's right to compensation could be promoted by a simplified rule. As a consequence the Committee proposed a Rule 71A on the subject of condemnation in its Preliminary Draft of May 1944. In the Second Preliminary Draft of May 1945 this earlier proposed Rule 71A was, however, omitted. The Committee did not then feel that it had sufficient time to prepare a revised draft satisfactorily to it which would meet legitimate objections made to the draft of May 1944. To avoid unduly delaying the proposed amendments to existing rules the Committee concluded to proceed in the regular way with the preparation of the amendments to these rules and deal with the question of a condemnation rule as an independent matter. As a consequence it made no recommendations to the Court on condemnation in its Final Report of Proposed Amendments of June 1946; and the amendments which the Court adopted in December 1946 did not deal with condemnation. After concluding its task relative to amendments, the Committee returned to a consideration of eminent domain, its proposed Rule 71A of May 1944, the suggestions and criticisms that had been presented in the interim, and in June 1947 prepared and distributed to the profession another draft of a proposed condemnation rule. This draft contained several alternative provisions; specifically called attention to and asked for opinion relative to these matters, and in particular as to the constitution of the tribunal to award compensation. The present draft was based on the June 1947 formulation, in light of the advice of the profession on both matters of substance and form.

2. Statutory Provisions. The need for a uniform condemnation rule in the federal courts arises from the fact that by various statutes Congress has prescribed diverse procedures for certain condemnation proceedings, and, in the absence of such statutes, has prescribed conformity to local state practice under 40 U.S.C. § 258. This general conformity adds to the diversity of procedure since in the United States there are multifarious methods of procedure in existence. Thus in 1931 it was said that there were 269 different methods of judicial procedure in different classes of condemnation cases and 56 methods of nonjudicial or administrative procedure. First Report of Judicial Council of Michigan, 1931, § 46, pp. 55–56. These numbers have not decreased. Consequently, the general requirement of conformity to state practice and procedure, particularly where the condemnor is the United States, leads to expense, delay and uncertainty. In advocacy of a uniform federal rule, see Armstrong, Proposed Amendments to Federal Rules for Civil Procedure 1944, 4 F.R.D. 124, 134; id., Report of the Advisory Committee on Federal Rules of Civil Procedure Recommending Amendments, 1946, 5 F.R.D. 339, 357.

There are a great variety of Acts of Congress authorizing the exercise of the power of eminent domain by the United States and its officers and agencies. These statutes for the most part do not specify the exact procedure to be followed, but where procedure is prescribed, it is by no means uniform.

The following are instances of Acts which merely authorize the exercise of the power without specific declaration as to the procedure:

U.S.C., Title 16:

§ 404c-11 (Mammoth Cave National Park; acquisition of lands, interests in lands or other property for park by the Secretary of the Interior).

§ 426d (Stones River National Park; acquisition of land for parks by the Secretary of the Army).

§ 450aa (George Washington Carver National Monument; acquisition of land by the Secretary of the Interior).

§ 517 (National forest reservation; title to lands to be acquired by the Secretary of Agriculture).

U.S.C., Title 42:

§§ 1805(b)(5), 1813(b) (Atomic Energy Act).

The following are instances of Acts which authorized condemnation and declare that the procedure is to conform with that of similar actions in state courts:

U.S.C., Title 16:

§ 423k (Richmond National Battlefield Park; acquisition of lands by the Secretary of the Interior).

§ 714 (Exercise by water power licensee of power of eminent domain).

U.S.C., Title 24:

§ 78 (Condemnation of land for the former National Home for Disabled Volunteer Soldiers).

U.S.C., Title 33:

§ 591 (Condemnation of lands and materials for river and harbor improvement by the Secretary of the Army).

U.S.C., Title 40:

§ 257 (Condemnation of realty for sites for public building and for other public uses by the Secretary of the Treasury authorized).

§ 258 (Same procedure).

U.S.C., Title 50:

§ 171 (Acquisition of land by the Secretary of the Army for national defense).

§ 172 (Acquisition of property by the Secretary of the Army, etc., for production of lumber).

§ 632 App. (Second War Powers Act, 1942; acquisition of real property for war purposes by the Secretary of the Army, the Secretary of the Navy and others).

The following are Acts in which a more or less complete code of procedure is set forth in connection with the taking:

U.S.C., Title 16:

§ 831x (Condemnation by Tennessee Valley Authority).

U.S.C., Title 40:

§§ 361–386 (now D.C. Code, 1951 Ed., Title 16-619 to 16-644) (Acquisition of lands in District of Columbia for use of United States; condemnation).

3. Adjustment of Rule to Statutory Provisions. While it was apparent that the principle of uniformity should be the basis for a rule to replace the multiple diverse procedures set out above, there remained a serious question as to whether an exception could properly be made relative to the method of determining compensation. Where Congress had provided for conformity to state law the following were the general methods in use: an initial determination by commissioners, with appeal to a judge; an initial award, likewise made by commissioners, but with the appeal to a jury; and determination by a jury without a previous award by commissioners. In two situations Congress had specified the tribunal to determine the issue of compensation: condemnation by the Tennessee Valley Authority; and condemnation in the District of Columbia. Under the TVA procedure the initial determination of value is by three disinterested commissioners, appointed by the court, from a locality other than the one in which the land lies. Either party may except to the award of the commission; in that case the exceptions are to be heard by three district judges (unless the parties stipulate for a lesser number), with a right of appeal to the circuit court of appeals. The TVA is a regional agency. It is faced with the necessity of acquiring a very substantial acreage within a relatively small area, and charged with the task of carrying on within the Tennessee Valley and in cooperation with the local people a permanent program involving navigation and flood control, electric power, soil conservation, and general regional development. The success of this program is partially dependent upon the good will and cooperation of the people of the Tennessee Valley, and this in turn partially depends upon the land acquisition program. Disproportionate awards among landowners would create dissatisfaction and ill will. To secure uniformity in treatment Congress provided the rather unique procedure of the three-judge court to review de novo the initial award of the commissioners. This procedure has worked to the satisfaction of the property owners and the TVA. A full statement of the TVA position and experience is set forth in Preliminary Draft of Proposed Rule to Govern Condemnation Cases (June, 1947) 15–19. A large majority of the district judges with experience under this procedure approve it, subject to some objection to the requirement for a three-judge district court to review commissioners' awards. A statutory three-judge requirement is, however, jurisdictional and must be strictly followed. *Stratton* v. *St. Louis, Southwestern Ry. Co.*, 1930, 51 S.Ct. 8, 282 U.S. 10, 75 L.Ed. 135; *Ayrshire Collieries Corp.* v. *United States*, 1947, 67 S.Ct. 1168, 331 U.S. 132, 91 L.Ed. 1391. Hence except insofar as the TVA statute itself authorizes the parties to stipulate for a court of less than three judges, the requirement must be followed, and would seem to be beyond alteration by court rule even if change were thought desirable. Accordingly the TVA procedure is retained for the determination of compensation in TVA condemnation cases. It was also thought desirable to retain the specific method Congress had prescribed for the District of Columbia, which is a so-called jury of five appointed by the court. This is a local matter and the specific treatment accorded by Congress has given local satisfaction.

Aside from the foregoing limited exceptions dealing with the TVA and the District of Columbia, the question was whether a uniform method for determining compensation should be a commission with appeal to a district judge, or a commission with appeal to a jury, or a jury without a commission. Experience with the commission on a nationwide basis, and in particular with the utilization of a commission followed by an appeal to a jury, has been that the commission is time consuming and expensive. Furthermore, it is largely a futile procedure where it is preparatory to jury trial. Since in the bulk of states a land owner is entitled eventually to a jury trial, since the jury is a traditional tribunal for the determination of questions of value, and since experience with juries has proved satisfactory to both government and land owner, the right to jury trial is adopted as the general rule. Condemnation involving the TVA and the District of Columbia are the two exceptions. See Note to Subdivision (h), infra.

*Note to Subdivision (a).* As originally promulgated the Federal Rules governed appeals in condemnation proceedings but were not otherwise applicable. Rule 81(a)(7). Pre-appeal procedure, in the main, conformed to state procedure. See statutes and discussion, supra. The purpose of Rule 71A is to provide a uniform procedure for condemnation in the federal district courts, including the District of Columbia. To achieve this purpose Rule 71A prescribes such specialized procedure as is required by condemnation proceedings, otherwise it utilizes the general framework of the Federal Rules where specific detail is unnecessary. The adoption of Rule 71A, of course, renders paragraph (7) of Rule 81(a) unnecessary.

The promulgation of a rule for condemnation procedure is within the rule-making power. The Enabling Act [Act of June 19, 1934, c. 651, §§ 1, 2 (48 Stat. 1064), 28 U.S.C. former §§ 723b, 723c, now § 2072] gives the Supreme Court "the power to prescribe, by general rules * * * the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law." Such rules, however, must not abridge, enlarge, or modify substantive rights. In *Kohl* v. *United States*, 1875, 91 U.S. 367, 23 L.Ed. 449, a proceeding instituted by the United States to appropriate land for a post-office site under a statute enacted for such purpose, the Supreme Court held that "a proceeding to take land in virtue of the government's eminent domain, and determining the compensation to be made for it, is * * * a suit at common law, when initiated in a court." See also *Madisonville Traction Co.* v. *Saint Bernard Mining Co.*, 1905, 25 S.Ct. 251, 196 U.S. 239, 23 L.Ed. 449, infra, under subdivision (k). And the Conformity Act, 40 U.S.C. § 258, which is superseded by Rule 71A, deals only with "practice, pleadings, forms and proceedings and not with matters of substantive laws." *United States* v. *243.22 Acres of Land in Village of Farmingdale, Town of Babylon, Suffolk County, N.Y.*, D.C.N.Y. 1942, 43 F.Supp. 561, affirmed 129 F.2d 678, certiorari denied, 63 S.Ct. 441, 317 U.S. 698, 87 L.Ed. 558.

Rule 71A affords a uniform procedure for all cases of condemnation invoking the national power of eminent domain, and, to the extent stated in subdivision (k), for cases invoking a state's power of eminent domain; and supplants all statutes prescribing a different procedure. While the almost exclusive utility of the rule is for the condemnation of real property, it also applies to the condemnation of personal property, either as an incident to real property or as the sole object of the proceeding, when permitted or required by statute. See 38 U.S.C. § 438j (World War Veterans' Relief Act); 42 U.S.C. §§ 1805, 1811, 1813 (Atomic Energy Act); 50 U.S.C. § 79 (Nitrates Act); 50 U.S.C. §§ 161-166 (Helium Gas Act). Requisitioning of personal property with the right in the owner to sue the United States, where the compensation cannot be agreed upon (see 42 U.S.C. § 1813, supra, for example) will continue to be the normal method of acquiring personal property and Rule 71A in no way interferes with or restricts any such right. Only where the law requires or permits the formal procedure of condemnation to be utilized will the rule have any applicability to the acquisition of personal property.

Rule 71A is not intended to and does not supersede the Act of February 26, 1931, ch. 307, §§ 1-5 (46 Stat. 1421), 40 U.S.C. §§ 258a-258e, which is a supplementary condemnation statute, permissive in its nature and designed to permit the prompt acquisition of title by the United States, pending the condemnation proceeding, upon a deposit in court. See *United States* v. *76,800 Acres, More or Less, of Land, in Bryan and Liberty Counties, Ga.*, D.C.Ga. 1942, 44 F.Supp. 653; *United States* v. *17,280 Acres of Land, More or Less, Situated in Saunders County, Nebr.*, D.C.Neb. 1942, 47 F.Supp. 267. The same is true insofar as the following or any other statutes authorize the acquisition of title or the taking of immediate possession:

U.S.C., Title 33:

§ 594 (When immediate possession of land may be taken; for a work of river and harbor improvements).

U.S.C., Title 42:

§ 1813(b) (When immediate possession may be taken under Atomic Energy Act).

U.S.C., Title 50:

§ 171 (Acquisition of land by the Secretary of the Army for national defense).

§ 632 App. (Second War Powers Act, 1942; acquisition of real property for war purposes by the Secretary of the Army, the Secretary of the Navy, and others).

*Note to Subdivision* (*b*). This subdivision provides for broad joinder in accordance with the tenor of other rules such as Rule 18. To require separate condemnation proceedings for each piece of property separately owned would be unduly burdensome and would serve no useful purpose. And a restriction that only properties may be joined which are to be acquired for the same public use would also cause difficulty. For example, a unified project to widen a street, construct a bridge across a navigable river, and for the construction of approaches to the level of the bridge on both sides of the river might involve acquiring property for different public uses. Yet it is eminently desirable that the plaintiff may in one proceeding condemn all the property interests and rights necessary to carry out this project. Rule 21 which allows the court to sever and proceed separately with any claim against a party, and Rule 42(b) giving the court broad discretion to order separate trials give adequate protection to all defendants in condemnation proceedings.

*Note to Subdivision* (*c*). Since a condemnation proceeding is in rem and since a great many property owners are often involved, paragraph (1) requires the property to be named and only one of the owners. In other respects the caption will contain the name of the court, the title of the action, file number, and a designation of the pleading as a complaint in accordance with Rule 10(a).

Since the general standards of pleading are stated in other rules, paragraph (2) prescribes only the necessary detail for condemnation proceedings. Certain statutes allow the United States to acquire title or possession immediately upon commencement of an action. See the Act of February 26, 1931, ch. 307 §§ 1-5 (46 Stat. 1421), 40 U.S.C. §§ 258a-258e, supra; and 33 U.S.C. § 594, 42 U.S.C. § 1813(b), 50 U.S.C. §§ 171, 632, supra. To carry out the purpose of such statutes and to aid the condemnor in instituting the action even where title is not acquired at the outset, the plaintiff is initially required to join as defendants only the persons having or claiming an interest in the property whose names are then known. This in no way prejudices the property owner, who must eventually be joined as a defendant, served with process, and allowed to answer before there can be any hearing involving the compensation to be paid for his piece of property. The rule requires the plaintiff to name all persons having or claiming an interest in the property of whom the plaintiff has learned and, more importantly, those appearing of record. By charging the plaintiff with the necessity to make "a search of the records of the extent commonly made by competent searchers of title in the vicinity in light of the type and value of the property involved" both the plaintiff and property owner are protected. Where a short term interest in property of little value is involved, as a two or three year easement over a vacant land for purposes of ingress and egress to other property, a search of the records covering a long period of time is not required. Where on the other hand fee simple title in valuable property is being condemned the search must necessarily cover a much longer period of time and be commensurate with the interests involved. But even here the search is related to the type made by competent title searchers in the vicinity. A search that extends back to the original patent may be feasible in some midwestern and western states and be proper under certain circumstances. In the Atlantic seaboard states such a search is normally not feasible nor desirable. There is a common sense business accommodation of what title searchers can and should do. For state statutes requiring persons appearing as owners or otherwise interested in the property to be named as defendants, see 3 Colo. Stat. Ann., 1935, c. 61, § 2; Ill. Ann. Stat. (Smith-Hurd) c. 47, § 2; 1 Iowa Code, 1946, § 472.3; Kans. Stat. Ann., 1935, § 26-101; 2 Mass. Laws Ann., 1932, ch. 80A, § 4; 7 Mich. Stat. Ann., 1936, § 8.2; 2 Minn. Stat., Mason, 1927, § 6541; 20 N.J. Stat. Ann., 1939, § 1-2; 3 Wash. Revised Stat., Remington, 1932, Title 6, § 891. For state provisions allowing persons whose names are not known to be designated under the descriptive term of "unknown owner", see Hawaii Revised Laws, 1945, c. 8, § 310 ("such [unknown] defendant may be joined in the petition under a fictitious name."; Ill. Ann. Stat., Smith-Hurd), c. 47, § 2 ("Persons interested, whose names are unknown, may be made parties defendant by the description of the unknown owners; . . ."); Maryland Code Ann., 1939, Ar. 33A, § 1 ("In case any owner or owners is or are not known, he or they may be described in such petition as the unknown owner or owners, or the unknown heir or heirs of a deceased owner."); 2 Mass. Laws Ann., 1932, c. 80A, § 4 ("Persons not in being, unascertained or unknown who may have an interest in any of such land shall be made parties respondent by such description as seems appropriate, * * *"); New Mex. Stat. Ann., 1941, § 25-901 ("the owners * * * shall be parties defendant, by name, if the names are known, and by description of the unknown owners of the land therein described, if their names are unknown."); Utah Code Ann., 1943, § 104-61-7 ("The names of all owners and claimants of the property, if known, or a statement that they are unknown, who must be styled defendants").

The last sentence of paragraph (2) enables the court to expedite the distribution of a deposit, in whole or in part, as soon as pertinent facts of ownership, value and the like are established. See also subdivision (j).

The signing of the complaint is governed by Rule 11.

*Note to Subdivision* (*d*). In lieu of a summons, which is the initial process in other civil actions under Rule 4 (a), subdivision (d) provides for a notice which is to contain sufficient information so that the defendant in effect obtains the plaintiff's statement of his claim against the defendant to whom the notice is directed. Since the plaintiff's attorney is an officer of the court and to prevent unduly burdening the clerk of the court, paragraph (1) of subdivision (d) provides that plaintiff's attorney shall prepare and deliver a notice or notices to the clerk. Flexibility is provided by the provision for joint or several notices, and for additional notices. Where there are only a few defendants it may be convenient to prepare but one notice directed to all the defendants. In other cases where there are many defendants it will be more convenient to prepare two or more notices; but in any event a notice must be directed to each named defendant. Paragraph (2) provides that the notice is to be signed by the plaintiff's attorney. Since the notice is to be delivered to the clerk, the issuance of the notice will appear of record in the court. The clerk should forthwith deliver the notice or notices for service to the marshal or to a person specially appointed to serve the notice. Rule 4 (a). The form of the notice is such that, in addition to informing the defendant of the plaintiff's statement of claim, it tells the defendant precisely what his rights are. Failure on the part of the defendant to serve an answer constitutes a consent to the taking and to the authority of the court to proceed to fix compensation therefor, but it does not preclude the defendant from presenting evidence as to the amount of compensation due him or in sharing the award of distribution. See subdivision (e); Form 28.

While under Rule 4(f) the territorial limits of a summons are normally the territorial limits of the state in which the district court is held, the territorial limits for personal service of a notice under Rule 71A (d)(3) are those of the nation. This extension of process is here proper since the aim of the condemnation proceeding is not to enforce any personal liability and the property owner is helped, not imposed upon, by the best type of service possible. If personal service cannot be made either because the defendant's whereabouts cannot be ascertained, or, if ascertained, the defendant cannot be personally served, as where he resides in a foreign country such as Canada or Mexico, then service by publication is proper. The provisions for this type of service are set forth in the rule and are in no way governed by 28 U.S.C. § 118.

*Note to Subdivision (e).* Departing from the scheme of Rule 12, subdivision (e) requires all defenses and objections to be presented in an answer and does not authorize a preliminary motion. There is little need for the latter in condemnation proceedings. The general standard of pleading is governed by other rules, particularly Rule 8, and this subdivision (e) merely prescribes what matters the answer should set forth. Merely by appearing in the action a defendant can receive notice of all proceedings affecting him. And without the necessity of answering a defendant may present evidence as to the amount of compensation due him, and he may share in the distribution of the award. See also subdivision (d)(2); Form 28.

*Note to Subdivision (f).* Due to the number of persons who may be interested in the property to be condemned, there is a likelihood that the plaintiff will need to amend his complaint, perhaps many times, to add new parties or state new issues. This subdivision recognizes that fact and does not burden the court with applications by the plaintiff for leave to amend. At the same time all defendants are adequately protected; and their need to amend the answer is adequately protected by Rule 15, which is applicable by virtue of subdivision (a) of this Rule 71A.

*Note to Subdivision (g).* A condemnation action is a proceeding in rem. Commencement of the action as against a defendant by virtue of his joinder pursuant to subdivision (c)(2) is the point of cut-off and there is no mandatory requirement for substitution because of a subsequent change of interest, although the court is given ample power to require substitution. Rule 25 is inconsistent with subdivision (g) and hence inapplicable. Accordingly, the time periods of Rule 25 do not govern to require dismissal nor to prevent substitution.

*Note to Subdivision (h).* This subdivision prescribes the method for determining the issue of just compensation in cases involving the federal power of eminent domain. The method of jury trial provided by subdivision (h) will normally apply in cases involving the state power by virtue of subdivision (k).

Congress has specially constituted a tribunal for the trial of the issue of just compensation in two instances: condemnation under the Tennessee Valley Authority Act; and condemnation in the District of Columbia. These tribunals are retained for reasons set forth in the General Statement: 3. Adjustment of Rule to Statutory Provisions, supra. Subdivision (h) also has prospective application so that if Congress should create another special tribunal, that tribunal will determine the issue of just compensation. Subject to these exceptions the general method of trial of that issue is to be by jury if any party demands it, otherwise that issue, as well as all other issues, are to be tried by the court.

As to the TVA procedure that is continued, U.S.C., Title 16, § 831x requires that three commissioners be appointed to fix the compensation; that exceptions to their award are to be heard by three district judges (unless the parties stipulate for a lesser number) and that the district judges try the question de novo; that an appeal to the circuit court of appeals may be taken within 30 days from the filing of the decision of the district judges; and that the circuit court of appeals shall on the record fix compensation "without regard to the awards of findings theretofore made by the commissioners or the district judges." The mode of fixing compensation in the District of Columbia, which is also continued, is prescribed in U.S.C., Title 40, §§ 361-386. Under § 371 the court is required in all cases to order the selection of a jury of five from among not less than 20 names, drawn "from the special box provided by law." They must have the usual qualifications of jurors and in addition must be freeholders of the District, and not in the service of the United States or the District. A special oath is administered to the chosen jurors. The trial proceeds in the ordinary way, except that the jury is allowed to separate after they have begun to consider their verdict.

There is no constitutional right to jury trial in a condemnation proceeding. *Bauman* v. *Ross*, 1897, 17 S.Ct. 966, 167 U.S. 548, 42 L.Ed. 270. See, also, Hines, Does the Seventh Amendment to the Constitution of the United States Require Jury Trials in all Condemnation Proceedings? 1925, 11 Va.L.Rev. 505; Blair, Federal Condemnation Proceedings and the Seventh Amendment 1927, 41 Harv.L.Rev. 29; 3 Moore's Federal Practice 1938, 3007. Prior to Rule 71A, jury trial in federal condemnation proceedings was, however, enjoyed under the general conformity statute, 40 U.S.C. § 258, in states which provided for jury trial. See generally, 2 Lewis, Eminent Domain 3d ed. 1909, §§ 509, 510; 3 Moore, op. cit. supra. Since the general conformity statute is superseded by Rule 71A, see supra under subdivision (a), and since it was believed that the rule to be substituted should likewise give a right to jury trial, subdivision (h) establishes that method as the general one for determining the issue of just compensation.

*Note to Subdivision (i).* Both the right of the plaintiff to dismiss by filing a notice of dismissal and the right of the court to permit a dismissal are circumscribed to the extent that where the plaintiff has acquired the title or a lesser interest or possession, viz, any property interest for which just compensation should be paid, the action may not be dismissed, without the defendant's consent, and the property owner remitted to another court, such as the Court of Claims, to recover just compensation for the property right taken. Circuity of action is thus prevented without increasing the liability of the plaintiff to pay just compensation for any interest that is taken. Freedom of dismissal is accorded, where both the condemnor and condemnee agree, up to the time of the entry of judgment vesting plaintiff with title. And power is given to the court, where the parties agree, to vacate the judgment and thus revest title in the property owner. In line with Rule 21, the court may at any time drop a defendant who has been unnecessarily or improperly joined as where it develops that he has no interest.

*Note to Subdivision (j).* Whatever the substantive law is concerning the necessity of making a deposit will continue to govern. For statutory provisions concerning deposit in court in condemnation proceedings by the United States, see U.S.C., Title 40, § 258a; U.S.C., Title 33, § 594—acquisition of title and possession statutes referred to in note to subdivision (a), supra. If the plaintiff is invoking the state's power of eminent domain the necessity of deposit will be governed by the state law. For discussion of such law, see 1 Nichols, Eminent Domain, 2d ed. 1917, §§ 209-216. For discussion of the function of deposit and the power of the court to enter judgment in cases both of deficiency and overpayment, see *United States* v. *Miller*, 1943, 63 S.Ct. 276, 317 U.S. 369, 87 L.Ed. 336, 147 A.L.R. 55, rehearing denied, 63 S.Ct. 557, 318 U.S.

798, 87 L.Ed. 1162 (judgment in favor of plaintiff for overpayment ordered).

The court is to make distribution of the deposit as promptly as the facts of the case warrant. See also subdivision (c)(2).

*Note to Subdivision (k).* While the overwhelming number of cases that will be brought in the federal courts under this rule will be actions involving the federal power of eminent domain, a small percentage of cases may be instituted in the federal court or removed thereto on the basis of diversity or alienage which will involve the power of eminent domain under the law of a state. See *Boom Co.* v. *Patterson*, 1878, 98 U.S. 403, 25 L.Ed. 206; *Searl* v. *School District No. 2*, 1888, 8 S.Ct. 460, 124 U.S. 197, 31 L.Ed. 415; *Madisonville Traction Co.* v. *Saint Bernard Mining Co.*, 1905, 25 S.Ct. 251, 196 U.S. 239, 49 L.Ed. 462. In the Madisonville case, and in cases cited therein, it has been held that condemnation actions brought by state corporations in the exercise of a power delegated by the state might be governed by procedure prescribed by the laws of the United States, whether the cases were begun in or removed to the federal court. See also *Franzen* v. *Chicago, M. & St. P. Ry. Co.*, C.C.A.7th, 1921, 278 F. 370, 372.

Any condition affecting the substantial right of a litigant attached by state law is to be observed and enforced, such as making a deposit in court where the power of eminent domain is conditioned upon so doing. (See also subdivision (j)). Subject to this qualification, subdivision (k) provides that in cases involving the state power of eminent domain, the practice prescribed by other subdivisions of Rule 71A shall govern.

*Note to Subdivision (l).* Since the condemnor will normally be the prevailing party and since he should not recover his costs against the property owner, Rule 54(d), which provides generally that costs shall go to the prevailing party, is made inapplicable. Without attempting to state what the rule on costs is, the effect of subdivision (l) is that costs shall be awarded in accordance with the law that has developed in condemnation cases. This has been summarized as follows: "Costs of condemnation proceedings are not assessable against the condemnee, unless by stipulation he agrees to assume some or all of them. Such normal expenses of the proceeding as bills for publication of notice, commissioners' fees, the cost of transporting commissioners and jurors to take a view, fees for attorneys to represent defendants who have failed to answer, and witness' fees, are properly charged to the government, though not taxed as costs. Similarly, if it is necessary that a conveyance be executed by a commissioner, the United States pay his fees and those for recording the deed. However, the distribution of the award is a matter in which the United States has no legal interest. Expenses incurred in ascertaining the identity of distributees and deciding between conflicting claimants are properly chargeable against the award, not against the United States, although United States attorneys are expected to aid the court in such matters as amici curiae." Lands Division Manual 861. For other discussion and citation, see *Grand River Dam Authority* v. *Jarvis*, C.C.A.10th, 1942, 124 F.2d 914. Costs may not be taxed against the United States except to the extent permitted by law. *United States* v. *125.71 Acres of Land in Loyalhanna Tp., Westmoreland County, Pa.*, D.C.Pa. 1944, 54 F.Supp. 193; Lands Division Manual 859. Even if it were thought desirable to allow the property owner's costs to be taxed against the United States, this is a matter for legislation and not court rule.

#### NOTES OF ADVISORY COMMITTEE ON 1963 AMENDMENT TO RULES

This amendment conforms to the amendment of Rule 4(f).

#### CROSS REFERENCES

Condemnation of property, right of Government officials, see section 257 of Title 40, Public Buildings, Property, and Works.

District of Columbia, procedure in condemnation proceedings, see D.C. Code, §§ 16-1351 to 16-1368

Jurisdiction and venue in condemnation proceedings, see sections 1358 and 1403 of this title.

Possession and title, taking in advance of final judgment, see sections 258a to 258f of Title 40, Public Buildings, Property, and Works.

Reclamation projects, compensation for rights-of-way, see section 945b of Title 43, Public Lands.

Tennessee Valley Authority, procedure in condemnation proceedings, see section 831x of Title 16, Conservation.

### [Rules 72 to 76. Abrogated, Dec. 4, 1967, Effective July 1, 1968]

#### NOTES OF ADVISORY COMMITTEE ON RULES

These [Rules 72-76] are the civil rules relating to appeals, the provisions of which, except for Rule 73(h), are transferred to and covered by the Federal Rules of Appellate Procedure and (in the case of Rule 72) by the Rules of the Supreme Court. The substance of Rule 73(h) is to be transferred to Rule 9(h).

## TITLE X—DISTRICT COURTS AND CLERKS

### Rule 77. District Courts and Clerks

#### (a) District courts always open

The district courts shall be deemed always open for the purpose of filing any pleading or other proper paper, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, and rules.

#### (b) Trials and hearings; orders in chambers

All trials upon the merits shall be conducted in open court and so far as convenient in a regular court room. All other acts or proceedings may be done or conducted by a judge in chambers, without the attendance of the clerk or other court officials and at any place either within or without the district; but no hearing, other than one ex parte, shall be conducted outside the district without the consent of all parties affected thereby.

#### (c) Clerk's office and orders by clerk

The clerk's office with the clerk or a deputy in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays, but a district court may provide by local rule or order that its clerk's office shall be open for specified hours on Saturdays or particular legal holidays other than New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, and Christmas Day. All motions and applications in the clerk's office for issuing mesne process, for issuing final process to enforce and execute judgments, for entering defaults or judgments by default, and for other proceedings which do not require allowance or order of the court are grantable of course by the clerk; but his action may be suspended or altered or rescinded by the court upon cause shown.

#### (d) Notice of orders or judgments

Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and shall make a note in the docket of the mailing. Such mailing is sufficient notice for all purposes for which notice of the entry of an order is required by these rules; but any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Dec. 4, 1967, eff. July 1, 1968; Mar. 1, 1971, eff. July 1, 1971.)

### Notes of Advisory Committee on Rules

This rule states the substance of U.S.C., Title 28, formerly § 13 (now § 452) (Courts open as courts of admiralty and equity). Compare former Equity Rules 1 (District Court Always Open For Certain Purposes—Orders at Chambers), 2 (Clerk's Office Always Open, Except, Etc.), 4 (Notice of Orders), and 5 (Motions Grantable of Course by Clerk).

### Notes of Advisory Committee on 1946 Amendment to Rules

*Note.* Rule 77(d) has been amended to avoid such situations as the one arising in *Hill* v. *Hawes*, 1944, 320 U.S. 520. In that case, an action instituted in the District Court for the District of Columbia, the clerk failed to give notice of the entry of a judgment for defendant as required by Rule 77(d). The time for taking an appeal then was 20 days under Rule 10 of the Court of Appeals (later enlarged by amendment to thirty days), and due to lack of notice of the entry of judgment the plaintiff failed to file his notice of appeal within the prescribed time. On this basis the trial court vacated the original judgment and then reentered it, whereupon notice of appeal was filed. The Court of Appeals dismissed the appeal as taken too late. The Supreme Court, however, held that although Rule 77(d) did not purport to attach any consequence to the clerk's failure to give notice as specified, the terms of the rule were such that the appellant was entitled to rely on it, and the trial court in such a case, in the exercise of a sound discretion, could vacate the former judgment and enter a new one, so that the appeal would be within the allowed time.

Because of Rule 6(c), which abolished the old rule that the expiration of the term ends a court's power over its judgment, the effect of the decision in *Hill* v. *Hawes* is to give the district court power, in its discretion and without time limit, and long after the term may have expired, to vacate a judgment and reenter it for the purpose of reviving the right of appeal. This seriously affects the finality of judgments. See also proposed Rule 6(c) and Note; proposed Rule 60(b) and Note; and proposed Rule 73(a) and Note.

Rule 77(d) as amended makes it clear that notification by the clerk of the entry of a judgment has nothing to do with the starting of the time for appeal; that time starts to run from the date of entry of judgment and not from the date of notice of the entry. Notification by the clerk is merely for the convenience of litigants. And lack of such notification in itself has no effect upon the time for appeal; but in considering an application for extension of time for appeal as provided in Rule 73(a), the court may take into account, as one of the factors affecting its decision, whether the clerk failed to give notice as provided in Rule 77(d) or the party failed to receive the clerk's notice. It need not, however, extend the time for appeal merely because the clerk's notice was not sent or received. It would, therefore, be entirely unsafe for a party to rely on absence of notice from the clerk of the entry of a judgment, or to rely on the adverse party's failure to serve notice of the entry of a judgment. Any party may, of course, serve timely notice of the entry of a judgment upon the adverse party and thus preclude a successful application, under Rule 73(a), for the extension of the time for appeal.

### Notes of Advisory Committee on 1963 Amendment to Rules

Subdivision (c). The amendment authorizes closing of the clerk's office on Saturday as far as civil business is concerned. However, a district court may require its clerk's office to remain open for specified hours on Saturdays or "legal holidays" other than those enumerated. ("Legal holiday" is defined in Rule 6(a), as amended.) The clerk's offices of many district courts have customarily remained open on some of the days appointed as holidays by State law. This practice could be continued by local rule or order.

Subdivision (d). This amendment conforms to the amendment of Rule 5(a). See the Advisory Committee's Note to that amendment.

### Notes of Advisory Committee on 1968 Amendment to Rules

The provisions of Rule 73(a) are incorporated in Rule 4(a) of the Federal Rules of Appellate Procedure.

### Notes of Advisory Committee on 1971 Amendment to Rules

The amendment adds Columbus Day to the list of legal holidays. See the Note accompanying the amendment of Rule 6(a).

### References in Text

The Federal Rules of Appellate Procedure, referred to in text, are set out in the Appendix to this title.

### Cross References

Books and records kept by clerk and entries therein, see rule 79.

Courts always open, see section 452 of this title.

Entry of default judgment by clerk, see rule 55.

Execution, see rule 69.

Service of papers on attorney or party, see rule 5.

### Federal Rules of Criminal Procedure

Courts always open, see rule 56, Title 18, Appendix, Crimes and Criminal Procedure.

## Rule 78. Motion Day

Unless local conditions make it impracticable, each district court shall establish regular times and places, at intervals sufficiently frequent for the prompt dispatch of business, at which motions requiring notice and hearing may be heard and disposed of; but the judge at any time or place and on such notice, if any, as he considers reasonable may make orders for the advancement, conduct, and hearing of actions.

To expedite its business, the court may make provision by rule or order for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition.

### Notes of Advisory Committee on Rules

Compare former Equity Rule 6 (Motion Day) with the first paragraph of this rule. The second paragraph authorizes a procedure found helpful for the expedition of business in some of the Federal and State courts. See Rule 43(e) of these rules dealing with evidence on motions. Compare Civil Practice Rules of the Municipal Court of Chicago (1935), Rules 269, 270, 271.

### Cross References

Local rules not to be inconsistent with these rules, see rule 83.

Motions and other papers, see rule 7.

Service of affidavits in support of and in opposition to motions, see rule 6.

Time for noticing motions, see rule 6.

Use of affidavits on motions, see rule 43.

FEDERAL RULES OF CRIMINAL PROCEDURE

Motions, see rules 45, 47, 49, Title 18, Appendix, Crimes and Criminal Procedure.

## Rule 79. Books and Records Kept by the Clerk and Entries Therein

### (a) Civil docket

The clerk shall keep a book known as "civil docket" of such form and style as may be prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States, and shall enter therein each civil action to which these rules are made applicable. Actions shall be assigned consecutive file numbers. The file number of each action shall be noted on the folio of the docket whereon the first entry of the action is made. All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be entered chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number. These entries shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The entry of an order or judgment shall show the date the entry is made. When in an action trial by jury has been properly demanded or ordered the clerk shall enter the word "jury" on the folio assigned to that action.

### (b) Civil judgments and orders

The clerk shall keep, in such form and manner as the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States may prescribe, a correct copy of every final judgment or appealable order, or order affecting title to or lien upon real or personal property, and any other order which the court may direct to be kept.

### (c) Indices; calendars

Suitable indices of the civil docket and of every civil judgment and order referred to in subdivision (b) of this rule shall be kept by the clerk under the direction of the court. There shall be prepared under the direction of the court calendars of all actions ready for trial, which shall distinguish "jury actions" from "court actions."

### (d) Other books and records of the clerk

The clerk shall also keep such other books and records as may be required from time to time by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States.

(As amended Dec. 27, 1946, eff. March 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Jan. 21, 1963, eff. July 1, 1963.)

NOTES OF ADVISORY COMMITTEE ON RULES

Compare Equity Rule 3 (Books Kept by Clerk and Entries Therein). In connection with this rule, see also the following statutes of the United States:

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| U.S.C., Title 5: | |
| § 301 | (Officials for investigation of official acts, records and accounts of marshals, attorneys, clerks of courts, United States commissioners, referees and trustees) |
| § 318 | (Accounts of district attorneys) |
| U.S.C., Title 28, former: | |
| § 556 | (Clerks of district courts; books open to inspection) |
| § 567 | (Same; accounts) |
| § 568 | (Same; reports and accounts of moneys received; dockets) |
| § 813 | (Indices of judgment debtors to be kept by clerks) |

And see "Instructions to United States Attorneys, Marshals, Clerks and Commissioners" issued by the Attorney General of the United States.

NOTES OF ADVISORY COMMITTEE ON 1946 AMENDMENT TO RULES

*Note. Subdivision (a).* The amendment substitutes the Director of the Administrative Office of the United States Courts, acting subject to the approval of the Judicial Conference of Senior Circuit Judges, in the place of the Attorney General as a consequence of and in accordance with the provisions of the act establishing the Administrative Office and transferring functions thereto. Act of August 7, 1939, ch. 501, §§ 1–7, 53 Stat. 1223, 28 U.S.C. formerly §§ 444–450 (now §§ 601–610).

*Subdivision (b).* The change in this subdivision does not alter the nature of the judgments and orders to be recorded in permanent form but it does away with the express requirement that they be recorded in a book. This merely gives latitude for the preservation of court records in other than book form, if that shall seem advisable, and permits with the approval of the Judicial Conference and adoption of such modern, space-saving methods as microphotography. See Proposed Improvements in the Administration of the Offices of Clerks of United States District Courts, prepared by the Bureau of the Budget, 1941, 38–42. See also Rule 55, Federal Rules of Criminal Procedure [following section 687 of Title 18 U.S.C.].

*Subdivision (c).* The words "Separate and" have been deleted as unduly rigid. There is no sufficient reason for requiring that the indices in all cases be separate; on the contrary, the requirement frequently increases the labor of persons searching the records as well as the labor of the clerk's force preparing them. The matter should be left to administrative discretion. The other changes in the subdivision merely conform with those made in subdivision (b) of the rule.

*Subdivision (d).* Subdivision (d) is a new provision enabling the Administrative Office, with the approval of the Judicial Conference, to carry out any improvements in clerical procedure with respect to books and records which may be deemed advisable. See report cited in Note to subdivision (b), supra.

NOTES OF ADVISORY COMMITTEE ON 1963 AMENDMENT TO RULES

The terminology is clarified without any change of the prescribed practice. See amended Rule 58, and the Advisory Committee's Note thereto.

AMENDMENTS

1948—The amendment effective October 1949 substituted the name, "Judicial Conference of the United States," for "Judicial Conference of Senior Circuit Judges," in the first sentence of subdivision (a), and in subdivisions (b) and (d).

CROSS REFERENCES

Entry of judgment, see rule 58.

Examination of court dockets by Director of Administrative Office of the United States Courts, see section 604 of this title.

Filing of pleading and other papers with clerk or judge, see rule 5.

Lien of judgment, see section 1962 of this title.

Notice of entry of judgment or order, see rule 77.

Obsolete papers disposed of in accordance with rules of Judicial Conference of the United States, see section 457 of this title.

Registration of judgments for money or property in other districts, see section 1963 of this title.

Return of execution of process, see rule 4.

Survey and recommendation of Judicial Conference of the United States, see section 331 of this title.

Time for serving demand for jury trial, see rule 38.

### Federal Rules of Criminal Procedure

Notice of entry of orders by clerk, see rule 49, Title 18, Appendix, Crimes and Criminal Procedure.

Records, see rule 55.

## Rule 80. Stenographer; Stenographic Report or Transcript as Evidence

**[(a), (b) Abrogated]**

**(c) Stenographic report or transcript as evidence**

Whenever the testimony of a witness at a trial or hearing which was stenographically reported is admissible in evidence at a later trial, it may be proved by the transcript thereof duly certified by the person who reported the testimony.

(As amended Dec. 27, 1946, eff. March 19, 1948.)

### Notes of Advisory Committee on Rules

*Note to Subdivision* (a). This follows substantially former Equity Rule 50 (Stenographer—Appointment—Fees). [This subdivision was abrogated. See amendment note of Advisory Committee below.]

*Note to Subdivision* (b). See Reports of Conferences of Senior Circuit Judges with the Chief Justice of the United States (1936), 22 A.B.A.J. 818, 819; (1937), 24 A.B.A.J. 75, 77. [This subdivision was abrogated. See amendment note of Advisory Committee below.]

*Note to Subdivision* (c). Compare Iowa Code (1935) § 11353.

### Notes of Advisory Committee on Amendments to Rules

*Note.* Subdivisions (a) and (b) of Rule 80 have been abrogated because of Public Law 222, 78th Cong., ch. 3, 2d Sess., approved Jan. 20, 1944, 28 U.S.C. formerly § 9a (now §§ 550, 604, 753, 1915, 1920), providing for the appointment of official stenographers for each district court, prescribing their duties, providing for the furnishing of transcripts, the taxation of the fees therefor as costs and other related matters. This statute has now been implemented by Congressional appropriation available for the fiscal year beginning July 1, 1945.

Subdivision (c) of Rule 80 (Stenographic Report or Transcript as Evidence) has been retained unchanged.

### Cross References

Appointment and compensation of court reporters, see section 753 of this title.

Fees for transcripts of court reporters, see section 753 of this title.

Fees of court reporter for stenographic transcript taxable as costs, see section 1920 of this title.

Payment by United States for fees for transcripts and printing record on appeal furnished persons proceeding in forma pauperis, see sections 753 and 1915 of this title.

Proof of official record, see rule 44.

# TITLE XI—GENERAL PROVISIONS

## Rule 81. Applicability in General

**(a) To what proceedings applicable**

(1) These rules do not apply to prize proceedings in admiralty governed by Title 10, U.S.C. §§ 7651-7681. They do not apply to proceedings in bankruptcy or proceedings in copyright under Title 17, U.S.C., except insofar as they may be made applicable thereto by rules promulgated by the Supreme Court of the United States. They do not apply to mental health proceedings in the United States District Court for the District of Columbia.

(2) These rules are applicable to proceedings for admission to citizenship, habeas corpus, and quo warranto, to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in civil actions. The writ of habeas corpus, or order to show cause, shall be directed to the person having custody of the person detained. It shall be returned within 3 days unless for good cause shown additional time is allowed which in cases brought under 28 U.S.C. § 2254 shall not exceed 40 days, and in all other cases shall not exceed 20 days.

(3) In proceedings under Title 9, U.S.C., relating to arbitration, or under the Act of May 20, 1926, ch. 347, § 9 (44 Stat. 585), U.S.C., Title 45, § 159, relating to boards of arbitration of railway labor disputes, these rules apply only to the extent that matters of procedure are not provided for in those statutes. These rules apply to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings.

(4) These rules do not alter the method prescribed by the Act of February 18, 1922, ch. 57, § 2 (42 Stat. 388), U.S.C., Title 7, § 292; or by the Act of June 10, 1930, ch. 436, § 7 (46 Stat. 534), as amended, U.S.C., Title 7, § 499g(c), for instituting proceedings in the United States district courts to review orders of the Secretary of Agriculture; or prescribed by the Act of June 25, 1934, ch. 742, § 2 (48 Stat. 1214), U.S.C., Title 15, § 522, for instituting proceedings to review orders of the Secretary of the Interior; or prescribed by the Act of February 22, 1935, ch. 18, § 5 (49 Stat. 31), U.S.C., Title 15, § 715d(c), as extended, for instituting proceedings to review orders of petroleum control boards; but the conduct of such proceedings in the district courts shall be made to conform to these rules as far as applicable.

(5) These rules do not alter the practice in the United States district courts prescribed in the Act of July 5, 1935, ch. 372, §§ 9 and 10 (49 Stat. 453), as amended, U.S.C., Title 29, §§ 159 and 160, for beginning and conducting proceedings to enforce orders of the National Labor Relations Board; and in respects not covered by those statutes, the practice in the district courts shall conform to these rules so far as applicable.

(6) These rules apply to proceedings for enforcement or review of compensation orders under the Longshoremen's and Harbor Work-

ers' Compensation Act, Act of March 4, 1927, c. 509, §§ 18, 21 (44 Stat. 1434, 1436), as amended, U.S.C., Title 33, §§ 918, 921, except to the extent that matters of procedure are provided for in that Act. The provisions for service by publication and for answer in proceedings to cancel certificates of citizenship under the Act of June 27, 1952, ch. 477, title III, ch. 2, § 340 (66 Stat. 260), U.S.C., Title 8, § 1451, remain in effect.

[(7) Abrogated, eff. Aug. 1, 1951. Supreme Court Order, April 30, 1951]

**(b) Scire facias and mandamus**

The writs of scire facias and mandamus are abolished. Relief heretofore available by mandamus or scire facias may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules.

**(c) Removed actions**

These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal. Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, he shall answer or present the other defenses or objections available to him under these rules within 20 days after the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based, or within 20 days after the service of summons upon such initial pleading, then filed, or within 5 days after the filing of the petition for removal, whichever period is longest. If at the time of removal all necessary pleadings have been served, a party entitled to trial by jury under Rule 38 shall be accorded it, if his demand therefor is served within 10 days after the petition for removal is filed if he is the petitioner, or if he is not the petitioner within 10 days after service on him of the notice of filing the petition. A party who, prior to removal, has made an express demand for trial by jury in accordance with state law, need not make a demand after removal. If state law applicable in the court from which the case is removed does not require the parties to make express demands in order to claim trial by jury, they need not make demands after removal unless the court directs that they do so within a specified time if they desire to claim trial by jury. The court may make this direction on its own motion and shall do so as a matter of course at the request of any party. The failure of a party to make demand as directed constitutes a waiver by him of trial by jury.

**[(d) Abrogated, eff. Oct. 20, 1949. Supreme Court Order, Dec. 29, 1948]**

**(e) Law applicable**

Whenever in these rules the law of the state in which the district court is held is made applicable, the law applied in the District of Columbia governs proceedings in the United States District Court for the District of Columbia. When the word "state" is used, it includes, if appropriate, the District of Columbia. When the term "statute of the United States" is used, it includes, so far as concerns proceedings in the United States District Court for the District of Columbia, any Act of Congress locally applicable to and in force in the District of Columbia. When the law of a state is referred to, the word "law" includes the statutes of that state and the state judicial decisions construing them.

**(f) References to officer of the United States**

Under any rule in which reference is made to an officer or agency of the United States, the term "officer" includes a district director of internal revenue, a former district director or collector of internal revenue, or the personal representative of a deceased district director or collector of internal revenue.

(As amended Dec. 28, 1939, eff. Apr. 3, 1941; Dec. 27, 1946, eff. March 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Dec. 4, 1967, eff. July 1, 1968; Mar. 1, 1971, eff. July 1, 1971.)

### NOTES OF ADVISORY COMMITTEE ON RULES

*Note to Subdivision* (*a*). Paragraph (1): Compare the enabling act, act of June 19, 1934, U.S.C., Title 28, formerly § 723b (now § 2072) (Rules in actions at law; Supreme Court authorized to make) and formerly § 723c (now § 2072) (Union of equity and action at law rules; power of Supreme Court). For the application of these rules in bankruptcy and copyright proceedings, see Orders xxxvi and xxxvii in Bankruptcy and Rule 1 of Rules of Practice and Procedure under § 25 of the copyright act, act of March 4, 1909, U.S.C., Title 17, § 25 (now § 101) (Infringement and rules of procedure).

For examples of statutes which are preserved by paragraph (2) see: U.S.C., Title 8, ch. 9 (Naturalization); Title 28, former ch. 14 (Habeas corpus); Title 28, former §§ 377a–377c (Quo warranto); and such forfeiture statutes as U.S.C., Title 7, former § 116 (Misbranded seeds, confiscation), and Title 21, formerly § 14 (now § 334(b)) (Pure Food and Drug Act—condemnation of adulterated or misbranded food; procedure). See also *443 Cans of Frozen Eggs Product* v. *U.S.*, 226 U.S. 172, 33 S. Ct. 50, 57 L. Ed. 174 (1912).

For examples of statutes which under paragraph (7) will continue to govern procedure in condemnation cases, see U.S.C., Title 40, § 258 (Condemnation of realty for sites for public building, *etc.*, procedure); U.S.C., Title 16, § 831x (Condemnation by Tennessee Valley Authority); U.S.C., Title 40, § 120 (Acquisition of lands for public use in District of Columbia); Title 40, ch. 7 (Acquisition of lands in District of Columbia for use of United States; condemnation).

*Note to Subdivision* (*b*). Some statutes which will be affected by this subdivision are:

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| U.S.C., Title 7: | |
| § 222 | (Federal Trade Commission powers adopted for enforcement of Stockyards Act) (By reference to Title 15, § 49) |
| U.S.C., Title 15: | |
| § 49 | (Enforcement of Federal Trade Commission orders and antitrust laws) |
| § 77t(c) | (Enforcement of Securities and Exchange Commission orders and Securities Act of 1933) |
| § 78u(f) | (Same; Securities Exchange Act of 1934) |
| § 79r(g) | (Same; Public Utility Holding Company Act of 1935) |
| U.S.C., Title 16: | |
| § 820 | (Proceedings in equity for revocation or to prevent violations of license of Federal Power Commission licensee) |
| § 825m/b | Mandamus to compel compliance with Federal Water Power Act, etc.) |
| U.S.C., Title 19: | |
| § 1333(c) | (Mandamus to compel compliance with orders of Tariff Commission, etc.) |

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| U.S.C., Title 28, former: | |
| § 377 | (Power to issue writs) |
| § 572 | (Fees, attorneys, solicitors and proctors) |
| § 778 | (Death of parties; substitution of executor or administrator). Compare Rule 25 (a) (Substitution of parties; death), and the note thereto. |
| U.S.C., Title 33: | |
| § 495 | (Removal of bridges over navigable waters) |
| U.S.C., Title 45: | |
| § 88 | (Mandamus against Union Pacific Railroad Company) |
| § 153(p) | (Mandamus to enforce orders of Adjustment Board under Railway Labor Act) |
| § 185 | (Same; National. Air Transport Adjustment Board) (By reference to § 153) |
| U.S.C., Title 47: | |
| § 11 | (Powers of Federal Communications Commission) |
| § 401(a) | (Enforcement of Federal Communications Act and orders of Commission) |
| § 406 | (Same; compelling furnishing of facilities; mandamus) |
| U.S.C., Title 49: | |
| § 19a(*l*) | (Mandamus to compel compliance with Interstate Commerce Act) |
| § 20(9) | (Jurisdiction to compel compliance with interstate commerce laws by mandamus) |

For comparable provisions in state practice see Ill. Rev. Stat. (1937), ch. 110, § 179; Calif. Code Civ. Proc. (Deering, 1937) § 802.

*Note to Subdivision* (*c*). Such statutes as the following dealing with the removal of actions are substantially continued and made subject to these rules:

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| U.S.C., Title 28, former: | |
| § 71 | (Removal of suits from state courts) |
| § 72 | (Same; procedure) |
| § 73 | (Same; suits under grants of land from different states) |
| § 74 | (Same; causes against persons denied civil rights) |
| § 75 | (Same; petitioner in actual custody of state court) |
| § 76 | (Same; suits and prosecutions against revenue officers) |
| § 77 | (Same; suits by aliens) |
| § 78 | (Same; copies of records refused by clerk of state court) |
| § 79 | (Same; previous attachment bonds or orders) |
| § 80 | (Same; dismissal or remand) |
| § 81 | (Same; proceedings in suits removed) |
| § 82 | (Same; record; filing and return) |
| § 83 | (Service of process after removal) |

U.S.C., Title 28, formerly § 72 (now §§ 1446, 1447), *supra*, however, is modified by shortening the time for pleading in removed actions.

*Note to Subdivision* (*e*). The last sentence of this subdivision modifies U.S.C., Title 28, formerly § 725 (now § 1652) (Laws of States as rules of decision) in so far as that statute has been construed to govern matters of procedure and to exclude state judicial decisions relative thereto.

### NOTES OF ADVISORY COMMITTEE ON 1946 AMENDMENT TO RULES

*Note to Subdivision* (*a*). Despite certain dicta to the contrary, *Lynn* v. *United States*, C.C.A.5th, 1940, 110 F.2d 586; *Mount Tivy Winery, Inc.* v. *Lewis*, N.D.Cal. 1942, 42 F.Supp. 636, it is manifest that the rules apply to actions against the United States under the Tucker Act [28 U.S.C., formerly §§ 41(20), 250, 251, 254, 257, 258, 287, 289, 292, 761–765 (now §§ 791, 1346, 1401, 1402, 1491, 1493, 1496, 1501, 1503, 2071, 2072, 2411, 2412, 2501, 2506, 2509, 2510)]. See United States to use of *Foster Wheeler Corp.* v. *American Surety Co. of New York*, E.D.N.Y. 1939, 25 F.Supp. 700; *Boerner* v. *United States*, E.D.N.Y. 1939, 26 F.Supp. 769; *United States* v. *Gallagher*, C.C.A.9th, 1945, 151 F.2d 556. Rules 1 and 81 provide that the rules shall apply to all suits of a civil nature, whether cognizable as cases at law or in equity, except those specifically excepted; and the character of the various proceedings excepted by express statement in Rule 81, as well as the language of the rules generally, shows that the term "civil action" [Rule 2] includes actions against the United States. Moreover, the rules in many places expressly make provision for the situation wherein the United States is a party as either plaintiff or defendant. See Rules 4(d)(4), 12(a), 13(d), 25(d), 37(f), 39(c), 45(c), 54(d), 55(e), 62(e), and 65(c). In *United States* v. *Sherwood*, 1941, 312 U.S. 584, 61 S.Ct. 767, the Solicitor General expressly conceded in his brief for the United States that the rules apply to Tucker Act cases. The Solicitor General stated: "The Government, of course, recognizes that the Federal Rules of Civil Procedure apply to cases brought under the Tucker Act." (Brief for the United States, p. 31). Regarding *Lynn* v. *United States*, *supra*, The Solicitor General said: "In *Lynn* v. *United States* * * * the Circuit Court of Appeals for the Fifth Circuit went beyond the Government's contention there, and held that an action under the Tucker Act is neither an action at law nor a suit in equity and, seemingly, that the Federal Rules of Civil Procedure are, therefore, inapplicable. We think the suggestion is erroneous. Rules 4(d), 12(a), 39(c), and 55(e) expressly contemplate suits against the United States, and nothing in the enabling Act (48 Stat. 1064, 28 U.S.C. formerly §§ 723b, 723c (now § 2072)) suggests that the Rules are inapplicable to Tucker Act proceedings, which in terms are to accord with court rules and their subsequent modifications (Sec. 4, Act of March 3, 1887, 24 Stat. 505, 28 U.S.C., formerly § 761 (now §§ 2071, 2072))." (Brief for the United States, p. 31, n. 17.)

*United States* v. *Sherwood*, *supra*, emphasizes, however, that the application of the rules in Tucker Act cases affects only matters of procedure and does not operate to extend jurisdiction. See also Rule 82. In the Sherwood case, the New York Supreme Court, acting under § 795 of the New York Civil Practice Act, made an order authorizing Sherwood, as a judgment creditor, to maintain a suit under the Tucker Act to recover damages from the United States for breach of its contract with the judgment debtor, Kaiser, for construction of a post office building. Sherwood brought suit against the United States and Kaiser in the District Court for the Eastern District of New York. The question before the United States Supreme Court was whether a United States District Court had jurisdiction to entertain a suit against the United States wherein private parties were joined as parties defendant. It was contended that either the Federal Rules of Civil Procedure or the Tucker Act, or both, embodied the consent of the United States to be sued in litigations in which issues between the plaintiff and third persons were to be adjudicated. Regarding the effect of the Federal Rules, the Court declared that nothing in the rules, so far as they may be applicable in Tucker Act cases, authorized the maintenance of any suit against the United States to which it had not otherwise consented. The matter involved was not one of procedure but of jurisdiction, the limits of which were marked by the consent of the United States to be sued. The jurisdiction thus limited is unaffected by the Federal Rules of Civil Procedure.

*Subdivision* (*a*)(*2*). The added sentence makes it clear that the rules have not superseded the requirements of U.S.C. Title 28, formerly § 466 (now § 2253). *Schenk* v. *Plummer*, C.C.A. 9th 1940, 113 F. 2d 726.

For correct application of the rules in proceedings for forfeiture of property for violation of a statute of the United States, such as under U.S.C., Title 22, § 405 (seizure of war materials intended for unlawful export) or U.S.C., Title 21, § 334(b) (Federal Food, Drug, and Cosmetic Act; formerly Title 21, U.S.C. § 14, Pure Food and Drug Act), see *Reynal* v. *United States*, C.C.A.5th, 1945, 153 F.2d 929; *United States* v. *108 Boxes of Cheddar Cheese*, S.D.Iowa 1943, 3 F.R.D. 40.

*Subdivision* (*a*)(*3*). The added sentence makes it clear that the rules apply to appeals from proceedings to enforce administrative subpoenas. See *Perkins* v. *Endicott Johnson Corp.*, C.C.A. 2d 1942; 128 F. 2d 208, aff'd on other grounds, 1943, 317 U.S. 501, 63 S. Ct. 339; *Walling* v. *News Printing, Inc.*, C.C.A. 3d, 1945, 148 F. 2d 57; *McCrone* v. *United States*, 1939, 307 U.S. 61, 59 S. Ct. 685. And, although the provision allows full recognition of the fact that the rigid application of the rules in the proceedings themselves may conflict with the summary determination desired, *Goodyear Tire & Rubber Co.* v. *National Labor Relations Board*, C.C.A. 6th, 1941, 122 F. 2d 450; *Cudahy Packing Co.* v. *National Labor Relations Board*, C.C.A. 10th, 1941, 117 F. 2d 692, it is drawn so as to permit application of any of the rules in the proceedings whenever the district court deems them helpful. See, e.g., *Peoples Natural Gas Co.* v. *Federal Power Commission*, App. D.C. 1942, 127 F. 2d 153, cert. den., 1942, 316 U.S. 700, 62 S. Ct. 1298; *Martin* v. *Chandis Securities Co.*, C.C.A. 9th, 1942, 128 F. 2d 731. Compare the application of the rules in summary proceedings in bankruptcy under General Order 37. See 1 Collier on Bankruptcy, 14th ed. by Moore and Oglebay, 326–327; 2 Collier, op. cit. supra, 1401–1402; 3 Collier, op. cit. supra, 228–231; 4 Collier, op. cit. supra, 1199–1202.

*Subdivision* (*a*)(*6*). Section 405 of U.S.C., Title 8 originally referred to in the last sentence of paragraph (6), has been repealed and former § 738 (now § 1451), U.S.C., Title 8, has been enacted in its stead. The last sentence of paragraph (6) has, therefore, been amended in accordance with this change. The sentence has also been amended so as to refer directly to the statute regarding the provision of time for answer, thus avoiding any confusion attendant upon a change in the statute.

That portion of subdivision (a)(6) making the rules applicable to proceedings for enforcement or review of compensation orders under the Longshoremen's and Harbor Workers' Compensation Act [33 U.S.C. § 901 et seq.] was added by an amendment made pursuant to order of the Court, December 28, 1939, effective three months subsequent to the adjournment of the 76th Congress, January 3, 1941.

*Subdivision* (*c*). The change in subdivision (c) effects more speedy trials in removed actions. In some states many of the courts have only two terms a year. A case, if filed 20 days before a term, is returnable to that term, but if filed less than 20 days before a term, is returnable to the following term, which convenes six months later. Hence, under the original wording of Rule 81(c), where a case is filed less than 20 days before the term and is removed within a few days but before answer, it is possible for the defendant to delay interposing his answer or presenting his defenses by motion for six months or more. The rule as amended prevents this result.

*Subdivision* (*f*). The use of the phrase "the United States or an officer or agency thereof" in the rules (as e.g., in Rule 12(a) and amended Rule 73(a)) could raise the question of whether "officer" includes a collector of internal revenue, a former collector, or the personal representative of a deceased collector, against whom suits for tax refunds are frequently instituted. Difficulty might ensue for the reason that a suit against a collector or his representative has been held to be a personal action. *Sage* v. *United States*, 1919, 250 U.S. 33, 39 S.Ct. 415; *Smietanka* v. *Indiana Steel Co.*, 1921, 257 U.S. 1, 42 S.Ct. 1; *United States* v. *Nunnally Investment Co.*, 1942, 316 U.S. 258, 62 S.Ct. 1064. The addition of subdivision (f) to Rule 81 dispels any doubts on the matter and avoids further litigation.

### NOTES OF ADVISORY COMMITTEE ON 1948 AMENDMENT TO RULES

The amendment effective October 1949 substituted the words "United States District Court" for the words "District Court of the United States" in the last sentence of subdivision (a)(1) and in the first and third sentences of subdivision (e). The amendment substituted the words "United States district courts" for "district courts of the United States" in subdivision (a)(4) and (5) and in the first sentence of subdivision (c).

The amendment effective October 20, 1949, also made the following changes:

In subdivision (a)(1), the reference to "Title 17, U.S.C." was substituted for the reference to "the Act of March 4, 1909, ch. 320, § 25 (35 Stat. 1081), as amended, U.S.C.; Title 17, § 25."

In subdivision (a)(2), the reference to "Title 28, U.S.C., § 2253" was substituted for "U.S.C., Title 28, § 466."

In subdivision (a)(3), the reference in the first sentence to "Title 9, U.S.C.," was substituted for "the Act of February 12, 1925, ch. 213 (43 Stat. 883), U.S.C., Title 9".

In subdivision (a)(5), the words "as amended" were inserted after the parenthetical citation of "(49 Stat. 453)," and after the citations of "Title 29, §§ 159 and 160," former references to subdivisions "(e), (g), and (i)" were deleted.

In subdivision (a)(6), after the words "These rules" at the beginning of the first sentence, the following words were deleted: "do not apply to proceedings under the Act of September 13, 1888, ch. 1015, § 13 (25 Stat. 479), as amended, U.S.C., Title 8, § 282, relating to deportation of Chinese; they". Also in the first sentence, after the parenthetical citation of "(44 Stat. 1434, 1436)," the words "as amended" were added. In the last sentence, the words "October 14, 1940, ch. 876, § 338 (54 Stat. 1158)" were inserted in lieu of the words "June 29, 1906, ch. 3592, § 15 (34 Stat. 601), as amended."

In subdivision (c), the word "all" originally appearing in the first sentence between the words "govern" and "procedure" was deleted. In the third sentence, the portion beginning with the words "20 days after the receipt" and including all the remainder of that sentence was substituted for the following language: "the time allowed for answer by the law of the state or within 5 days after the filing of the transcript of the record in the district court of the United States, whichever period is longer, but in any event within 20 days after the filing of the transcript". In the fourth or last sentence, after the words at the beginning of the sentence. "If at the time of removal all necessary pleadings have been," the word "served" was inserted in lieu of the word "filed," and the concluding words of the sentence, "petition for removal is filed if he is the petitioner," together with the final clause immediately following, were substituted for the words "record of the action is filed in the district court of the United States."

### NOTES OF ADVISORY COMMITTEE ON 1963 AMENDMENT TO RULES

Subdivision (a)(4). This change reflects the transfer of functions from the Secretary of Commerce to the Secretary of the Interior made by 1939 Reorganization Plan No. II, § 4(e), 53 Stat. 1433.

Subdivision (a)(6). The proper current reference is to the 1952 statute superseding the 1940 statute.

Subdivision (c). Most of the cases have held that a party who has made a proper express demand for jury trial in the State court is not required to renew the demand after removal of the action. *Zakoscielny* v. *Waterman Steamship Corp.*, 16 F.R.D. 314 (D.Md. 1954); *Talley* v. *American Bakeries Co.*, 15 F.R.D. 391 (E.D.Tenn. 1954); *Rehrer* v. *Service Trucking Co.*, 15 F.R.D. 113 (D.Del. 1953); 5 Moore's Federal Practice ¶ 38.39[3] (2d ed. 1951); 1 Barron & Holtzoff, Federal Practice and Procedure § 132 (Wright ed. 1960). But there is some authority to the contrary. *Petsel* v. *Chicago, B. & Q.R. Co.*, 101 F.Supp. 1006 (S.D.Iowa 1951) *Nelson* v. *American Nat. Bank & Trust Co.*, 9 F.R.D. 680 (E.D.Tenn. 1950). The amendment adopts the preponderant view.

In order still further to avoid unintended waivers of jury trial, the amendment provides that where by State law applicable in the court from which the case is removed a party is entitled to jury trial without making an express demand, he need not make a demand after removal. However, the district court for calendar or other purposes may on its own motion direct the parties to state whether they demand a jury, and the court must make such a direction upon the request of any party. Under the amendment a district court may find it convenient to establish a routine practice of giving these directions to the parties in appropriate cases.

Subdivision (f). The amendment recognizes the change of nomenclature made by Treasury Dept. Order 150-26(2), 18 Fed. Reg. 3499 (1953).

As to a special problem arising under Rule 25 (Substitution of parties) in actions for refund of taxes, see the Advisory Committee's Note to the amendment of Rule 25(d), effective July 19, 1961; and 4 Moore's Federal Practice § 25.09 at 531 (2d ed. 1950).

### NOTES OF ADVISORY COMMITTEE ON 1966 AMENDMENT TO RULES

See Note to Rule 1, supra.

Statutory proceedings to forfeit property for violation of the laws of the United States, formerly governed by the admiralty rules, will be governed by the unified and supplemental rules. See Supplemental Rule A.

Upon the recommendation of the judges of the United States District Court for the District of Columbia, the Federal Rules of Civil Procedure are made applicable to probate proceedings in that court. The exception with regard to adoption proceedings is removed because the court no longer has jurisdiction of those matters; and the words "mental health" are substituted for "lunacy" to conform to the current characterization in the District.

The purpose of the amendment to paragraph (3) is to permit the deletion from Rule 73(a) of the clause "unless a shorter time is provided by law." The 10 day period fixed for an appeal under 45 U.S.C. § 159 is the only instance of a shorter time provided for appeals in civil cases. Apart from the unsettling effect of the clause, it is eliminated because its retention would preserve the 15 day period heretofore allowed by 28 U.S.C. § 2107 for appeals from interlocutory decrees in admiralty, it being one of the purposes of the amendment to make the time for appeals in civil and admiralty cases uniform under the unified rules. See Advisory Committee's Note to subdivision (a) of Rule 73.

### NOTES OF ADVISORY COMMITTEE ON 1968 AMENDMENT TO RULES

The amendments eliminate inappropriate references to appellate procedure.

### NOTES OF ADVISORY COMMITTEE ON 1971 AMENDMENT TO RULES

Title 28, U.S.C., § 2243 now requires that the custodian of a person detained must respond to an application for a writ of habeas corpus "within three days unless for good cause additional time, not exceeding twenty days, is allowed." The amendment increases to forty days the additional time that the district court may allow in habeas corpus proceedings involving persons in custody pursuant to a judgment of a state court. The substantial increase in the number of such proceedings in recent years has placed a considerable burden on state authorities. Twenty days has proved in practice too short a time in which to prepare and file the return in many such cases. Allowance of additional time should, of course, be granted only for good cause.

While the time allowed in such a case for the return of the writ may not exceed forty days, this does not mean that the state must necessarily be limited to that period of time to provide for the federal court the transcript of the proceedings of a state trial or plenary hearing if the transcript must be prepared after the habeas corpus proceeding has begun in the federal court.

### EFFECTIVE DATE OF ABROGATION

Abrogation of par. (7) of subdivision (a) of this rule as effective August 1, 1951, see Effective Date note under Rule 71A.

### CROSS REFERENCES

Antitrust Civil Process Act petitions, application of rules, see section 1314 of Title 15, Commerce and Trade.

Demand for jury trial, see rule 38.

Habeas corpus, see this title.

Power of court to issue writs, see section 1651 of this title.

Procedure before and after removal generally, see sections 1446 and 1447 of this title.

Scope of rules, see rule 1.

Virgin Islands, applicability of rules to district court for, see section 1615 of Title 48, Territories and Insular Possessions.

### FEDERAL RULES OF CRIMINAL PROCEDURE

Application and exception, see rule 54, Title 18, Appendix, Crimes and Criminal Procedure.

### COPYRIGHT RULES OF PRACTICE

Infringement of copyrights, applicability of rules in so far as not inconsistent, see rule 1, Title 17, Appendix, Copyrights.

## Rule 82. Jurisdiction and Venue Unaffected

**These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. An admiralty or maritime claim within the meaning of Rule 9(h) shall not be treated as a civil action for the purposes of Title 28, U.S.C., §§ 1391–93.**

**(As amended Dec. 29, 1948, eff. Oct. 20, 1949; Feb. 28, 1966, eff. July 1, 1966.)**

### NOTES OF ADVISORY COMMITTEE ON RULES

These rules grant extensive power of joining claims and counterclaims in one action, but, as this rule states, such grant does not extend federal jurisdiction. The rule is declaratory of existing practice under the former Federal Equity Rules with regard to such provisions as former Equity Rule 26 on Joinder of Causes of Action and former Equity Rule 30 on Counterclaims. Compare Shulman and Jaegerman, Some Jurisdictional Limitations on Federal Procedure, 45 Yale L.J. 393 (1936).

### NOTES OF ADVISORY COMMITTEE ON 1966 AMENDMENT TO RULES

Title 28, U.S.C. § 1391(b) provides: "A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law." This provision cannot appropriately be applied to what were formerly suits in admiralty. The rationale of decisions holding it inapplicable rests largely on the use of the term "civil action"; i.e., a suit in admiralty is not a "civil action" within the statute. By virtue of the amendment to Rule 1, the provisions of Rule 2 convert suits in admiralty into civil actions. The added sentence is necessary to avoid an undesirable change in existing law with respect to venue.

### AMENDMENTS

1948—The amendment effective October 1949 substituted the words "United States district courts" for "district courts of the United States".

### Rule 83. Rules by District Courts

Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.

#### NOTES OF ADVISORY COMMITTEE ON RULES

This rule substantially continues U.S.C., Title 28, formerly § 731 (now § 2071) (Rules of practice in district courts) with the additional requirement that copies of such rules and amendments be furnished to the Supreme Court of the United States. See Equity Rule 79 (Additional Rules by District Court). With the last sentence compare United States Supreme Court Admiralty Rules (1920), Rule 44 (Right of Trial Courts To Make Rules of Practice) (originally promulgated in 1842).

#### CROSS REFERENCES

Rule-making power generally, see section 2071 of this title.

#### FEDERAL RULES OF CRIMINAL PROCEDURE

Local rules, see rule 57, Title 18, Appendix, Crimes and Criminal Procedure.

### Rule 84. Forms

The forms contained in the Appendix of Forms are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate.

(As amended Dec. 27, 1946, eff. March 19, 1948.)

#### NOTES OF ADVISORY COMMITTEE ON RULES

In accordance with the practice found useful in many codes, provision is here made for a limited number of official forms which may serve as guides in pleading. Compare 2 Mass. Gen. Laws (Ter. Ed., 1932) ch. 231, § 147, Forms 1-47; English Annual Practice (1937) Appendix A to M, inclusive; Conn. Practice Book (1934) Rules, 47-68, pp. 123-427.

#### NOTES OF ADVISORY COMMITTEE ON 1946 AMENDMENT TO RULES

*Note.* The amendment serves to emphasize that the forms contained in the Appendix of Forms are sufficient to withstand attack under the rules under which they are drawn, and that the practitioner using them may rely on them to that extent. The circuit courts of appeals generally have upheld the use of the forms as promoting desirable simplicity and brevity of statement. *Sierocinski* v. *E. I. DuPont DeNemours & Co.*, C.C.A. 3d, 1939, 103 F. 2d 843; *Swift & Co.* v. *Young*, C.C.A. 4th, 1939, 107 F. 2d 170; *Sparks* v. *England*, C.C.A. 8th, 1940, 113 F. 2d 579; *Ramsouer* v. *Midland Valley R. Co.*, C.C.A. 8th, 1943, 135 F. 2d 101. And the forms as a whole have met with widespread approval in the courts. See cases cited in 1 Moore's Federal Practice, 1938, Cum. Supplement § 8.07, under "Page 554"; see also Commentary, The Official Forms, 1941, 4 Fed. Rules Serv. 954. In Cook, "Facts" and "Statements of Fact", 1937, 4 U. Chi. L. Rev. 233, 245-246, it is said with reference to what is now Rule 84: "* * * pleaders in the federal courts are not to be left to guess as to the meaning of [the] language" in Rule 8 (a) regarding the form of the complaint. "All of which is as it should be. In no other way can useless litigation be avoided." Ibid. The amended rule will operate to discourage isolated results such as those found in *Washburn* v. *Moorman Mfg. Co.*, S. D. Cal. 1938, 25 F. Supp. 546; *Employers Mutual Liability Ins. Co. of Wisconsin* v. *Blue Line Transfer Co.*, W. D. Mo. 1941, 2 F.R.D. 121, 5 Fed. Rules Serv. 12e.235, Case 2.

#### FEDERAL RULES OF CRIMINAL PROCEDURE

Forms as illustrative and not mandatory, see rule 58, Title 18, Appendix, Crimes and Criminal Procedure.

### Rule 85. Title

These rules may be known and cited as the Federal Rules of Civil Procedure.

#### FEDERAL RULES OF CRIMINAL PROCEDURE

Title, see rule 60, Title 18, Appendix, Crimes and Criminal Procedure.

### Rule 86. Effective Date

**(a) [Effective date of original rules]**

These rules will take effect on the day which is 3 months subsequent to the adjournment of the second regular session of the 75th Congress, but if that day is prior to September 1, 1938, then these rules will take effect on September 1, 1938. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies.

**(b) Effective date of amendments**

The amendments adopted by the Supreme Court on December 27, 1946, and transmitted to the Attorney General on January 2, 1947, shall take effect on the day which is three months subsequent to the adjournment of the first regular session of the 80th Congress, but, if that day is prior to September 1, 1947, then these amendments shall take effect on September 1, 1947. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.

(Added Dec. 27, 1946, eff. Mar. 19, 1948.)

**(c) Effective Date of amendments**

The amendments adopted by the Supreme Court on December 29, 1948, and transmitted to the Attorney General on December 31, 1948, shall take effect on the day following the adjournment of the first regular session of the 81st Congress.

(Added Dec. 29, 1948, eff. Oct. 20, 1949.)

**(d) Effective date of amendments**

The amendments adopted by the Supreme Court on April 17, 1961, and transmitted to the Congress on April 18, 1961, shall take effect on July 19, 1961. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.

(Added Apr. 17, 1961, eff. July 19, 1961.)

### (e) Effective date of amendments

The amendments adopted by the Supreme Court on January 21, 1963, and transmitted to the Congress on January 21, 1963 shall take effect on July 1, 1963. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.

(Added Jan. 21, 1963, and amended Mar. 18, 1963, eff. July 1, 1963.)

#### NOTES OF ADVISORY COMMITTEE ON RULES

See former Equity Rule 81 (These Rules Effective February 1, 1913—Old Rules Abrogated).

#### EFFECTIVE DATE OF 1966 AMENDMENT; TRANSMISSION TO CONGRESS; RESCISSION

Sections 2-4 of the Order of the Supreme Court, dated Feb. 28, 1966, 383 U.S. 1031, provided:

"2. That the foregoing amendments and additions to the Rules of Civil Procedure shall take effect on July 1, 1966, and shall govern all proceedings in actions brought thereafter and also in all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action then pending would not be feasible or would work injustice, in which event the former procedure applies.

"3. That the Chief Justice be, and he hereby is, authorized to transmit to the Congress the foregoing amendments and additions to the Rules of Civil Procedure in accordance with the provisions of Title 28, U.S.C., §§ 2072 and 2073.

"4. That: (a) subdivision (c) of Rule 6 of the Rules of Civil Procedure for the United States District Courts promulgated by this court on December 20, 1937, effective September 16, 1938; (b) Rule 2 of the Rules for Practice and Procedure under section 25 of An Act To amend and consolidate the Acts respecting copyright, approved March 4, 1909, promulgated by this court on June 1, 1909, effective July 1, 1909; and (c) the Rules of Practice in Admiralty and Maritime Cases, promulgated by this court on December 6, 1920, effective March 7, 1921, as revised, amended and supplemented be, and they hereby are, rescinded, effective July 1, 1966."

#### CROSS REFERENCES

All laws in conflict with these rules to be of no further force and effect, see section 2072 of this title.

#### FEDERAL RULES OF CRIMINAL PROCEDURE

Effective Date, see rule 59, Title 18, Appendix, Crimes and Criminal Procedure.

## APPENDIX OF FORMS

(See Rule 84)

Form
1. Summons.
2. Allegation of Jurisdiction.
3. Complaint on a Promissory Note.
4. Complaint on an Account.
5. Complaint for Goods Sold and Delivered.
6. Complaint for Money Lent.
7. Complaint for Money Paid by Mistake.
8. Complaint for Money Had and Received.
9. Complaint for Negligence.
10. Complaint for Negligence Where Plaintiff is Unable to Determine Definitely Whether the Person Responsible is C.D. or E.F. or Whether Both are Responsible and Where His Evidence May Justify a Finding of Wilfulness or of Recklessness or of Negligence.
11. Complaint for Conversion.
12. Complaint for Specific Performance of Contract to Convey Land.
13. Complaint on Claim for Debt and to Set Aside Fraudulent Conveyance under Rule 18(b).
14. Complaint for Negligence under Federal Employer's Liability Act.
15. Complaint for Damages under Merchant Marine Act.
16. Complaint for Infringement of Patent.
17. Complaint for Infringement of Copyright and Unfair Competition.
18. Complaint for Interpleader and Declaratory Relief.
19. Motion to Dismiss, Presenting Defenses of Failure to State a Claim, of Lack of Service of Process, of Improper Venue, and of Lack of Jurisdiction under Rule 12(b).
20. Answer Presenting Defenses under Rule 12(b).
21. Answer to Complaint Set Forth in Form 8, With Counterclaim for Interpleader.

[22. Superseded.]

22-A. Summons and Complaint Against Third-Party Defendant.

22-B. Motion to Bring in Third-Party Defendant.

23. Motion to Intervene as a Defendant under Rule 24.
24. Motion for Production of Documents, etc., under Rule 34.
25. Request for Admission under Rule 36.
26. Allegation of Reason for Omitting Party.
27. Abrogated.
28. Notice: Condemnation.
29. Complaint: Condemnation.
30. Suggestion of Death Upon the Record Under Rule 25(a)(1).
31. Judgment on Jury Verdict.
32. Judgment on Decision by the Court.

#### INTRODUCTORY STATEMENT

1. The following forms are intended for illustration only. They are limited in number. No attempt is made to furnish a manual of forms. Each form assumes the action to be brought in the Southern District of New York. If the district in which an action is brought has divisions, the division should be indicated in the caption.

2. Except where otherwise indicated each pleading, motion, and other paper should have a caption similar to that of the summons, with the designation of the particular paper substituted for the word "Summons". In the caption of the summons and in the caption of the complaint all parties must be named but in other pleadings and papers, it is sufficient to state the name of the first party on either side, with an appropriate indication of other parties. See Rules 4(b), 7(b)(2), and 10(a).

3. In Form 3 and the forms following, the words, "Allegation of jurisdiction," are used to indicate the appropriate allegation in Form 2.

4. Each pleading, motion, and other paper is to be signed in his individual name by at least one attorney of record (Rule 11). The attorney's name is to be followed by his address as indicated in Form 3. In forms following Form 3 the signature and address are not indicated.

5. If a party is not represented by an attorney, the signature and address of the party are required in place of those of the attorney.

**Form 1. Summons**

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action File Number———

A. B., Plaintiff
*v.*
C. D., Defendant } *Summons*

*To the above-named Defendant:*

You are hereby summoned and required to serve upon———, plaintiff's attorney, whose address is————, answer to the complaint which is herewith served upon you, within 20 [1] days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

————————,
*Clerk of Court.*

[Seal of the U.S. District Court]

Dated————

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[1] If the United States or an officer or agency thereof is a defendant, the time to be inserted as to it is 60 days.

(As amended Dec. 29, 1948, effective Oct. 20, 1949.)

(This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure)

**Form 2. Allegation of jurisdiction**

(a) Jurisdiction founded on diversity of citizenship and amount.

Plaintiff is a [citizen of the State of Connecticut] [1] [corporation incorporated under the laws of the State of Connecticut having its principal place of business in the State of Connecticut] and defendant is a corporation incorporated under the laws of the State of New York having its principal place of business in a State other than the State of Connecticut. The matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars.

(b) Jurisdiction founded on the existence of a Federal question and amount in controversy.

The action arises under [the Constitution of the United States, Article —, Section —]; [the ——Amendment to the Constitution of the United States, Section ——]; [the Act of ——, —— Stat. —— U.S.C., Title ——, §——]; [the Treaty of the United States (here describe the treaty)], [2] as hereinafter more fully appears. The matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars.

(c) Jurisdiction founded on the existence of a question arising under particular statutes.

The action arises under the Act of ——, —— Stat. ——; U.S.C., Title ——, §——, as hereinafter more fully appears.

(d) Jurisdiction founded on the admiralty or maritime character of the claim.

This is a case of admiralty and maritime jurisdiction, as hereinafter more fully appears. [If the pleader wishes to invoke the distinctively maritime procedures referred to in Rule 9(h), add the following or its substantial equivalent: This is an admiralty or maritime claim within the meaning of Rule 9(h).]

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[1] Form for natural person.

[2] Use the appropriate phrase or phrases. The general allegation of the existence of a Federal question is ineffective unless the matters constituting the claim for relief as set forth in the complaint raise a Federal question.

(As amended Apr. 17, 1961, eff. July 19, 1961; Feb. 28, 1966, eff. July 1, 1966.)

### NOTES OF ADVISORY COMMITTEE

1. Diversity of Citizenship. If the plaintiff is an assignee, he should allege such other facts of citizenship as will show that he is entitled to prosecute his action under U.S.C.A., Title 28, § 1332, formerly § 41(1).

2. Jurisdiction Founded on Some Fact Other Than Diversity of Citizenship. The allegation as to the matter in controversy may be omitted in any case where by law no jurisdictional amount is required. See for example, U.S.C.A., Title 28, former § 41(2)-(28).

3. Pleading Venue. Since improper venue is an affirmative dilatory defense, it is not necessary for plaintiff to include allegations showing the venue to be proper.

4. It is sufficient to allege that a corporation is incorporated in a particular state, there being, for jurisdictional purposes, a conclusive presumption that all of its members or stockholders are citizens of that State, *Marshall* v. *Baltimore and Ohio R.R. Co.*, 1853, 16 How. 314; Henderson, Position of Foreign Corporations in American Constitutional Law (1918) 54-64.

### NOTES OF ADVISORY COMMITTEE ON 1961 AMENDMENT TO RULES

1. *Diversity of citizenship.* U.S.C., Title 28, § 1332 (Diversity of citizenship; amount in controversy; costs), as amended by P.L. 85-554, 72 Stat. 415, July 25, 1958, states in subsection (c) that "For the purposes of this section and section 1441 of this title [removable actions], a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." Thus if the defendant corporation in Form 2(a) had its principal place of business in Connecticut, diversity of citizenship would not exist. An allegation regarding the principal place of business of each corporate party must be made in addition to an allegation regarding its place of incorporation.

2. *Jurisdictional amount.* U.S.C., Title 28, § 1331 (Federal question; amount in controversy; costs) and § 1332 (Diversity of citizenship; amount in controversy; costs), as amended by P.L. 85-554, 72 Stat. 415, July 25, 1958, require that the amount in controversy, exclusive of interest and costs, be in excess of $10,000. The allegation as to the amount in controversy may be omitted in any case where by law no jurisdictional amount is required. See, for example, U.S.C., Title 28, § 1338 (Patents, copyrights, trade-marks, and unfair competition), § 1343 (Civil rights and elective franchise).

3. *Pleading venue.* Since improper venue is a matter of defense, it is not necessary for plaintiff to include allegations showing the venue to be proper. See 1 Moore's Federal practice, par. 0.140 [1.-4] (2d ed. 1959).

### NOTES OF ADVISORY COMMITTEE ON 1966 AMENDMENT TO RULES

Since the Civil Rules have not heretofore been applicable to proceedings in Admiralty (Rule 81(a)(1)), Form 2 naturally has not contained a provision for invoking the admiralty jurisdiction. The form has never purported to be comprehensive, as making provision for all possible grounds of jurisdiction; but a provision for invoking the admiralty jurisdiction is particularly appropriate as an incident of unification.

Certain distinctive features of the admiralty practice must be preserved in unification, just as certain distinctive characteristics of equity were preserved in the merger of law and equity in 1938. Rule 9(h) provides the device whereby, after unification, with its abolition of the distinction between civil actions and suits in admiralty, the pleader may indicate his choice of the distinctively maritime procedures, and designates those features that are preserved. This form illustrates an appropriate way in which the pleader may invoke those procedures. Use of this device is not necessary if the claim is cognizable only by virtue of the admiralty and maritime jurisdiction, nor if the claim is within the exclusive admiralty jurisdiction of the district court.

Omission of a statement such as this from the pleading indicates the pleader's choice that the action proceed as a conventional civil action, if this is jurisdictionally possible, without the distinctive maritime remedies and procedures. It should be remembered, however, that Rule 9(h) provides that a pleading may be amended to add or withdraw such an identifying statement subject to the principles stated in Rule 15.

**Form 3. Complaint on a promissory note**

1. Allegation of jurisdiction.

2. Defendant on or about June 1, 1935, executed and delivered to plaintiff a promissory note [in the following words and figures: (here set out the note verbatim)]; [a copy of which is hereto annexed as Exhibit A]; [whereby defendant promised to pay to plaintiff or order on June 1, 1936 the sum of —— dollars with interest thereon at the rate of six percent per annum].

3. Defendant owes to plaintiff the amount of said note and interest.

Wherefore plaintiff demands judgment against defendant for the sum of —— dollars, interest, and cost.

Signed: ——————————,
*Attorney for Plaintiff.*

Address: ——————————

(As amended Jan. 21, 1963, eff. July 1, 1963.)

NOTES

1. The pleader may use the material in one of the three sets of brackets. His choice will depend upon whether he desires to plead the document verbatim, or by exhibit, or according to its legal effect.

2. Under the rules free joinder of claims is permitted. See rules 8(e) and 18. Consequently the claims set forth in each and all of the following forms may be joined with this complaint or with each other. Ordinarily each claim should be stated in a separate division of the complaint, and the divisions should be designated as counts successively numbered. In particular the rules permit alternative and inconsistent pleading. See Form 10.

NOTES OF ADVISORY COMMITTEE ON RULES

At various places, these Forms [Forms 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 18, 21] allege or refer to damages of "ten thousand dollars, interest, and costs," or the like. The Forms were written at a time when the jurisdictional amount in ordinary "diversity" and "Federal question" cases was an amount in excess of $3,000, exclusive of interest and costs, so the illustrative amounts set out in the Forms were adequate for jurisdictional purposes. However, U.S.C. Title 28, § 1331 (Federal question; amount in controversy; costs) and § 1332 (Diversity of citizenship; amount in controversy; costs), as amended by Pub. Law 85-554, 72 Stat. 415, July 25, 1958, now require that the amount in controversy, exclusive of interest and costs, be in excess of $10,000. Accordingly the Forms are misleading. They are amended at appropriate places by deleting the stated dollar amount and substituting a blank, to be properly filled in by the pleader.

**Form 4. Complaint on an account**

1. Allegation of jurisdiction.

2. Defendant owes plaintiff —— dollars according to the account hereto annexed as Exhibit A.

Wherefore (etc. as in Form 3).

(As amended Jan. 21, 1963, eff. July 1, 1963.)

NOTES OF ADVISORY COMMITTEE ON RULES

This form was amended in 1963 by deleting the stated dollar amount and substituting a blank, to be properly filled in by the pleader. See Note of Advisory Committee under Form 3.

**Form 5. Complaint for goods sold and delivered**

1. Allegation of jurisdiction.

2. Defendant owes plaintiff —— dollars for goods sold and delivered by plaintiff to defendant between June 1, 1936 and December 1, 1936.

Wherefore (etc. as in Form 3).

(As amended Jan. 21, 1963, eff. July 1, 1963.)

NOTE

This form may be used where the action is for an agreed price or for the reasonable value of the goods.

NOTES OF ADVISORY COMMITTEE ON RULES

This form was amended in 1963 by deleting the stated dollar amount and substituting a blank, to be properly filled in by the pleader. See Note of Advisory Committee under Form 3.

**Form 6. Complaint for money lent**

1. Allegation of jurisdiction.

2. Defendant owes plaintiff —— dollars for money lent by plaintiff to defendant on June 1, 1936.

Wherefore (etc. as in Form 3).

(As amended Jan. 21, 1963, eff. July 1, 1963.)

NOTES OF ADVISORY COMMITTEE ON RULES

This form was amended in 1963 by deleting the stated dollar amount and substituting a blank, to be properly filled in by the pleader. See Note of Advisory Committee under Form 3.

**Form 7. Complaint for money paid by mistake**

1. Allegation of jurisdiction.

2. Defendant owes plaintiff —— dollars for money paid by plaintiff to defendant by mistake on June 1, 1936, under the following circumstances: [here state the circumstances with particularity—see Rule 9(b)].

Wherefore (etc. as in Form 3).

(As amended Jan. 21, 1963, eff. July 1, 1963.)

NOTES OF ADVISORY COMMITTEE ON RULES

This form was amended in 1963 by deleting the stated dollar amount and substituting a blank, to be properly filled in by the pleader. See Note of Advisory Committee under Form 3.

**Form 8. Complaint for money had and received.**

1. Allegation of jurisdiction.

2. Defendant owes plaintiff —— dollars for money had and received from one G. H. on

June 1, 1936, to be paid by defendant to plaintiff.

Wherefore (etc. as in Form 3).

(As amended Jan. 21, 1963, eff. July 1, 1963.)

#### NOTES OF ADVISORY COMMITTEE ON RULES

This form was amended in 1963 by deleting the stated dollar amount and substituting a blank, to be properly filled in by the pleader. See Note of Advisory Committee under Form 3.

### Form 9. Complaint for negligence

1. Allegation of jurisdiction.

2. On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway.

3. As a result plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of one thousand dollars.

Wherefore plaintiff demands judgment against defendant in the sum of —— dollars and costs.

(As amended Jan. 21, 1963, eff. July 1, 1963.)

#### NOTE

Since contributory negligence is an affirmative defense the complaint need contain no allegation of due care of plaintiff.

#### NOTES OF ADVISORY COMMITTEE ON RULES

This form was amended in 1963 by deleting the stated dollar amount and substituting a blank, to be properly filled in by the pleader. See Note of Advisory Committee under Form 3.

### Form 10. Complaint for negligence where plaintiff is unable to determine definitely whether the person responsible is C. D. or E. F. or whether both are responsible and where his evidence may justify a finding of wilfulness or of recklessness or of negligence

A. B., Plaintiff
*v.*
C. D. and E. F.,
Defendants } *Complaint*

1. Allegation of jurisdiction.

2. On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant C. D. or defendant E. F., or both defendants C. D. and E. F. wilfully or recklessly or negligently drove or caused to be driven a motor vehicle against plaintiff who was then crossing said highway.

3. As a result plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of one thousand dollars.

Wherefore plaintiff demands judgment against C. D. or against E. F. or against both in the sum of —— dollars and costs.

(As amended Jan. 21, 1963, eff. July 1, 1963.)

#### NOTES OF ADVISORY COMMITTEE ON RULES

This form was amended in 1963 by deleting the stated dollar amount and substituting a blank, to be properly filled in by the pleader. See Note of Advisory Committee under Form 3.

### Form 11. Complaint for conversion

1. Allegation of jurisdiction.

2. On or about December 1, 1936, defendant converted to his own use ten bonds of the ———Company (here insert brief identification as by number and issue) of the value of —— dollars, the property of plaintiff.

Wherefore plaintiff demands judgment against defendant in the sum of —— dollars, interest, and costs.

(As amended Jan. 21, 1963, eff. July 1, 1963.)

#### NOTES OF ADVISORY COMMITTEE ON RULES

This form was amended in 1963 by deleting the stated dollar amount and substituting a blank, to be properly filled in by the pleader. See Note of Advisory Committee under Form 3.

### Form 12. Complaint for specific performance of contract to convey land

1. Allegation of jurisdiction.

2. On or about December 1, 1936, plaintiff and defendant entered into an agreement in writing a copy of which is hereto annexed as Exhibit A.

3. In accord with the provisions of said agreement plaintiff tendered to defendant the purchase price and requested a conveyance of the land, but defendant refused to accept the tender and refused to make the conveyance.

4. Plaintiff now offers to pay the purchase price.

Wherefore plaintiff demands (1) that defendant be required specifically to perform said agreement, (2) damages in the sum of one thousand dollars, and (3) that if specific performance is not granted plaintiff have judgment against defendant in the sum of —— dollars.

(As amended Jan. 21, 1963, eff. July 1, 1963.)

#### NOTE

Here, as in Form 3, plaintiff may set forth the contract verbatim in the complaint or plead it, as indicated, by exhibit, or plead it according to its legal effect. Furthermore, plaintiff may seek legal or equitable relief or both even though this was impossible under the system in operation before these rules.

#### NOTES OF ADVISORY COMMITTEE ON RULES

This form was amended in 1963 by deleting the stated dollar amount and substituting a blank, to be properly filled in by the pleader. See Note of Advisory Committee under Form 3.

### Form 13. Complaint on claim for debt and to set aside fraudulent conveyance under Rule 18(b)

A. B., Plaintiff
*v.*
C. D. and E. F.,
Defendants } *Complaint*

1. Allegation of jurisdiction.

2. Defendant C. D. on or about ——— executed and delivered to plaintiff a promissory note (in the following words and figures: (here set out the note verbatim)); [a copy of which is hereto annexed as Exhibit A]; [whereby defendant C. D. promised to pay to plaintiff or order on —— the sum of five thousand dollars with

interest thereon at the rate of —— percent. per annum].

3. Defendant C. D. owes to plaintiff the amount of said note and interest.

4. Defendant C. D. on or about —— conveyed all his property, real and personal (or specify and describe) to defendant E. F. for the purpose of defrauding plaintiff and hindering and delaying the collection of the indebtedness evidenced by the note above referred to.

Wherefore plaintiff demands:

(1) That plaintiff have judgment against defendant C. D. for —— dollars and interest; (2) that the aforesaid conveyance to defendant E. F. be declared void and the judgment herein be declared a lien on said property; (3) that plaintiff have judgment against the defendants for costs.

(As amended Jan. 21, 1963, eff. July 1, 1963.)

### NOTES OF ADVISORY COMMITTEE ON RULES

This form was amended in 1963 by deleting the stated dollar amount and substituting a blank, to be properly filled in by the pleader. See Note of Advisory Committee under Form 3.

### Form 14. Complaint for negligence under Federal Employer's Liability Act

1. Allegation of jurisdiction.

2. During all the times herein mentioned defendant owned and operated in interstate commerce a railroad which passed through a tunnel located at —— and known as Tunnel No. ——.

3. On or about June 1, 1936, defendant was repairing and enlarging the tunnel in order to protect interstate trains and passengers and freight from injury and in order to make the tunnel more conveniently usable for interstate commerce.

4. In the course of thus repairing and enlarging the tunnel on said day defendant employed plaintiff as one of its workmen, and negligently put plaintiff to work in a portion of the tunnel which defendant had left unprotected and unsupported.

5. By reason of defendant's negligence in thus putting plaintiff to work in that portion of the tunnel, plaintiff was, while so working pursuant to defendant's orders, struck and crushed by a rock, which fell from the unsupported portion of the tunnel, and was (here describe plaintiff's injuries).

6. Prior to these injuries, plaintiff was a strong, able-bodied man, capable of earning and actually earning —— dollars per day. By these injuries he has been made incapable of any gainful activity, has suffered great physical and mental pain, and has incurred expense in the amount of —— dollars for medicine, medical attendance, and hospitalization.

Wherefore plaintiff demands judgment against defendant in the sum of —— dollars and costs.

### Form 15. Complaint for damages under Merchant Marine Act

1. Allegation of jurisdiction. [If the pleader wishes to invoke the distinctively maritime procedures referred to in Rule 9(h), add the following or its substantial equivalent: This is an admiralty or maritime claim within the meaning of Rule 9(h).]

2. During all the times herein mentioned defendant was the owner of the steamship —— and used it in the transportation of freight for hire by water in interstate and foreign commerce.

3. During the first part of (month and year) at —— plaintiff entered the employ of defendant as an able seaman on said steamship under seamen's articles of customary form for a voyage from —— ports to the Orient and return at a wage of —— dollars per month and found, which is equal to a wage of —— dollars per month as a shore worker.

4. On June 1, 1936, said steamship was about —— days out of the port of —— and was being navigated by the master and crew on the return voyage to —— ports. (Here describe weather conditions and the condition of the ship and state as in an ordinary complaint for personal injuries the negligent conduct of defendant.)

5. By reason of defendant's negligence in thus (brief statement of defendant's negligent conduct) and the unseaworthiness of said steamship, plaintiff was (here describe plaintiff's injuries).

6. Prior to these injuries, plaintiff was a strong, able-bodied man, capable of earning and actually earning —— dollars per day. By these injuries he has been made incapable of any gainful activity; has suffered great physical and mental pain, and has incurred expense in the amount of —— dollars for medicine, medical attendance, and hospitalization.

Wherefore plaintiff demands judgment against defendant in the sum of —— dollars and costs.

(As amended Feb. 28, 1966, eff. July 1, 1966.)

### NOTES OF ADVISORY COMMITTEE ON 1966 AMENDMENT TO RULES

See Advisory Committee's Note to Form 2.

### Form 16. Complaint for infringement of patent

1. Allegation of jurisdiction.

2. On May 16, 1934, United States Letters Patent No. —— were duly and legally issued to plaintiff for an invention in an electric motor; and since that date plaintiff has been and still is the owner of those Letters Patent.

3. Defendant has for a long time past been and still is infringing those Letters Patent by making, selling, and using electric motors embodying the patented invention, and will continue to do so unless enjoined by this court.

4. Plaintiff has placed the required statutory notice on all electric motors manufactured and sold by him under said Letters Patent, and has given written notice to defendant of his said infringement.

Wherefore plaintiff demands a preliminary and final injunction against continued infringement, an accounting for damages, and an assessment of interest and costs against defendant.

(As amended Jan. 21, 1963, eff. July 1, 1963.)

NOTES OF ADVISORY COMMITTEE ON RULES

The prayer for relief is amended to reflect the language of the present patent statute, Title 35, U.S.C., § 284 (Damages).

### Form 17. Complaint for infringement of copyright and unfair competition

1. Allegation of jurisdiction.

2. Prior to March, 1936, plaintiff, who then was and ever since has been a citizen of the United States, created and wrote an original book, entitled ———

3. This book contains a large amount of material wholly original with plaintiff and is copyrightable subject matter under the laws of the United States.

4. Between March 2, 1936, and March 10, 1936, plaintiff complied in all respects with the Act of (give citation) and all other laws governing copyright, and secured the exclusive rights and privileges in and to the copyright of said book, and received from the Register of Copyrights a certificate of registration, dated and identified as follows: "March 10, 1936, Class ———, No. ———."

5. Since March 10, 1936, said book has been published by plaintiff and all copies of it made by plaintiff or under his authority or license have been printed, bound, and published in strict conformity with the provisions of the Act of ——— and all other laws governing copyright.

6. Since March 10, 1936, plaintiff has been and still is the sole proprietor of all rights, title, and interest in and to the copyright in said book.

7. After March 10, 1936, defendant infringed said copyright by publishing and placing upon the market a book entitled ———, which was copied largely from plaintiff's copyrighted book, entitled ———.

8. A copy of plaintiff's copyrighted book is hereto attached as "Exhibit 1"; and a copy of defendant's infringing book is hereto attached as "Exhibit 2."

9. Plaintiff has notified defendant that defendant has infringed the copyright of plaintiff, and defendant has continued to infringe the copyright.

10. After March 10, 1936, and continuously since about ———, defendant has been publishing, selling and otherwise marketing the book entitled ———, and has thereby been engaging in unfair trade practices and unfair competition against plaintiff to plaintiff's irreparable damage.

Wherefore plaintiff demands:

(1) That defendant, his agents, and servants be enjoined during the pendency of this action and permanently from infringing said copyright of said plaintiff in any manner, and from publishing, selling, marketing or otherwise disposing of any copies of the book entitled ———.

(2) That defendant be required to pay to plaintiff such damages as plaintiff has sustained in consequence of defendant's infringement of said copyright and said unfair trade practices and unfair competition and to account for

(a) all gains, profits and advantages derived by defendant by said trade practices and unfair competition and

(b) all gains, profits, and advantages derived by defendant by his infringement of plaintiff's copyright or such damages as to the court shall appear proper within the provisions of the copyright statutes, but not less than two hundred and fifty dollars.

(3) That defendant be required to deliver up to be impounded during the pendency of this action all copies of said book entitled ——— in his possession or under his control and to deliver up for destruction all infringing copies and all plates, molds, and other matter for making such infringing copies.

(4) That defendant pay to plaintiff the costs of this action and reasonable attorney's fees to be allowed to the plaintiff by the court.

(5) That plaintiff have such other and further relief as is just.

AMENDMENTS

This form, as set out, incorporates amendments made at the same time certain rules of the Federal Rules of Civil Procedure were amended. See Rule 86(b) of such rules.

### Form 18. Complaint for interpleader and declaratory relief

1. Allegation of jurisdiction.

2. On or about June 1, 1935, plaintiff issued to G. H. a policy of life insurance whereby plaintiff promised to pay to K. L. as beneficiary the sum of ——— dollars upon the death of G. H. The policy required the payment by G. H. of a stipulated premium on June 1, 1936, and annually thereafter as a condition precedent to its continuance in force.

3. No part of the premium due June 1, 1936, was ever paid and the policy ceased to have any force or effect on July 1, 1936.

4. Thereafter, on September 1, 1936, G. H. and K. L. died as the result of a collision between a locomotive and the automobile in which G. H. and K. L. were riding.

5. Defendant C. D. is the duly appointed and acting executor of the will of G. H.; defendant E. F. is the duly appointed and acting executor of the will of K. L.; defendant X. Y. claims to have been duly designated as beneficiary of said policy in place of K. L.

6. Each of defendants, D. C., E. F., and X. Y. is claiming that the above-mentioned policy was in full force and effect at the time of the death of G. H.; each of them is claiming to be the only person entitled to receive payment of the amount of the policy and has made demand for payment thereof.

7. By reason of these conflicting claims of the defendants, plaintiff is in great doubt as to which defendant is entitled to be paid the amount of the policy, if it was in force at the death of G. H.

Wherefore plaintiff demands that the court adjudge:

(1) That none of the defendants is entitled to recover from plaintiff the amount of said policy or any part thereof.

(2) That each of the defendants be restrained from instituting any action against plaintiff for the recovery of the amount of said policy or any part thereof.

(3) That, if the court shall determine that said policy was in force at the death of G. H., the defendants be required to interplead and settle between themselves their rights to the money due under said policy, and that plaintiff be discharged from all liability in the premises except to the person whom the court shall adjudge entitled to the amount of said policy.

(4) That plaintiff recover its costs.

(As amended Jan. 21, 1963, eff. July 1, 1963.)

### Notes of Advisory Committee on Rules

This form was amended in 1963 by deleting the stated dollar amount and substituting a blank, to be properly filled in by the pleader. See Note of Advisory Committee under Form 3.

## Form 19. Motion to dismiss, presenting defenses of failure to state a claim, of lack of service of process, of improper venue, and of lack of jurisdiction under Rule 12(b)

The defendant moves the court as follows:

1. To dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted.

2. To dismiss the action or in lieu thereof to quash the return of service of summons on the grounds (a) that the defendant is a corporation organized under the laws of Delaware and was not and is not subject to service of process within the Southern District of New York, and (b) that the defendant has not been properly served with process in this action, all of which more clearly appears in the affidavits of M. N. and X. Y. hereto annexed as Exhibit A and Exhibit B respectively.

3. To dismiss the action on the ground that it is in the wrong district because (a) the jurisdiction of this court is invoked solely on the ground that the action arises under the Constitution and laws of the United States and (b) the defendant is a corporation incorporated under the laws of the State of Delaware and is not licensed to do or doing business in the Southern District of New York, all of which more clearly appears in the affidavits of K. L. and V. W. hereto annexed as Exhibit C and D respectively.

4. To dismiss the action on the ground that the court lacks jurisdiction because the amount actually in controversy is less than ten thousand dollars exclusive of interest and costs.

Signed:————————————
*Attorney for Defendant.*

Address:————————
*Notice of Motion.*

To:————————————
*Attorney for Plaintiff.*

————————————

Please take notice, that the undersigned will bring the above motion on for hearing before this Court at Room ——, United States Court House, Foley Square, City of New York, on the —— day of———, 193—, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Signed:————————————
*Attorney for Defendant.*

Address:————————————

(As amended Dec. 29, 1948, eff. Oct. 20, 1949; Apr. 17, 1961, eff. July 19, 1961.)

### Explanatory Notes

1. The above motion and notice of motion may be combined and denominated Notice of Motion. See Rule 7(b).

2. As to paragraph 3, see U.S.C., Title 28, § 1391 (Venue generally), subsections (b) and (c).

3. As to paragraph 4, see U.S.C., Title 28, § 1331 (Federal question; amount in controversy; costs), as amended by P.L. 85-554, 72 Stat. 415, July 25, 1958, requiring that the amount in controversy, exclusive of interest and costs, be in excess of $10,000.

## Form 20. Answer presenting defenses under Rule 12(b)

### First Defense

The complaint fails to state a claim against defendant upon which relief can be granted.

### Second Defense

If defendant is indebted to plaintiffs for the goods mentioned in the complaint, he is indebted to them jointly with G. H. G. H. is alive; is a citizen of the State of New York and a resident of this district, is subject to the jurisdiction of this court, as to both service of process and venue; can be made a party without depriving this court of jurisdiction of the present parties, and has not been made a party.

### Third Defense

Defendant admits the allegation contained in paragraphs 1 and 4 of the complaint; alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 2 of the complaint; and denies each and every other allegation contained in the complaint.

### Fourth Defense

The right of action set forth in the complaint did not accrue within six years next before the commencement of this action.

### Counterclaim

(Here set forth any claim as a counterclaim in the manner in which a claim is pleaded in a complaint. No statement of the grounds on which the court's jurisdiction depends need be made unless the counterclaim requires independent grounds of jurisdiction.)

### Cross-Claim Against Defendant M. N.

(Here set forth the claim constituting a cross-claim against defendant M. N. in the manner in which a claim is pleaded in a complaint. The statement of grounds upon which the court's jurisdiction depends need not be made unless the cross-claim requires independent grounds of jurisdiction.)

### Note

The above form contains examples of certain defenses provided for in rule 12(b). The first defense challenges the legal sufficiency of the complaint. It is a substitute for a general demurrer or a motion to dismiss.

The second defense embodies the old plea in abatement; the decision thereon, however, may well provide under Rules 19 and 21 for the citing in of the party rather than an abatement of the action.

The third defense is an answer on the merits.

The fourth defense is one of the affirmative defenses provided for in Rule 8(c).

The answer also includes a counterclaim and a cross-claim.

### REVISION

The explanatory note incorporates revisions made by the Advisory Committee at the same time amendments to certain rules of the Federal Rules of Civil Procedure were made. See also rule 12(b), as amended.

## Form 21. Answer to complaint set forth in Form 8, with counterclaim for interpleader

### DEFENSE

Defendant admits the allegations stated in paragraph 1 of the complaint; and denies the allegations stated in paragraph 2 to the extent set forth in the counterclaim herein.

### COUNTERCLAIM FOR INTERPLEADER

1. Defendant received the sum of —— dollars as a deposit from E. F.

2. Plaintiff has demanded the payment of such deposit to him by virtue of an assignment of it which he claims to have received from E. F.

3. E. F. has notified the defendant that he claims such deposit, that the purported assignment is not valid, and that he holds the defendant responsible for the deposit.

Wherefore defendant demands:

(1) That the court order E. F. to be made a party defendant to respond to the complaint and to this counterclaim.[1]

(2) That the court order the plaintiff and E. F. to interplead their respective claims.

(3) That the court adjudge whether the plaintiff or E. F. is entitled to the sum of money.

(4) That the court discharge defendant from all liability in the premises except to the person it shall adjudge entitled to the sum of money.

(5) That the court award to the defendant its costs and attorney's fees.

[1] Rule 13(h) provides for the court ordering parties to a counterclaim, but who are not parties to the original action, to be brought in as defendants.

(As amended Jan. 21, 1963, eff. July 1, 1963.)

### NOTES OF ADVISORY COMMITTEE ON 1963 AMENDMENT TO RULES

This form was amended in 1963 by deleting the stated dollar amount and substituting a blank, to be properly filled in by the pleader. See Note of Advisory Committee under Form 3.

## [Form 22. Superseded, eff. July 1, 1963]

Form 22 for motion to bring in third-party defendant, setting out as an exhibit summons and third-party complaint, and for notice of motion, was superseded by Forms 22-A and 22-B, setting out summons and complaint against third-party defendant, and motion to bring in third-party defendant, effective July 1, 1963. See Advisory Committee notes under Forms 22-A and 22-B.

## Form 22-A. Summons and complaint against third-party defendant

United States District Court for the Southern District of New York

Civil Action, File Number ——

A. B., Plaintiff
v.
C. D., Defendant and Third-Party Plaintiff
v.
E. F., Third-Party Defendant
} *Summons*

*To the above-named Third-Party Defendant:*

You are hereby summoned and required to serve upon ———, plaintiff's attorney whose address is ———, and upon ———, who is attorney for C. D., defendant and third-party plaintiff, and whose address is ———, an answer to the third-party complaint which is herewith served upon you within 20 days after the service of this summons upon you exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the third-party complaint. There is also served upon you herewith a copy of the complaint of the plaintiff which you may but are not required to answer.

————————,
*Clerk of Court.*

[Seal of District Court]
Dated ————————

United States District Court for the Southern District of New York

Civil Action, File Number ——

A. B., Plaintiff
v.
C. D., Defendant and Third-Party Plaintiff
v.
E. F., Third-Party Defendant
} *Third-Party Complaint*

1. Plaintiff A. B. has filed against defendant C. D. a complaint, a copy of which is hereto attached as "Exhibit A."

2. (Here state the grounds upon which C. D. is entitled to recover from E. F., all or part of what A. B. may recover from C. D. The statement should be framed as in an original complaint.)

Wherefore C. D. demands judgment against third-party defendant E. F. for all sums[1] that may be adjudged against defendant C. D. in favor of plaintiff A. B.

Signed: ————————,
*Attorney for C. D., Third-Party Plaintiff.*

Address: ————————

[1] Make appropriate change where C. D. is entitled to only partial recovery-over against E. F.

(As amended Jan. 21, 1963, eff. July 1, 1963.)

### NOTES OF ADVISORY COMMITTEE ON RULES

Under the amendment of Rule 14(a), a defendant who files a third-party complaint not later than 10 days after serving his original answer need not obtain leave of court to bring in the third-party defendant by service under Rule 4. Form 22-A is intended for use in these cases.

The changes in the form of summons reflect an earlier amendment of Rule 14(a), effective in 1948, making it permissive, rather than mandatory, for the third-party defendant to answer the plaintiff's complaint. See *Cooper* v. *D/S A/S Progress,* 188 F.Supp. 578 (E.D.Pa. 1960); 1A Barron & Holtzoff, Federal Practice and Procedure 696 (Wright ed. 1960).

Under the amendment of Rule 5(a) requiring, with certain exceptions, that papers be served upon all the parties to the action, the third-party defendant, even if he makes no answer to the plaintiff's complaint, is obliged to serve upon the plaintiff a copy of his answer to the third-party complaint. Similarly, the defendant is obliged to serve upon the plaintiff a copy of the summons and complaint against the third-party defendant.

### Form 22-B. Motion to bring in third-party defendant

Defendant moves for leave, as third-party plaintiff, to cause to be served upon E. F. a summons and third-party complaint, copies of which are hereto attached as Exhibit X.

Signed: ——————,
*Attorney for Defendant C. D.*

Address: ——————

*Notice of Motion*

(Contents the same as in Form 19. The notice should be addressed to all parties to the action.)

EXHIBIT X

(Contents the same as in Form 22-A.)

(Added Jan. 21, 1963, eff. July 1, 1963.)

NOTES OF ADVISORY COMMITTEE ON RULES

Form 22-B is intended for use when, under amended Rule 14(a), leave of court is required to bring in a third-party defendant.

### Form 23. Motion to Intervene as a Defendant Under Rule 24

(Based upon the complaint, Form 16)

United States District Court for the Southern District of New York

Civil Action, File Number ——

A. B., plaintiff
*v.*
C. D., defendant
E. F., applicant for intervention
} *Motion to intervene as a defendant*

E. F. moves for leave to intervene as a defendant in this action, in order to assert the defenses set forth in his proposed answer, of which a copy is hereto attached, on the ground that he is the manufacturer and vendor to the defendant, as well as to others, of the articles alleged in the complaint to be an infringement of plaintiff's patent, and as such has a defense to plaintiff's claim presenting both questions of law and of fact which are common to the main action.[1]

Signed: ——————,
*Attorney for E. F., Applicant for Intervention.*

Address: ——————

*Notice of Motion*

(Contents the same as in Form 19)

United States District Court for the Southern District of New York

Civil Action, File Number ——

A. B., plaintiff
*v.*
C. D., defendant
E. F., intervener
} *Intervener's Answer*

FIRST DEFENSE

Intervener admits the allegations stated in paragraphs 1 and 4 of the complaint; denies the allegations in paragraph 3, and denies the allegations in paragraph 2 in so far as they assert the legality of the issuance of the Letter Patent to plaintiff.

SECOND DEFENSE

Plaintiff is not the first inventor of the articles covered by the Letters Patent specified in his complaint, since articles substantially identical in character were previously patented in Letters Patent granted to intervener on January 5, 1920.

Signed: ——————,
*Attorney for E. F., Intervener.*

Address: ——————

(As amended Dec. 29, 1948, eff. Oct. 20, 1949.)

### Form 24. Motion for Production of Documents, etc., Under Rule 34

Plaintiff A. B. requests defendant C. D. to respond within —— days to the following requests:

(1) That defendant produce and permit plaintiff to inspect and to copy each of the following documents:

(Here list the documents either individually or by category and describe each of them.)

(Here state the time, place, and manner of making the inspection and performance of any related acts.)

(2) That defendant produce and permit plaintiff to inspect and to copy, test, or sample each of the following objects:

(Here list the objects either individually or by category and describe each of them.)

(Here state the time, place, and manner of making the inspection and performance of any related acts.)

(3) That defendant permit plaintiff to enter (here describe property to be entered) and to inspect and to photograph, test or sample (here describe the portion of the real property and the objects to be inspected).

(Here state the time, place, and manner of making the inspection and performance of any related acts.)

Signed: ——————,
*Attorney for Plaintiff.*

Address: ——————

(As amended Mar. 30, 1970, eff. July 1, 1970.)

NOTES OF ADVISORY COMMITTEE ON 1970 AMENDMENT TO RULES

Form 24 is revised to accord with the changes made in Rule 34.

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[1] For other grounds of intervention, either of right or in the discretion of the court, see rule 24(a) and (b).

### Form 25. Request for admission under Rule 36

Plaintiff A. B. requests defendant C. D. within ——— days after service of this request to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

1. That each of the following documents, exhibited with this request, is genuine.

(Here list the documents and describe each document.)

2. That each of the following statements is true.

(Here list the statements.)

Signed: ————————————,
*Attorney for Plaintiff.*

Address: ————————————

(As amended Dec. 27, 1946, eff. Mar. 19, 1948.)

### Form 26. Allegation of reason for omitting party

When it is necessary, under Rule 19(c), for the pleader to set forth in his pleading the names of persons who ought to be made parties, but who are not so made, there should be an allegation such as the one set out below:

John Doe named in this complaint is not made a party to this action [because he is not subject to the jurisdiction of this court]; [because he cannot be made a party to this action without depriving this court of jurisdiction].

### [Form 27. Abrogated. Dec. 4, 1967, eff. July 1, 1968]

NOTES OF ADVISORY COMMITTEE ON RULES

The form of notice of appeal is transferred to the Federal Rules of Appellate Procedure as Form 1.

### Form 28. Notice: Condemnation

United States District Court for the Southern District of New York

Civil Action, File Number ——

| | |
|---|---|
| United States of America, Plaintiff<br>*v.*<br>1,000 Acres of Land in [here insert a general location as "City of ——" or "County of ——"], John Doe et al., and Unknown Owners, Defendants | *Notice* |

*To* (here insert the names of the defendants to whom the notice is directed):

You are hereby notified that a complaint in condemnation has heretofore been filed in the office of the clerk of the United States District Court for the Southern District of New York, in the United States Court House in New York City, New York, for the taking (here state the interest to be acquired, as "an estate in fee simple") for use (here state briefly the use, "as a site for a post-office building") of the following described property in which you have or claim an interest.

(Here insert brief description of the property in which the defendants, to whom the notice is directed, have or claim an interest.)

The authority for the taking is (here state briefly, as "the Act of ——, —— Stat., ——, U.S.C., Title —— § ——".)[1]

You are further notified that if you desire to present any objection or defense to the taking of your property you are required to serve your answer on the plaintiff's attorney at the address herein designated within twenty days after ——————.[2]

Your answer shall identify the property in which you claim to have an interest, state the nature and extent of the interest you claim, and state all of your objections and defenses to the taking of your property. All defenses and objections not so presented are waived. And in case of your failure so to answer the complaint, judgment of condemnation of that part of the above-described property in which you have or claim an interest will be rendered.

But without answering, you may serve on the plaintiff's attorney a notice of appearance designating the property in which you claim to be interested. Thereafter you will receive notice of all proceedings affecting it. At the trial of the issue of just compensation, whether or not you have previously appeared or answered, you may present evidence as to the amount of the compensation to be paid for your property, and you may share in the distribution of the award.

Signed ————————————
*United States Attorney.*

Address ————————————

(Here state an address within the district where the United States Attorney may be served as "United States Court House, New York, N.Y.".)

Dated ———

---

[1] And where appropriate add a citation to any applicable Executive Order.

[2] Here insert the words "personal service of this notice upon you," if personal service is to be made pursuant to subdivision (d)(3)(i) of this rule [Rule 71A]; or, insert the date of the last publication of notice, if service by publication is to be made pursuant to subdivision (d)(3)(ii) of this rule.

(Added May 1, 1951, eff. Aug. 1, 1951.)

### Form 29. Complaint: Condemnation

United States District Court for the Southern District of New York

Civil Action, File Number——

| | |
|---|---|
| United States of America, Plaintiff<br>*v.*<br>1,000 Acres of Land in [here insert a general location as "City of ———" or "County of——"], John Doe et al., and Unknown Owners, Defendants | *Complaint* |

1. This is an action of a civil nature brought by the United States of America for the taking of property under the power of eminent domain and for the ascertainment and award of just compensation to the owners and parties in interest.[1]

2. The authority for the taking is (here state briefly, as "the Act of ——, —— Stat. ——, U.S.C., Title ——, § ——").[2]

3. The use for which the property is to be taken is (here state briefly the use, "as a site for a post-office building").

4. The interest to be acquired in the property is (here state the interest as "an estate in fee simple").

5. The property so to be taken is (here set forth a description of the property sufficient for its identification) or (described in Exhibit A hereto attached and made a part hereof).

6. The persons known to the plaintiff to have or claim an interest in the property [3] are:

(Here set forth the names of such persons and the interests claimed.) [4]

7. In addition to the persons named, there are or may be others who have or may claim some interest in the property to be taken, whose names are unknown to the plaintiff and on diligent inquiry have not been ascertained. They are made parties to the action under the designation "Unknown Owners."

Wherefore the plaintiff demands judgment that the property be condemned and that just compensation for the taking be ascertained and awarded and for such other relief as may be lawful and proper.

Signed:————————————

*United States Attorney.*

Address ————————————

(Here state an address within the district where the United States Attorney may be served, as "United States Court House, New York, N. Y.".)

---

[1] If the plaintiff is not the United States, but is, for example, a corporation invoking the power of eminent domain delegated to it by the state, then this paragraph 1 of the complaint should be appropriately modified and should be preceded by a paragraph appropriately alleging federal jurisdiction for the action, such as diversity. See Form 2.

[2] And where appropriate add a citation to any applicable Executive Order.

[3] At the commencement of the action the plaintiff need name as defendants only the persons having or claiming an interest in the property whose names are then known, but prior to any hearing involving the compensation to be paid for a particular piece of property the plaintiff must add as defendants all persons having or claiming an interest in that property whose names can be ascertained by an appropriate search of the records and also those whose names have otherwise been learned. See Rule 71A(c)(2).

[4] The plaintiff should designate, as to each separate piece of property, the defendants who have been joined as owners thereof or of some interest therein. See Rule 71A(c)(2).

(Added May 1, 1951, eff. Aug. 1, 1951.)

### Form 30. Suggestion of death upon the record under Rule 25(a)(1)

A. B. [describe as a party, or as executor, administrator, or other representative or successor of C. D., the deceased party] suggests upon the record, pursuant to Rule 25(a)(1), the death of C. D. [describe as party] during the pendency of this action.

(Added Jan. 21, 1963, eff. July 1, 1963.)

### Form 31. Judgment on jury verdict

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action, File Number ——

A. B., Plaintiff
*v.*
C. D., Defendant } *Judgment*

This action came on for trial before the Court and a jury, Honorable John Marshall, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged

[that the plaintiff A. B. recover of the defendant C. D. the sum of ——, with interest thereon at the rate of — percent as provided by law, and his costs of action.]

[that the plaintiff take nothing, that the action be dismissed on the merits, and that the defendant C. D. recover of the plaintiff A. B. his costs of action.]

Dated at New York, New York, this —— day of ——, 19—.

————————,

*Clerk of Court.*

(Added Jan. 21, 1963, eff. July 1, 1963.)

EXPLANATORY NOTE

1. This form is illustrative of the judgment to be entered upon the general verdict of a jury. It deals with the cases where there is a general jury verdict awarding the plaintiff money damages or finding for the defendant, but is adaptable to other situations of jury verdicts.

2. The clerk, unless the court otherwise orders, is required forthwith to prepare, sign, and enter the judgment upon a general jury verdict without awaiting any direction by the court. The form of the judgment upon a special verdict or a general verdict accompanied by answers to interrogatories shall be promptly approved by the court, and the clerk shall thereupon enter it. See Rule 58, as amended.

3. The rules contemplate a simple judgment promptly entered. See Rule 54(a). Every judgment shall be set forth on a separate document. See Rule 58, as amended.

4. Attorneys are not to submit forms of judgment unless directed in exceptional cases to do so by the court. See Rule 58, as amended.

### Form 32. Judgment on decision by the court.

United States District Court for the Southern District of New York

Civil Action, File Number ——

A. B., Plaintiff
*v.*
C. D., Defendant } *Judgment*

This action came on for [trial] [hearing] before the Court, Honorable John Marshall, District Judge, presiding, and the issues having been duly [tried] [heard] and a decision having been duly rendered,

It is Ordered and Adjudged

[that the plaintiff A. B. recover of the defendant C. D. the sum of——, with interest thereon at the rate of—— percent as provided by law, and his costs of action.]

[that the plaintiff take nothing, that the action be dismissed on the merits, and that the defendant C. D. recover of the plaintiff A. B. his costs of action.]

Dated at New York, New York, this —— day of ——, 19—.

______________,
*Clerk of Court.*

(Added Jan. 21, 1963, eff. July 1, 1963.)

EXPLANATORY NOTE

1. This form is illustrative of the judgment to be entered upon a decision of the court. It deals with the cases of decisions by the court awarding a party only money damages or costs, but is adaptable to other decisions by the court.

2. The clerk, unless the court otherwise orders, is required forthwith, without awaiting any direction of the court, to prepare, sign, and enter the judgment upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied. The form of the judgment upon a decision by the court granting other relief shall be promptly approved by the court, and the clerk shall thereupon enter it. See Rule 58, as amended.

3. See also paragraphs 3-4 of the Explanatory Note to Form 31.

## SUPPLEMENTAL RULES FOR CERTAIN ADMIRALTY AND MARITIME CLAIMS

NOTES OF ADVISORY COMMITTEE ON RULES

The amendments to the Federal Rules of Civil Procedure to unify the civil and admiralty procedure, together with the Supplemental Rules for Certain Admiralty and Maritime Claims, completely superseded the Admiralty Rules, effective July 1, 1966. Accordingly, the latter were rescinded.

### Rule A. Scope of Rules

These Supplemental Rules apply to the procedure in admiralty and maritime claims within the meaning of Rule 9(h) with respect to the following remedies:

(1) Maritime attachment and garnishment;

(2) Actions in rem;

(3) Possessory, petitory, and partition actions;

(4) Actions for exoneration from or limitation of liability.

These rules also apply to the procedure in statutory condemnation proceedings analogous to maritime actions in rem, whether within the admiralty and maritime jurisdiction or not. Except as otherwise provided, references in these Supplemental Rules to actions in rem include such analogous statutory condemnation proceedings.

The general Rules of Civil Procedure for the United States District Courts are also applicable to the foregoing proceedings except to the extent that they are inconsistent with these Supplemental Rules.

(Added Feb. 28, 1966, eff. July 1, 1966.)

NOTES OF ADVISORY COMMITTEE ON RULES

Certain distinctively maritime remedies must be preserved in unified rules. The commencement of an action by attachment or garnishment has heretofore been practically unknown in federal jurisprudence except in admiralty, although the amendment of Rule 4(e) effective July 1, 1963, makes available that procedure in accordance with state law. The maritime proceeding in rem is unique, except as it has been emulated by statute, and is closely related to the substantive maritime law relating to liens. Arrest of the vessel or other maritime property is an historic remedy in controversies over title or right to possession, and in disputes among co-owners over the vessel's employment. The statutory right to limit liability is limited to owners of vessels, and has its own complexities. While the unified federal rules are generally applicable to these distinctive proceedings, certain special rules dealing with them are needed.

Arrest of the person and imprisonment for debt are not included because these remedies are not peculiarly maritime. The practice is not uniform but conforms to state law. See 2 Benedict § 286; 28 U.S.C., § 2007; FRCP 64, 69. The relevant provisions of Admiralty Rules 2, 3, and 4 are unnecessary or obsolete.

No attempt is here made to compile a complete and self-contained code governing these distinctively maritime remedies. The more limited objective is to carry forward the relevant provisions of the former Rules of Practice for Admiralty and Maritime Cases, modernized and revised to some extent but still in the context of history and precedent. Accordingly, these Rules are not to be construed as limiting or impairing the traditional power of a district court, exercising the admiralty and maritime jurisdiction, to adapt its procedures and its remedies in the individual case, consistently with these rules, to secure the just, speedy, and inexpensive determination of every action. (See *Swift & Co., Packers* v. *Compania Columbiana Del Caribe, S/A*, 339 U.S. 684, (1950); Rule 1). In addition, of course, the district courts retain the power to make local rules not inconsistent with these rules. See Rule 83; cf. Admiralty Rule 44.

### Rule B. Attachment and Garnishment: Special Provisions

(1) *When Available; Complaint, Affidavit, and Process.*—With respect to any admiralty or maritime claim in personam a verified complaint may contain a prayer for process to attach the defendant's goods and chattels, or credits and effects in the hands of garnishees named in the complaint to the amount sued for, if the defendant shall not be found within the district. Such a complaint shall be accompanied by an affidavit signed by the plaintiff or his attorney that, to the affiant's knowledge, or to the best of his information and belief, the defendant cannot be found within the district. When a verified complaint is supported by such an affidavit the clerk shall forthwith issue a summons and process of attachment and garnishment. In addition, or in the alternative, the plaintiff may, pursuant to Rule 4(e), invoke the remedies provided by state law for attachment and garnishment or similar seizure of the defendant's property. Except for Rule E(8) these Supplemental Rules do not apply to state remedies so invoked.

(2) *Notice to Defendant.*—No judgment by default shall be entered except upon proof, which may be by affidavit, (a) that the plaintiff or the garnishee has given notice of the action to the defendant by mailing to him a copy of the complaint, summons, and process of attachment or garnishment, using any form of mail requiring a return receipt, or (b) that the complaint, summons, and process of attachment or garnishment have been served on the defendant in a manner authorized by Rule 4(d) or (i), or (c) that the plaintiff or the garnishee has made diligent efforts to give notice of the action to the defendant and has been unable to do so.

(3) *Answer.*—

(a) *By Garnishee.*—The garnishee shall serve his answer, together with answers to any interrogatories served with the complaint, within 20 days after service of process upon him. Interrogatories to the garnishee may be served with the complaint without leave of court. If the garnishee refuses or neglects to answer on oath as to the debts, credits, or effects of the defendant in his hands, or any interrogatories concerning such debts, credits, and effects that may be propounded by the plaintiff, the court may award compulsory process against him. If he admits any debts, credits, or effects, they shall be held in his hands or paid into the registry of the court, and shall be held in either case subject to the further order of the court.

(b) *By Defendant.*—The defendant shall serve his answer within 30 days after process has been executed, whether by attachment of property or service on the garnishee.

(Added Feb. 28, 1966, eff. July 1, 1966.)

### NOTES OF ADVISORY COMMITTEE ON RULES

Subdivision (1)

This preserves the traditional maritime remedy of attachment and garnishment, and carries forward the relevant substance of Admiralty Rule 2. In addition, or in the alternative, provision is made for the use of similar state remedies made available by the amendment of Rule 4(e) effective July 1, 1963. On the effect of appearance to defend against attachment see Rule E(8).

The rule follows closely the language of Admiralty Rule 2. No change is made with respect to the property subject to attachment. No change is made in the condition that makes the remedy available. The rules have never defined the clause, "if the defendant shall not be found within the district," and no definition is attempted here. The subject seems one best left for the time being to development on a case-by-case basis. The proposal does shift from the marshal (on whom it now rests in theory) to the plaintiff the burden of establishing that the defendant cannot be found in the district.

A change in the context of the practice is brought about by Rule 4(f), which will enable summons to be served throughout the state instead of, as heretofore, only within the district. The Advisory Committee considered whether the rule on attachment and garnishment should be correspondingly changed to permit those remedies only when the defendant cannot be found within the state and concluded that the remedy should not be so limited.

The effect is to enlarge the class of cases in which the plaintiff may proceed by attachment or garnishment although jurisdiction of the person of the defendant may be independently obtained. This is possible at the present time where, for example, a corporate defendant has appointed an agent within the district to accept service of process but is not carrying on activities there sufficient to subject it to jurisdiction. (*Seawind Compania, S.A.* v. *Crescent Line, Inc.*, 320 F.2d 580 (2d Cir. 1963)), or where, though the foreign corporation's activities in the district are sufficient to subject it personally to the jurisdiction, there is in the district no officer on whom process can be served (*United States* v. *Cia. Naviera Continental, S.A.*, 178 F.Supp. 561, (S.D.N.Y. 1959)).

Process of attachment or garnishment will be limited to the district. See Rule E(3)(a).

Subdivision (2)

The former Admiralty Rules did not provide for notice to the defendant in attachment and garnishment proceedings. None is required by the principles of due process, since it is assumed that the garnishee or custodian of the property attached will either notify the defendant or be deprived of the right to plead the judgment as a defense in an action against him by the defendant. *Harris* v. *Balk*, 198 U.S. 215 (1905); *Pennoyer* v. *Neff*, 95 U.S. 714 (1878). Modern conceptions of fairness, however, dictate that actual notice be given to persons known to claim an interest in the property that is the subject of the action where that is reasonably practicable. In attachment and garnishment proceedings the persons whose interests will be affected by the judgment are identified by the complaint. No substantial burden is imposed on the plaintiff by a simple requirement that he notify the defendant of the action by mail.

In the usual case the defendant is notified of the pendency of the proceedings by the garnishee or otherwise, and appears to claim the property and to make his answer. Hence notice by mail is not routinely required in all cases, but only in those in which the defendant has not appeared prior to the time when a default judgment is demanded. The rule therefore provides only that no default judgment shall be entered except upon proof of notice, or of inability to give notice despite diligent efforts to do so. Thus the burden of giving notice is further minimized.

In some cases the plaintiff may prefer to give notice by serving process in the usual way instead of simply by mail. (Rule 4(d).) In particular, if the defendant is in a foreign country the plaintiff may wish to utilize the modes of notice recently provided to facilitate compliance with foreign laws and procedures (Rule 4(i)). The rule provides for these alternatives.

The rule does not provide for notice by publication because there is no problem concerning unknown claimants, and publication has little utility in proportion to its expense where the identity of the defendant is known.

Subdivision (3)

Subdivision (a) incorporates the substance of Admiralty Rule 36.

The Admiralty Rules were silent as to when the garnishee and the defendant were to answer. See also 2 Benedict ch. XXIV.

The rule proceeds on the assumption that uniform and definite periods of time for responsive pleadings should be substituted for return days (see the discussion under Rule C(6), below). Twenty days seems sufficient time for the garnishee to answer (cf. FRCP 12(a)), and an additional 10 days should suffice for the defendant. When allowance is made for the time required for notice to reach the defendant this gives the defendant in attachment and garnishment approximately the same time that defendants have to answer when personally served.

### Rule C. Actions in Rem: Special Provisions

(1) *When Available.*—An action in rem may be brought:

(a) To enforce any maritime lien;

(b) Whenever a statute of the United States provides for a maritime action in rem or a proceeding analogous thereto.

Except as otherwise provided by law a party who may proceed in rem may also, or in the alternative, proceed in personam against any person who may be liable.

Statutory provisions exempting vessels or other property owned or possessed by or operated by or for the United States from arrest or seizure are not affected by this rule. When a statute so provides, an action against the United States or an instrumentality thereof may proceed on in rem principles.

(2) *Complaint.*—In actions in rem the complaint shall be verified on oath or solemn affirmation. It shall describe with reasonable particularity the property that is the subject of the action and state that it is within the district or will be during the pendency of the action. In actions for the enforcement of forfeitures for violation of any statute of the United States the complaint shall state the place of seizure and whether it was on land or on navigable waters, and shall contain such allegations as

may be required by the statute pursuant to which the action is brought.

(3) *Process.*—Upon the filing of the complaint the clerk shall forthwith issue a warrant for the arrest of the vessel or other property that is the subject of the action and deliver it to the marshal for service. If the property that is the subject of the action consists in whole or in part of freight, or the proceeds of property sold, or other intangible property, the clerk shall issue a summons directing any person having control of the funds to show cause why they should not be paid into court to abide the judgment.

(4) *Notice.*—No notice other than the execution of the process is required when the property that is the subject of the action has been released in accordance with Rule E(5). If the property is not released within 10 days after execution of process, the plaintiff shall promptly or within such time as may be allowed by the court cause public notice of the action and arrest to be given in a newspaper of general circulation in the district, designated by order of the court. Such notice shall specify the time within which the answer is required to be filed as provided by subdivision (6) of this rule. This rule does not affect the requirements of notice in actions to foreclose a preferred ship mortgage pursuant to the Act of June 5, 1920, ch. 250, § 30, as amended.

(5) *Ancillary Process.*—In any action in rem in which process has been served as provided by this rule, if any part of the property that is the subject of the action has not been brought within the control of the court because it has been removed or sold, or because it is intangible property in the hands of a person who has not been served with process, the court may, on motion order any person having possession or control of such property or its proceeds to show cause why it should not be delivered into the custody of the marshal or paid into court to abide the judgment; and, after hearing, the court may enter such judgment as law and justice may require.

(6) *Claim and Answer; Interrogatories.*—The claimant of property that is the subject of an action in rem shall file his claim within 10 days after process has been executed, or within such additional time as may be allowed by the court, and shall serve his answer within 20 days after the filing of the claim. The claim shall be verified on oath or solemn affirmation, and shall state the interest in the property by virtue of which the claimant demands its restitution and the right to defend the action. If the claim is made on behalf of the person entitled to possession by an agent, bailee, or attorney, it shall state that he is duly authorized to make the claim. At the time of answering the claimant shall also serve answers to any interrogatories served with the complaint. In actions in rem interrogatories may be so served without leave of court.

(Added Feb. 28, 1966, eff. July 1, 1966.)

### Notes of Advisory Committee on Rules

Subdivision (1).

This rule is designed not only to preserve the proceeding in rem as it now exists in admiralty cases, but to preserve the substance of Admiralty Rules 13-18. The general reference to enforcement of any maritime lien is believed to state the existing law, and is an improvement over the enumeration in the former Admiralty Rules, which is repetitious and incomplete (e.g., there was no reference to general average). The reference to any maritime lien is intended to include liens created by state law which are enforceable in admiralty.

The main concern of Admiralty Rules 13-18 was with the question whether certain actions might be brought in rem or also, or in the alternative, in personam. Essentially, therefore, these rules deal with questions of substantive law, for in general an action in rem may be brought to enforce any maritime lien, and no action in personam may be brought when the substantive law imposes no personal liability.

These rules may be summarized as follows:

1. Cases in which the plaintiff may proceed in rem and/or in personam:
   - a. Suits for seamen's wages;
   - b. Suits by materialmen for supplies, repairs, etc.;
   - c. Suits for pilotage;
   - d. Suits for collision damages;
   - e. Suits founded on mere maritime hypothecation;
   - f. Suits for salvage.
2. Cases in which the plaintiff may proceed only in personam:
   - a. Suits for assault and beating.
3. Cases in which the plaintiff may proceed only in rem:
   - a. Suits on bottomry bonds.

The coverage is complete, since the rules omit mention of many cases in which the plaintiff may proceed in rem or in personam. This revision proceeds on the principle that it is preferable to make a general statement as to the availability of the remedies, leaving out conclusions on matters of substantive law. Clearly it is not necessary to enumerate the cases listed under Item 1, above, nor to try to complete the list.

The rule eliminates the provision of Admiralty Rule 15 that actions for assault and beating may be brought only in personam. A preliminary study fails to disclose any reason for the rule. It is subject to so many exceptions that it is calculated to receive rather than to inform. A seaman may sue in rem when he has been beaten by a fellow member of the crew so vicious as to render the vessel unseaworthy. The Rolph, 293 Fed. 269, aff'd 299 Fed. 52 (9th Cir. 1923), or where the theory of the action is that a beating by the master is a breach of the obligation under the shipping articles to treat the seaman with proper kindness. The David Evans, 187 Fed. 775 (D. Hawaii 1911); and a passenger may sue in rem on the theory that the assault is a breach of the contract of passage, The Western States, 159 Fed. 354 (2d Cir. 1908). To say that an action for money damages may be brought only in personam seems equivalent to saying that a maritime lien shall not exist; and that, in turn, seems equivalent to announcing a rule of substantive law rather than a rule of procedure. Dropping the rule will leave it to the courts to determine whether a lien exists as a matter of substantive law.

The specific reference to bottomry bonds is omitted because, as a matter of hornbook substantive law, there is no personal liability on such bonds.

Subdivision (2).

This incorporates the substance of Admiralty Rules 21 and 22.

Subdivision (3).

Derived from Admiralty Rules 10 and 37. The provision that the warrant is to be issued by the clerk is new, but is assumed to state existing law.

There is remarkably little authority bearing on Rule 37, although the subject would seem to be an important one. The rule appears on its face to have provided for a sort of ancillary process, and this may well be the case when tangible property, such as a vessel, is arrested, and intangible property such as freight is incidentally involved. It can easily happen, however, that the only property against which the action may be brought is intangible, as where the owner of a vessel under charter has a lien on subfreights. See 2 Benedict § 299 and cases cited. In such cases it would seem that the order to the person holding the fund is equivalent to original process, taking the place of the warrant for arrest. That being so, it would also seem that (1) there should be some provision for notice, comparable to that given when tangible property is arrested, and (2) it should not be necessary, as Rule 37 provided, to petition the court for issuance of the process, but that it should issue as of course. Accordingly the substance of Rule 37 is included in the rule covering ordinary process, and notice will be required by Rule C(4). Presumably the rules omit any requirement of notice in these cases because the holder of the funds (e.g., the cargo owner) would be required on general principles (cf. *Harris* v. *Balk*, 198 U.S. 215 (1905) to notify his obligee (e.g., the charterer); but in actions in rem such notice seems plainly inadequate because there may be adverse claims to the fund (e.g., there may be liens against the subfreights for seamen's wages, etc.). Compare Admiralty Rule 9.

**Subdivision (4).**

This carries forward the notice provision of Admiralty Rule 10, with one modification. Notice by publication is too expensive and ineffective a formality to be routinely required. When, as usually happens, the vessel or other property is released on bond or otherwise there is no point in publishing notice; the vessel is freed from the claim of the plaintiff and no other interest in the vessel can be affected by the proceedings. If however, the vessel is not released, general notice is required in order that all persons, including unknown claimants, may appear and be heard, and in order that the judgment in rem shall be binding on all the world.

**Subdivision (5).**

This incorporates the substance of Admiralty Rule 9.

There are remarkably few cases dealing directly with the rule. In The George Prescott, 10 Fed. Cas. 222 (No. 5,339) (E.D.N.Y. 1865), the master and crew of a vessel libeled her for wages, and other lienors also filed libels. One of the lienors suggested to the court that prior to the arrest of the vessel the master had removed the sails, and asked that he be ordered to produce them. He admitted removing the sails and selling them, justifying on the ground that he held a mortgage on the vessel. He was ordered to pay the proceeds into court. Cf. *United States* v. *The Zarko*, 187 F.Supp. 371 (S.D.Cal. 1960), where an armature belonging to a vessel subject to a preferred ship mortgages was in possession of a repairman claiming a lien.

It is evident that, though the rule has had a limited career in the reported cases, it is a potentially important one. It is also evident that the rule is framed in terms narrower than the principle that supports it. There is no apparent reason for limiting it to ships and their appurtenances (2 Benedict § 299). Also, the reference to "third parties" in the existing rule seems unfortunate. In The George Prescott, the person who removed and sold the sails was a plaintiff in the action, and relief against him was just as necessary as if he had been a stranger.

Another situation in which process of this kind would seem to be useful is that in which the principal property that is the subject of the action is a vessel, but her pending freight is incidentally involved. The warrant of arrest, and notice of its service, should be all that is required by way of original process and notice; ancillary process without notice should suffice as to the incidental intangibles.

The distinction between Admiralty Rules 9 and 37 is not at once apparent, but seems to be this: Where the action was against property that could not be seized by the marshal because it is intangible, the original process was required to be similar to that issued against a garnishee, and general notice was required (though not provided for by the present rule; cf. Advisory Committee's Note to Rule C(3)). Under Admiralty Rule 9 property had been arrested and general notice had been given, but some of the property had been removed or for some other reason could not be arrested. Here no further notice was necessary.

The rule also makes provision for this kind of situation: The proceeding is against a vessel's pending freight only; summons has been served on the person supposedly holding the funds, and general notice has been given; it develops that another person holds all or part of the funds. Ancillary process should be available here without further notice.

**Subdivision (6).**

Adherence to the practice of return days seems unsatisfactory. The practice varies significantly from district to district. A uniform rule should be provided so that any claimant or defendant can readily determine when he is required to file or serve a claim or answer.

A virtue of the return-day practice is that it requires claimants to come forward and identify themselves at an early stage of the proceedings—before they could fairly be required to answer. The draft is designed to preserve this feature of the present practice by requiring early filing of the claim. The time schedule contemplated in the draft is closely comparable to the present practice in the Southern District of New York, where the claimant has a minimum of 8 days to claim and three weeks thereafter to answer.

This rule also incorporates the substance of Admiralty Rule 25. The present rule's emphasis on "the true and bona fide owner" is omitted, since anyone having the right to possession can claim (2 Benedict § 324).

### REFERENCES IN TEXT

The act of June 5, 1920, ch. 250, § 30, referred to in subd. (4), is section 30 of act June 5, 1920, ch. 250, 41 Stat. 988, known as the "Ship Mortgage Act, 1920", which is classified generally to chapter 25 (§ 911 et seq.) of Title 46, Shipping. For complete classification of this Act to the Code, see section 984 of Title 46 and Tables volume.

## Rule D. Possessory, Petitory and Partition Actions

In all actions for possession, partition, and to try title maintainable according to the course of the admiralty practice with respect to a vessel, in all actions so maintainable with respect to the possession of cargo or other maritime property, and in all actions by one or more part owners against the others to obtain security for the return of the vessel from any voyage undertaken without their consent, or by one or more part owners against the others to obtain possession of the vessel for any voyage on giving security for its safe return, the process shall be by a warrant of arrest of the vessel, cargo, or other property, and by notice in the manner provided by Rule B(2) to the adverse party or parties.

(Added Feb. 28, 1966, eff. July 1, 1966.)

### NOTES OF ADVISORY COMMITTEE ON RULES

This carries forward the substance of Admiralty Rule 19.

Rule 19 provided the remedy of arrest in controversies involving title and possession in general. See The Tilton, 23 Fed. Cas. 1277 (No. 14, 054) (C.C.D. Mass. 1830). In addition it provided that remedy in controversies between co-owners respecting the employment of a vessel. It did not deal comprehensively with controversies between co-owners, omitting the remedy of partition. Presumably the omission is traceable to the fact that, when the rules were originally promulgated, concepts of substantive law (sometimes stated as concepts of jurisdiction) denied the remedy of partition except where the parties in disagreement were the owners of equal shares. See The Steamboat Orleans, 36 U.S. (11 Pet.) 175 (1837). The Supreme Court has now removed any doubt as to the jurisdiction of the district courts to partition a vessel, and has held in addition that no fixed principle of federal admiralty law limits the remedy to the case of equal shares. *Madruga* v. *Superior Court*, 346 U.S. 556 (1954). It is therefore appropriate to include a reference to partition in the rule.

### Rule E. Actions in Rem and Quasi in Rem: General Provisions

(1) *Applicability.*—Except as otherwise provided, this rule applies to actions in personam with process of maritime attachment and garnishment, actions in rem, and petitory, possessory, and partition actions, supplementing Rules B, C, and D.

(2) *Complaint; Security.*—

(*a*) *Complaint.* In actions to which this rule is applicable the complaint shall state the circumstances from which the claim arises with such particularity that the defendant or claimant will be able, without moving for a more definite statement, to commence an investigation of the facts and to frame a responsive pleading.

(*b*) *Security for Costs.* Subject to the provisions of Rule 54(d) and of relevant statutes, the court may on the filing of the complaint or on the appearance of any defendant, claimant, or any other party, or at any later time, require the plaintiff, defendant, claimant, or other party to give security, or additional security, in such sum as the court shall direct to pay all costs and expenses that shall be awarded against him by any interlocutory order or by the final judgment, or on appeal by any appellate court.

(3) *Process.*—

(*a*) *Territorial Limits of Effective Service.* Process in rem and of maritime attachment and garnishment shall be served only within the district.

(*b*) *Issuance and Delivery.* Issuance and delivery of process in rem, or of maritime attachment and garnishment, shall be held in abeyance if the plaintiff so requests.

(4) *Execution of Process; Marshal's Return; Custody of Property.*—

(*a*) *In General.* Upon issuance and delivery of the process, or, in the case of summons with process of attachment and garnishment, when it appears that the defendant cannot be found within the district, the marshal shall forthwith execute the process in accordance with this subdivision (4), making due and prompt return.

(*b*) *Tangible Property.* If tangible property is to be attached or arrested, the marshal shall take it into his possession for safe custody. If the character or situation of the property is such that the taking of actual possession is impracticable, the marshal shall execute the process by affixing a copy thereof to the property in a conspicuous place and by leaving a copy of the complaint and process with the person having possession or his agent. In furtherance of his custody of any vessel the marshal is authorized to make a written request to the collector of customs not to grant clearance to such vessel until notified by the marshal or his deputy or by the clerk that the vessel has been released in accordance with these rules.

(*c*) *Intangible Property.* If intangible property is to be attached or arrested the marshal shall execute the process by leaving with the garnishee or other obligor a copy of the complaint and process requiring him to answer as provided in Rules B(3)(a) and C(6); or he may accept for payment into the registry of the court the amount owed to the extent of the amount claimed by the plaintiff with interest and costs, in which event the garnishee or other obligor shall not be required to answer unless alias process shall be served.

(*d*) *Directions With Respect to Property in Custody.* The marshal may at any time apply to the court for directions with respect to property that has been attached or arrested, and shall give notice of such application to any or all of the parties as the court may direct.

(*e*) *Expenses of Seizing and Keeping Property; Deposit.* These rules do not alter the provisions of Title 28, U.S.C., § 1921, as amended, relative to the expenses of seizing and keeping property attached or arrested and to the requirement of deposits to cover such expenses.

(5) *Release of Property.*—

(*a*) *Special Bond.* Except in cases of seizures for forfeiture under any law of the United States, whenever process of maritime attachment and garnishment or process in rem is issued the execution of such process shall be stayed, or the property released, on the giving of security, to be approved by the court or clerk, or by stipulation of the parties, conditioned to answer the judgment of the court or of any appellate court. The parties may stipulate the amount and nature of such security. In the event of the inability or refusal of the parties so to stipulate the court shall fix the principal sum of the bond or stipulation at an amount sufficient to cover the amount of the plaintiff's claim fairly stated with accrued interest and costs; but the principal sum shall in no event exceed (i) twice the amount of the plaintiff's claim or (ii) the value of the property on due appraisement, whichever is smaller. The bond or stipulation shall be conditioned for the payment of the principal sum and interest thereon at 6 per cent per annum.

(*b*) *General Bond.* The owner of any vessel may file a general bond or stipulation, with sufficient surety, to be approved by the court, conditioned to answer the judgment of such court in all or any actions that may be brought thereafter in such court in which the vessel is attached or arrested. Thereupon the execution of all such process against such vessel shall be stayed so long as the amount secured by such bond or stipulation is at least double the aggregate amount claimed by plaintiffs in all actions begun and pending in which such vessel has been attached or arrested. Judgments and remedies may be had on such bond or stipulation as if a special bond or stipulation had been filed in each of such actions. The district court may make necessary orders to carry this rule into effect, particularly as to the giving of proper notice of any action against or attachment of a vessel for which a general bond has been filed. Such bond or stipulation shall be indorsed by the clerk with a minute of the actions wherein process is so stayed. Further security may be required by the court at any time.

If a special bond or stipulation is given in a particular case, the liability on the general bond or stipulation shall cease as to that case.

(*c*) *Release by Consent or Stipulation; Order of Court or Clerk; Costs.* Any vessel, cargo, or other property in the custody of the marshal may be released forthwith upon his acceptance and approval of a stipulation, bond, or other security, signed by the party on whose behalf the property is detained or his attorney and expressly authorizing such release, if all costs and charges of the court and its officers shall have first been paid. Otherwise no property in the custody of the marshal or other officer of the court shall be released without an order of the court; but such order may be entered as of course by the clerk, upon the giving of approved security as provided by law and these rules, or upon the dismissal or discontinuance of the action; but the marshal shall not deliver any property so released until the costs and charges of the officers of the court shall first have been paid.

(*d*) *Possessory, Petitory, and Partition Actions.* The foregoing provisions of this subdivision (5) do not apply to petitory, possessory, and partition actions. In such cases the property arrested shall be released only by order of the court, on such terms and conditions and on the giving of such security as the court may require.

(6) *Reduction or Impairment of Security.*—Whenever security is taken the court may, on motion and hearing, for good cause shown, reduce the amount of security given; and if the surety shall be or become insufficient, new or additional sureties may be required on motion and hearing.

(7) *Security on Counterclaim.*—Whenever there is asserted a counterclaim arising out of the same transaction or occurrence with respect to which the action was originally filed, and the defendant or claimant in the original action has given security to respond in damages, any plaintiff for whose benefit such security has been given shall give security in the usual amount and form to respond in damages to the claims set forth in such counterclaim, unless the court, for cause shown, shall otherwise direct; and proceedings on the original claim shall be stayed until such security is given, unless the court otherwise directs. When the United States or a corporate instrumentality thereof as defendant is relieved by law of the requirement of giving security to respond in damages it shall nevertheless be treated for the purposes of this subdivision E(7) as if it had given such security if a private person so situated would have been required to give it.

(8) *Restricted Appearance.*—An appearance to defend against an admiralty and maritime claim with respect to which there has issued process in rem, or process of attachment and garnishment whether pursuant to these Supplemental Rules or to Rule 4(e), may be expressly restricted to the defense of such claim, and in that event shall not constitute an appearance for the purposes of any other claim with respect to which such process is not available or has not been served.

(9) *Disposition of Property; Sales.*—

(*a*) *Actions for Forfeitures.* In any action in rem to enforce a forfeiture for violation of a statute of the United States the property shall be disposed of as provided by statute.

(*b*) *Interlocutory Sales.* If property that has been attached or arrested is perishable, or liable to deterioration, decay, or injury by being detained in custody pending the action, or if the expense of keeping the property is excessive or disproportionate, or if there is unreasonable delay in securing the release of property, the court, on application of any party or of the marshal, may order the property or any portion thereof to be sold; and the proceeds, or so much thereof as shall be adequate to satisfy any judgment, may be ordered brought into court to abide the event of the action; or the court may, on motion of the defendant or claimant, order delivery of the property to him, upon the giving of security in accordance with these rules.

(c) *Sales; Proceeds.* All sales of property shall be made by the marshal or his deputy, or other proper officer assigned by the court where the marshal is a party in interest; and the proceeds of sale shall be forthwith paid into the registry of the court to be disposed of according to law.

(Added Feb. 28, 1966, eff. July 1, 1966.)

### NOTES OF ADVISORY COMMITTEE ON RULES

Subdivisions (1), (2).

Adapted from Admiralty Rule 24. The rule is based on the assumption that there is no more need for security for costs in maritime personal actions than in civil cases generally, but that there is reason to retain the requirement for actions in which property is seized. As to proceedings for limitation of liability see Rule F(1).

Subdivision (3).

The Advisory Committee has concluded for practical reasons that process requiring seizure of property should continue to be served only within the geographical limits of the district. Compare Rule B(1), continuing the condition that process of attachment and garnishment may be served only if the defendant is not found within the district.

The provisions of Admiralty Rule 1 concerning the persons by whom process is to be served will be superseded by FRCP 4(c).

Subdivision (4).

This rule is intended to preserve the provisions of Admiralty Rules 10 and 36 relating to execution of process, custody of property, seized by the marshal, and the marshal's return. It is also designed to make express provision for matters not heretofore covered.

The provision relating to clearance in subdivision (b) is suggested by Admiralty Rule 44 of the District of Maryland.

Subdivision (d) is suggested by English Rule 12, Order 75.

28 U.S.C. § 1921 as amended in 1962 contains detailed provisions relating to the expenses of seizing and preserving property attached or arrested.

Subdivision (5).

In addition to Admiralty Rule 11 (see Rule E(9), the release of property seized on process of attachment or in rem was dealt with by Admiralty Rules 5, 6, 12, and 57, and 28 U.S.C., § 2464 (formerly Rev. Stat. § 941). The rule consolidates these provisions and makes them uniformly applicable to attachment and garnishment and actions in rem.

The rule restates the substance of Admiralty Rule 5. Admiralty Rule 12 dealt only with ships arrested on in rem process. Since the same ground appears to be covered more generally by 28 U.S.C., § 2464, the subject matter of Rule 12 is omitted. The substance of Admiralty Rule 57 is retained. 28 U.S.C., § 2464 is incorporated with changes of terminology, and with a substantial change as to the amount of the bond. See 2 Benedict 395 n. 1a; The Lotosland, 2 F. Supp. 42 (S.D.N.Y. 1933). The provision for general bond is enlarged to include the contingency of attachment as well as arrest of the vessel.

Subdivision (6).

Adapted from Admiralty Rule 8.

Subdivision (7).

Derived from Admiralty Rule 50.

Title 46, U.S.C., § 783 extends the principle of Rule 50 to the Government when sued under the Public Vessels Act, presumably on the theory that the credit of the Government is the equivalent of the best security. The rule adopts this principle and extends it to all cases in which the Government is defendant although the Suits in Admiralty Act contains no parallel provisions.

Subdivision (8).

Under the liberal joinder provisions of unified rules the plaintiff will be enabled to join with maritime actions in rem, or maritime actions in personam with process of attachment and garnishment, claims with respect to which such process is not available, including nonmaritime claims. Unification should not, however, have the result that, in order to defend against an admiralty and maritime claim with respect to which process in rem or quasi in rem has been served, the claimant or defendant must subject himself personally to the jurisdiction of the court with reference to other claims with respect to which such process is not available or has not been served, especially when such other claims are nonmaritime. So far as attachment and garnishment are concerned this principle holds true whether process is issued according to admiralty tradition and the Supplemental Rules or according to Rule 4(e) as incorporated by Rule B(1).

A similar problem may arise with respect to civil actions other than admiralty and maritime claims within the meaning of Rule 9(h). That is to say, in an ordinary civil action, whether maritime or not, there may be joined in one action claims with respect to which process of attachment and garnishment is available under state law and Rule 4(e) and claims with respect to which such process is not available or has not been served. The general Rules of Civil Procedure do not specify whether an appearance in such cases to defend the claim with respect to which process of attachment and garnishment has issued is an appearance for the purposes of the other claims. In that context the question has been considered best left to case-by-case development. Where admiralty and maritime claims within the meaning of Rule 9(h) are concerned, however, it seems important to include a specific provision to avoid an unfortunate and unintended effect of unification. No inferences whatever as to the effect of such an appearance in an ordinary civil action should be drawn from the specific provision here and the absence of such a provision in the general Rules.

Subdivision (9).

Adapted from Admiralty Rules 11, 12, and 40. Subdivision (a) is necessary because of various provisions as to disposition of property in forfeiture proceedings. In addition to particular statutes, note the provisions of 28 U.S.C., §§ 2461–65.

The provision of Admiralty Rule 12 relating to unreasonable delay was limited to ships but should have broader application. See 2 Benedict 404. Similarly, both Rules 11 and 12 were limited to actions in rem, but should equally apply to attached property.

## Rule F. Limitation of Liability

(1) *Time for Filing Complaint; Security.*—Not later than six months after his receipt of a claim in writing, any vessel owner may file a complaint in the appropriate district court, as provided in subdivision (9) of this rule, for limitation of liability pursuant to statute. The owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of his interest in the vessel and pending freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of the statutes as amended; or (b) at his option shall transfer to a trustee to be appointed by the court, for the benefit of claimants, his interest in the vessel and pending freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of the statutes as amended. The plaintiff shall also give security for costs and, if he elects to give security, for interest at the rate of 6 per cent per annum from the date of the security.

(2) *Complaint.*—The complaint shall set forth the facts on the basis of which the right to limit liability is asserted, and all facts necessary to enable the court to determine the amount to which the owner's liability shall be limited. The complaint may demand exoneration from as well as limitation of liability. It shall state the voyage, if any, on which the demands sought to be limited arose, with the date and place of its termination; the amount of all demands including all unsatisfied liens or claims of lien, in contract or in tort or otherwise, arising on that voyage, so far as known to the plaintiff, and what actions and proceedings, if any, are pending thereon; whether the vessel was damaged, lost, or abandoned, and, if so, when and where; the value of the vessel at the close of the voyage or, in case of wreck, the value of her wreckage, strippings, or proceeds, if any, and where and in whose possession they are; and the amount of any pending freight recovered or recoverable. If the plaintiff elects to transfer his interest in the vessel to a trustee, the complaint must further show any prior paramount liens thereon, and what voyages or trips, if any, she has made since the voyage or trip on which the claims sought to be limited arose, and any existing liens arising upon any such subsequent voyage or trip, with the amounts and causes thereof, and the names and addresses of the lienors, so far as known; and whether the vessel sustained any injury upon or by reason of such subsequent voyage or trip.

(3) *Claims Against Owner; Injunction.*—Upon compliance by the owner with the requirements of subdivision (1) of this rule all claims and proceedings against the owner or his property with respect to the matter in question shall cease. On application of the plaintiff the court shall enjoin the further prosecution of any action or proceeding against the plaintiff or his property with respect to any claim subject to limitation in the action.

(4) *Notice to Claimants.*—Upon the owner's compliance with subdivision (1) of this rule the court shall issue a notice to all persons asserting claims with respect to which the complaint seeks limitation, admonishing them to file their respective claims with the clerk of the court and to serve on the attorneys for the plaintiff a copy thereof on or before a date to be named in the notice. The date so fixed shall not be less than 30 days after issuance of the notice. For cause shown, the court may enlarge the time within which claims may be filed. The notice shall be published in such newspaper or newspapers as the court may direct once a week for four successive weeks prior to the date fixed for the filing of claims. The plaintiff not later than the day of second publication shall also mail a copy of the notice to every person known to

have made any claim against the vessel or the plaintiff arising out of the voyage or trip on which the claims sought to be limited arose. In cases involving death a copy of such notice shall be mailed to the decedent at his last known address, and also to any person who shall be known to have made any claim on account of such death.

(5) *Claims and Answer.*—Claims shall be filed and served on or before the date specified in the notice provided for in subdivision (4) of this rule. Each claim shall specify the facts upon which the claimant relies in support of his claim, the items thereof, and the dates on which the same accrued. If a claimant desires to contest either the right to exoneration from or the right to limitation of liability he shall file and serve an answer to the complaint unless his claim has included an answer.

(6) *Information to be Given Claimants.*—Within 30 days after the date specified in the notice for filing claims, or within such time as the court thereafter may allow, the plaintiff shall mail to the attorney for each claimant (or if the claimant has no attorney to the claimant himself) a list setting forth (a) the name of each claimant, (b) the name and address of his attorney (if he is known to have one), (c) the nature of his claim, i.e., whether property loss, property damage, death, personal injury, etc., and (d) the amount thereof.

(7) *Insufficiency of Fund or Security.*—Any claimant may by motion demand that the funds deposited in court or the security given by the plaintiff be increased on the ground that they are less than the value of the plaintiff's interest in the vessel and pending freight. Thereupon the court shall cause due appraisement to be made of the value of the plaintiff's interest in the vessel and pending freight; and if the court finds that the deposit or security is either insufficient or excessive it shall order its increase or reduction. In like manner any claimant may demand that the deposit or security be increased on the ground that it is insufficient to carry out the provisions of the statutes relating to claims in respect of loss of life or bodily injury; and, after notice and hearing, the court may similarly order that the deposit or security be increased or reduced.

(8) *Objections to Claims: Distribution of Fund.*—Any interested party may question or controvert any claim without filing an objection thereto. Upon determination of liability the fund deposited or secured, or the proceeds of the vessel and pending freight, shall be divided pro rata, subject to all relevant provisions of law, among the several claimants in proportion to the amounts of their respective claims, duly proved, saving, however, to all parties any priority to which they may be legally entitled.

(9) *Venue; Transfer.*—The complaint shall be filed in any district in which the vessel has been attached or arrested to answer for any claim with respect to which the plaintiff seeks to limit liability; or, if the vessel has not been attached or arrested, then in any district in which the owner has been sued with respect to any such claim. When the vessel has not been attached or arrested to answer the matters aforesaid, and suit has not been commenced against the owner, the proceedings may be had in the district in which the vessel may be, but if the vessel is not within any district and no suit has been commenced in any district, then the complaint may be filed in any district. For the convenience of parties and witnesses, in the interest of justice, the court may transfer the action to any district; if venue is wrongly laid the court shall dismiss or, if it be in the interest of justice, transfer the action to any district in which it could have been brought. If the vessel shall have been sold, the proceeds shall represent the vessel for the purposes of these rules.

(Added Feb. 28, 1966, eff. July 1, 1966.)

### NOTES OF ADVISORY COMMITTEE ON RULES

Subdivision (1).

The amendments of 1936 to the Limitation Act superseded to some extent the provisions of Admiralty Rule 51, especially with respect to the time of filing the complaint and with respect to security. The rule here incorporates in substance the 1936 amendment of the Act (46 U.S.C., § 185) with a slight modification to make it clear that the complaint may be filed at any time not later than six months after a claim has been lodged with the owner.

Subdivision (2).

Derived from Admiralty Rules 51 and 53.

Subdivision (3).

This is derived from the last sentence of 36 U.S.C. § 185 and the last paragraph of Admiralty Rule 51.

Subdivision (4).

Derived from Admiralty Rule 51.

Subdivision (5).

Derived from Admiralty Rules 52 and 53.

Subdivision (6).

Derived from Admiralty Rule 52.

Subdivision (7).

Derived from Admiralty Rule 52 and 46 U.S.C., § 185.

Subdivision (8).

Derived from Admiralty Rule 52.

Subdivision (9).

Derived from Admiralty Rule 54. The provision for transfer is revised to conform closely to the language of 28 U.S.C. §§ 1404(a) and 1406(a), though it retains the existing rule's provision for transfer to any district for convenience. The revision also makes clear what has been doubted: that the court may transfer if venue is wrongly laid.

# RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES

*(As amended to January 1, 1977)*

## EFFECTIVE DATE AND APPLICATION OF RULES

**Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1926, provided: "That the following rules shall take effect on the one hundred and eightieth day beginning after the date of the enactment of this Act [Jan. 2, 1975]. These rules apply to actions, cases, and proceedings brought after the rules take effect. These rules also apply to further procedure in actions, cases, and proceedings then pending, except to the extent that application of the rules would not be feasible, or would work injustice, in which event former evidentiary principles apply."**

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[1] So in original. Does not conform to rule catchline.

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### AMENDMENTS

1975—Pub. L. 94-149, § 1(1) to (8), Dec. 12, 1975, 89 Stat. 805, amended analysis as follows: Item 106, substituted "or" for "on"; Item 301, inserted "in" immediately after "general"; Item 405(a), inserted "or opinion" after "Reputation" and preceding the period; Item 410, substituted "Inadmissibility of pleas, offers of pleas, and related statements" for "Offer to plead guilty; nolo contendere; withdrawn plea of guilty"; Item 501, substituted "General rule"; Item 608(a), substituted "Opinion and reputation" for "Reputation"; Item 901(b)(8), substituted "compilation" for "compilations"; and Item 1101(c), substituted "Rule" for "Rules".

## ARTICLE I—GENERAL PROVISIONS

### Rule 101. Scope

These rules govern proceedings in the courts of the United States and before United States magistrates, to the extent and with the exceptions stated in rule 1101.

(Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1929.)

#### NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

Rule 1101 specifies in detail the courts, proceedings, questions, and stages of proceedings to which the rules apply in whole or in part.

### Rule 102. Purpose and Construction

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

(Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1929.)

#### NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

For similar provisions see Rule 2 of the Federal Rules of Criminal Procedure, Rule 1 of the Federal Rules of Civil Procedure, California Evidence Code § 2, and New Jersey Evidence Rule 5.

### Rule 103. Rulings on Evidence

(a) *Effect of erroneous ruling.* Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(*1*) *Objection.* In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(*2*) *Offer of proof.* In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

(b) *Record of offer and ruling.* The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) *Hearing of jury.* In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) *Plain error.* Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

(Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1930.)

#### NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

*Subdivision* (*a*) states the law as generally accepted today. Rulings on evidence cannot be assigned as error unless (1) a substantial right is affected, and (2) the nature of the error was called to the attention of the judge, so as to alert him to the proper course of action and enable opposing counsel to take proper corrective measures. The objection and the offer of proof are the techniques for accomplishing these objectives. For similar provisions see Uniform Rules 4 and 5; California Evidence Code §§ 353 and 354; Kansas Code of Civil Procedure §§ 60-404 and 60-405. The rule does not purport to change the law with respect to harmless error. See 28 U.S.C. § 2111, F.R.Civ.P. 61, F.R.Crim.P. 52, and decisions construing them. The status of constitutional error as harmless or not is treated in *Chapman* v. *California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), reh. denied *id.* 987, 87 S.Ct. 1283, 18 L.Ed.2d 241.

*Subdivision* (*b*). The first sentence is the third sentence of Rule 43(c) of the Federal Rules of Civil Procedure virtually verbatim. Its purpose is to reproduce for an appellate court, insofar as possible, a true reflection of what occurred in the trial court. The second sentence is in part derived from the final sentence of Rule 43(c). It is designed to resolve doubts as to what testimony the witness would have in fact given, and, in nonjury cases, to provide the appellate court with material for a possible final disposition of the case in the event of reversal of a ruling which excluded evidence. See 5 Moore's Federal Practice § 43.11 (2d ed. 1968). Application is made discretionary in view of the practical impossibility of formulating a satisfactory rule in mandatory terms.

*Subdivision* (*c*). This subdivision proceeds on the supposition that a ruling which excludes evidence in a jury case is likely to be a pointless procedure if the excluded evidence nevertheless comes to the attention of the jury. *Bruton* v. *United States*, 389 U.S. 818, 88 S.Ct. 126, L.Ed.2d 70 (1968). Rule 43(c) of the Federal Rules of Civil Procedure provides: "The court may require the offer to be made out of the hearing of the jury." *In re McConnell*, 370 U.S. 230, 82 S.Ct. 1288, 8 L.Ed.2d 434 (1962), left some doubt whether questions on which an offer is based must first be asked in the presence of the jury. The subdivision answers in the negative. The judge can foreclose a particular line of testimony and counsel can protect his record without a series of questions before the jury, designed at best to waste time and at worst "to waft into the jury box" the very matter sought to be excluded.

*Subdivision* (*d*). This wording of the plain error principle is from Rule 52(b) of the Federal Rules of Criminal Procedure. While judicial unwillingness to be constructed by mechanical breakdowns of the adversary system has been more pronounced in criminal cases, there is no scarcity of decisions to the same effect in civil cases. In general, see Campbell, Extent to Which Courts of Review Will Consider Questions Not Properly Raised and Preserved, 7 Wis.L.Rev. 91, 160 (1932); Vestal, Sua Sponte Consideration in Appellate Review, 27 Fordham L.Rev. 477 (1958-59); 64 Harv.L.Rev. 652 (1951). In the nature of things the application of the plain error rule will be more likely with respect to the admission of evidence than to exclusion, since failure to comply with normal requirements of offers of proof is likely to produce a record which simply does not disclose the error.

### Rule 104. Preliminary Questions

(a) *Questions of admissibility generally.* Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) *Relevancy conditioned on fact.* When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) *Hearing of jury.* Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require or, when an accused is a witness, if he so requests.

(d) *Testimony by accused.* The accused does not, by testifying upon a preliminary matter,

**subject himself to cross-examination as to other issues in the case.**

**(*e*) *Weight and credibility.* This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.**

**(Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1930.)**

### NOTES OF THE ADVISORY COMMITTEE ON PROPOSED RULES

*Subdivision (a).* The applicability of a particular rule of evidence often depends upon the existence of a condition. Is the alleged expert a qualified physician? Is a witness whose former testimony is offered unavailable? Was a stranger present during a conversation between attorney and client? In each instance the admissibility of evidence will turn upon the answer to the question of the existence of the condition. Accepted practice, incorporated in the rule, places on the judge the responsibility for these determinations. McCormick § 53; Morgan, Basic Problems of Evidence 45-50 (1962).

To the extent that these inquiries are factual, the judge acts as a trier of fact. Often, however, rulings on evidence call for an evaluation in terms of a legally set standard. Thus when a hearsay statement is offered as a declaration against interest, a decision must be made whether it possesses the required against-interest characteristics. These decisions, too, are made by the judge.

In view of these considerations, this subdivision refers to preliminary requirements generally by the broad term "questions," without attempt at specification.

This subdivision is of general application. It must, however, be read as subject to the special provisions for "conditional relevancy" in subdivision (b) and those for confessions in subdivision (d).

If the question is factual in nature, the judge will of necessity receive evidence pro and con on the issue. The rule provides that the rules of evidence in general do not apply to this process. McCormick § 53, p. 123, n. 8, points out that the authorities are "scattered and inconclusive," and observes:

> "Should the exclusionary law of evidence, 'the child of the jury system' in Thayer's phrase, be applied to this hearing before the judge? Sound sense backs the view that it should not, and that the judge should be empowered to hear any relevant evidence, such as affidavits or other reliable hearsay."

This view is reinforced by practical necessity in certain situations. An item, offered and objected to, may itself be considered in ruling on admissibility, though not yet admitted in evidence. Thus the content of an asserted declaration against interest must be considered in ruling whether it is against interest. Again, common practice calls for considering the testimony of a witness, particularly a child, in determining competency. Another example is the requirement of Rule 602 dealing with personal knowledge. In the case of hearsay, it is enough, if the declarant "so far as appears [has] had an opportunity to observe the fact declared." McCormick, § 10, p. 19.

If concern is felt over the use of affidavits by the judge in preliminary hearings on admissibility, attention is directed to the many important judicial determinations made on the basis of affidavits. Rule 47 of the Federal Rules of Criminal Procedure provides:

> "An application to the court for an order shall be by motion * * * It may be supported by affidavit."

The Rules of Civil Procedure are more detailed. Rule 43(e), dealing with motions generally, provides:

> "When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions."

Rule 4(g) provides for proof of service by affidavit. Rule 56 provides in detail for the entry of summary judgment based on affidavits. Affidavits may supply the foundation for temporary restraining orders under Rule 65(b).

The study made for the California Law Revision Commission recommended an amendment to Uniform Rule 2 as follows:

> "In the determination of the issue aforesaid [preliminary determination], exclusionary rules shall not apply, subject, however, to Rule 45 and any valid claim of privilege."

Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VIII, Hearsay), Cal. Law Revision Comm'n, Rep., Rec. & Studies, 470 (1962). The proposal was not adopted in the California Evidence Code. The Uniform Rules are likewise silent on the subject. However, New Jersey Evidence Rule 8(1), dealing with preliminary inquiry by the judge, provides:

> "In his determination the rules of evidence shall not apply except for Rule 4 [exclusion on grounds of confusion, etc.] or a valid claim of privilege."

*Subdivision (b).* In some situations, the relevancy of an item of evidence, in the large sense, depends upon the existence of a particular preliminary fact. Thus when a spoken statement is relied upon to prove notice to X, it is without probative value unless X heard it. Or if a letter purporting to be from Y is relied upon to establish an admission by him, it has no probative value unless Y wrote or authorized it. Relevance in this sense has been labelled "conditional relevancy." Morgan, Basic Problems of Evidence 45-46 (1962). Problems arising in connection with it are to be distinguished from problems of logical relevancy, e.g. evidence in a murder case that accused on the day before purchased a weapon of the kind used in the killing, treated in Rule 401.

If preliminary questions of conditional relevancy were determined solely by the judge, as provided in subdivision (a), the functioning of the jury as a trier of fact would be greatly restricted and in some cases virtually destroyed. These are appropriate questions for juries. Accepted treatment, as provided in the rule, is consistent with that given fact questions generally. The judge makes a preliminary determination whether the foundation evidence is sufficient to support a finding of fulfillment of the condition. If so, the item is admitted. If after all the evidence on the issue is in, pro and con, the jury could reasonably conclude that fulfillment of the condition is not established, the issue is for them. If the evidence is not such as to allow a finding, the judge withdraws the matter from their consideration. Morgan, *supra;* California Evidence Code § 403; New Jersey Rule 8(2). See also Uniform Rules 19 and 67.

The order of proof here, as generally, is subject to the control of the judge.

*Subdivision (c).* Preliminary hearings on the admissibility of confessions must be conducted outside the hearing of the jury. See *Jackson* v. *Denno,* 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). Otherwise, detailed treatment of when preliminary matters should be heard outside the hearing of the jury is not feasible. The procedure is time consuming. Not infrequently the same evidence which is relevant to the issue of establishment of fulfillment of a condition precedent to admissibility is also relevant to weight or credibility, and time is saved by taking foundation proof in the presence of the jury. Much evidence on preliminary questions, though not relevant to jury issues, may be heard by the jury with no adverse effect. A great deal must be left to the discretion of the judge who will act as the interests of justice require.

*Subdivision (d).* The limitation upon cross-examination is designed to encourage participation by the accused in the determination of preliminary matters. He may testify concerning them without exposing himself to cross-examination generally. The provision is necessary because of the breadth of cross-examination under Rule 611(b).

The rule does not address itself to questions of the subsequent use of testimony given by an accused at a hearing on a preliminary matter. See *Walder* v. *United States*, 347 U.S. 62 (1954); *Simmons* v. *United States*, 390 U.S. 377 (1968); *Harris* v. *New York*, 401 U.S. 222 (1971)

*Subdivision (e).* For similar provisions see Uniform Rule 8; California Evidence Code § 406; Kansas Code of Civil Procedure § 60-408; New Jersey Evidence Rule 8(1).

#### Notes of Committee on the Judiciary, House Report No. 93-650

Rule 104(c) as submitted to the Congress provided that hearings on the admissibility of confessions shall be conducted outside the presence of the jury and hearings on all other preliminary matters should be so conducted when the interests of justice require. The Committee amended the Rule to provide that where an accused is a witness as to a preliminary matter, he has the right, upon his request, to be heard outside the jury's presence. Although recognizing that in some cases duplication of evidence would occur and that the procedure could be subject to abuse, the Committee believed that a proper regard for the right of an accused not to testify generally in the case dictates that he be given an option to testify out of the presence of the jury on preliminary matters.

The Committee construes the second sentence of subdivision (c) as applying to civil actions and proceedings as well as to criminal cases, and on this assumption has left the sentence unamended.

#### Notes of Committee on the Judiciary, Senate Report No. 93-1277

Under rule 104(c) the hearing on a preliminary matter may at times be conducted in front of the jury. Should an accused testify in such a hearing, waiving his privilege against self-incrimination as to the preliminary issue, rule 104(d) provides that he will not generally be subject to cross-examination as to any other issue. This rule is not, however, intended to immunize the accused from cross-examination where, in testifying about a preliminary issue, he injects other issues into the hearing. If he could not be cross-examined about any issues gratuitously raised by him beyond the scope of the preliminary matters, injustice result. Accordingly, in order to prevent any such unjust result, the committee intends the rule to be construed to provide that the accused may subject himself to cross-examination as to issues raised by his own testimony upon a preliminary matter before a jury.

### Rule 105. Limited Admissibility

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

(Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1930.)

#### Notes of Advisory Committee on Proposed Rules

A close relationship exists between this rule and Rule 403 which requires exclusion when "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." The present rule recognizes the practice of admitting evidence for a limited purpose and instructing the jury accordingly. The availability and effectiveness of this practice must be taken into consideration in reaching a decision whether to exclude for unfair prejudice under Rule 403. In *Bruton* v. *United States*, 389 U.S. 818, 88 S.Ct. 126, 19 L.Ed.2d 70 (1968), the Court ruled that a limiting instruction did not effectively protect the accused against the prejudicial effect of admitting in evidence the confession of a codefendant which implicated him. The decision does not, however, bar the use of limited admissibility with an instruction where the risk of prejudice is less serious.

Similar provisions are found in Uniform Rule 6; California Evidence Code § 355; Kansas Code of Civil Procedure § 60-406; New Jersey Evidence Rule 6. The wording of the present rule differs, however, in repelling any implication that limiting or curative instructions are sufficient in all situations.

#### Notes of Committee on the Judiciary, House Report No. 93-650

Rule 106 as submitted by the Supreme Court (now Rule 105 in the bill) dealt with the subject of evidence which is admissible as to one party or for one purpose but is not admissible against another party or for another purpose. The Committee adopted this Rule without change on the understanding that it does not affect the authority of a court to order a severence in a multi-defendant case.

### Rule 106. Remainder of or Related Writings or Recorded Statements

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

(Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1930.)

#### Notes of Advisory Committee on Proposed Rules

The rule is an expression of the rule of completeness. McCormick § 56. It is manifested as to depositions in Rule 32(a)(4) of the Federal Rules of Civil Procedure, of which the proposed rule is substantially a restatement.

The rule is based on two considerations. The first is the misleading impression created by taking matters out of context. The second is the inadequacy of repair work when delayed to a point later in the trial. See McCormick § 56; California Evidence Code § 356. The rule does not in any way circumscribe the right of the adversary to develop the matter on cross-examination or as part of his own case.

For practical reasons, the rule is limited to writings and recorded statements and does not apply to conversations.

## ARTICLE II—JUDICIAL NOTICE

### Rule 201. Judicial Notice of Adjudicative Facts

(*a*) *Scope of rule.* This rule governs only judicial notice of adjudicative facts.

(*b*) *Kinds of facts.* A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(*c*) *When discretionary.* A court may take judicial notice, whether requested or not.

(*d*) *When mandatory.* A court shall take judicial notice if requested by a party and supplied with the necessary information.

(*e*) *Opportunity to be heard.* A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(*f*) *Time of taking notice.* Judicial notice may be taken at any stage of the proceeding.

**(g) *Instructing jury.* In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.**

**(Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1930.)**

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

*Subdivision (a).* This is the only evidence rule on the subject of judicial notice. It deals only with judicial notice of "adjudicative" facts. No rule deals with judicial notice of "legislative" facts. Judicial notice of matters of foreign law is treated in Rule 44.1 of the Federal Rules of Civil Procedure and Rule 26.1 of the Federal Rules of Criminal Procedure.

The omission of any treatment of legislative facts results from fundamental differences between adjudicative facts and legislative facts. Adjudicative facts are simply the facts of the particular case. Legislative facts, on the other hand, are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body. The terminology was coined by Professor Kenneth Davis in his article An Approach to Problems of Evidence in the Administrative Process, 55 Harv.L.Rev. 364, 404-407 (1942). The following discussion draws extensively upon his writings. In addition, see the same author's Judicial Notice, 55 Colum.L. Rev. 945 (1955); Administrative Law Treatise, ch. 15 (1958); A System of Judicial Notice Based on Fairness and Convenience, in Perspectives of Law 69 (1964).

The usual method of establishing adjudicative facts in through the introduction of evidence, ordinarily consisting of the testimony of witnesses. If particular facts are outside of reasonable controversy, this process is dispensed with as unnecessary. A high degree of indisputability is the essential prerequisite.

Legislative facts are quite different. As Professor Davis says:

"My opinion is that judge-made law would stop growing if judges, in thinking about questions of law and policy, were forbidden to take into account the facts they believe, as distinguished from facts which are 'clearly * * * within the domain of the indisputable.' Facts most needed in thinking about difficult problems of law and policy have a way of being outside the domain of the clearly indisputable." A System of Judicial Notice Based on Fairness and Convenience, *supra*, at 82.

An illustration is *Hawkins* v. *United States*, 358 U.S. 74, 79 S.Ct. 136, 3 L.Ed.2d 125 (1958), in which the Court refused to discard the common law rule that one spouse could not testify against the other, saying, "Adverse testimony given in criminal proceedings would, we think, be likely to destroy almost any marriage." This conclusion has a large intermixture of fact, but the factual aspect is scarcely "indisputable." See Hutchins and Slesinger, Some Observations on the Law of Evidence—Family Relations, 13 Minn.L.Rev. 675 (1929). If the destructive effect of the giving of adverse testimony by a spouse is not indisputable, should the Court have refrained from considering it in the absence of supporting evidence?

"If the Model Code or the Uniform Rules had been applicable, the Court would have been barred from thinking about the essential factual ingredient of the problems before it, and such a result would be obviously intolerable. What the law needs as its growing points is more, not less, judicial thinking about the factual ingredients of problems of what the law ought to be, and the needed facts are seldom 'clearly' indisputable." Davis, *supra*, at 83.

"Professor Morgan gave the following description of the methodology of determining domestic law:

"In determining the content or applicability of a rule of domestic law, the judge is unrestricted in his investigation and conclusion. He may reject the propositions of either party or of both parties. He may consult the sources of pertinent data to which they refer, or he may refuse to do so. He may make an independent search for persuasive data or rest content with what he has or what the parties present. * * * [T]he parties do no more than to assist; they control no part of the process." Morgan, Judicial Notice, 57 Harv.L.Rev. 269, 270-271 (1944).

This is the view which should govern judicial access to legislative facts. It renders inappropriate any limitation in the form of indisputability, any formal requirements of notice other than those already inherent in affording opportunity to hear and be heard and exchanging briefs, and any requirement of formal findings at any level. It should, however, leave open the possibility of introducing evidence through regular channels in appropriate situations. See *Borden's Farm Products Co.* v. *Baldwin*, 293 U.S. 194, 55 S.Ct. 187, 79 L.Ed. 281 (1934), where the cause was remanded for the taking of evidence as to the economic conditions and trade practices underlying the New York Milk Control Law.

Similar considerations govern the judicial use of nonadjudicative facts in ways other than formulating laws and rules. Thayer described them as a part of the judicial reasoning process.

"In conducting a process of judicial reasoning, as of other reasoning, not a step can be taken without assuming something which has not been proved; and the capacity to do this with competent judgement and efficiency, is imputed to judges and juries as part of their necessary mental outfit." Thayer, Preliminary Treatise on Evidence 279-280 (1898).

As Professor Davis points out, A System of Judicial Notice Based on Fairness and Convenience, in Perspectives of Law 69, 73 (1964), every case involves the use of hundreds or thousands of non-evidence facts. When a witness in an automobile accident case says "car," everyone, judge and jury included, furnishes, from non-evidence sources within himself, the supplementing information that the "car" is an automobile, not a railroad car, that it is self-propelled, probably by an internal combustion engine, that it may be assumed to have four wheels with pneumatic rubber tires, and so on. The judicial process cannot construct every case from scratch, like Descartes creating a world based on the postulate *Cogito, ergo sum.* These items could not possibly be introduced into evidence, and no one suggests that they be. Nor are they appropriate subjects for any formalized treatment of judicial notice of facts. See Levin and Levy, Persuading the Jury with Facts Not in Evidence: The Fiction-Science Spectrum, 105 U.Pa.L.Rev. 139 (1956).

Another aspect of what Thayer had in mind is the use of non-evidence facts to appraise or assess the adjudicative facts of the case. Pairs of cases from two jurisdictions illustrate this use and also the difference between non-evidence facts thus used and adjudicative facts. In *People* v. *Strook*, 347 Ill. 460, 179 N.E. 821 (1932), venue in Cook County had been held not established by testimony that the crime was committed at 7956 South Chicago Avenue, since judicial notice would not be taken that the address was in Chicago. However, the same court subsequently ruled that venue in Cook County was established by testimony that a crime occurred at 8900 South Anthony Avenue, since notice would be taken of the common practice of omitting the name of the city when speaking of local addresses, and the witness was testifying in Chicago. *People* v. *Pride*, 16 Ill.2d 82, 156 N.E.2d 551 (1951). And in *Hughes* v. *Vestal*, 264 N.C. 500, 142 S.E.2d 361 (1965), the Supreme Court of North Carolina disapproved the trial judge's admission in evidence of a state-published table of automobile stopping distances on the basis of judicial notice, though the court itself had referred to the same table in an earlier case in a "rhetorical and illustrative" way in determining that the defendant could not have stopped her car in time to avoid striking a child who suddenly appeared in the highway and that a non-suit was properly granted. *Ennis* v. *Dupree*, 262 N.C. 224, 136 S.E.2d 702 (1964). See also *Brown* v. *Hale*, 263 N.C. 176, 139 S.E.2d 210

(1964); *Clayton* v. *Rimmer*, 262 N.C. 302, 136 S.E.2d 562 (1964). It is apparent that this use of non-evidence facts in evaluating the adjudicative facts of the case is not an appropriate subject for a formalized judicial notice treatment.

In view of these considerations, the regulation of judicial notice of facts by the present rule extends only to adjudicative facts.

What, then, are "adjudicative" facts? Davis refers to them as those "which relate to the parties," or more fully:

"When a court or an agency finds facts concerning the immediate parties—who did what, where, when, how, and with what motive or intent—the court or agency is performing an adjudicative function, and the facts are conveniently called adjudicative facts. * * *

"Stated in other terms, the adjudicative facts are those to which the law is applied in the process of adjudication. They are the facts that normally go to the jury in a jury case. They relate to the parties, their activities, their properties, their businesses." 2 Administrative Law Treatise 353.

*Subdivision (b).* With respect to judicial notice of adjudicative facts, the tradition has been one of caution in requiring that the matter be beyond reasonable controversy. This tradition of circumspection appears to be soundly based, and no reason to depart from it is apparent. As Professor Davis says:

"The reason we use trial-type procedure, I think, is that we make the practical judgement, on the basis of experience, that taking evidence, subject to cross-examination and rebuttal, is the best way to resolve controversies involving disputes of adjudicative facts, that is, facts pertaining to the parties. The reason we require a determination on the record is that we think fair procedure in resolving disputes of adjudicative facts calls for giving each party a chance to meet in the appropriate fashion the facts that come to the tribunal's attention, and the appropriate fashion for meeting disputed adjudicative facts includes rebuttal evidence, cross-examination, usually confrontation, and argument (either written or oral or both). The key to a fair trial is opportunity to use the appropriate weapons (rebuttal evidence, cross-examination, and argument) to meet adverse materials that come to the tribunal's attention." A System of Judicial Notice Based on Fairness and Convenience, in Perspectives of Law 69, 93 (1964).

The rule proceeds upon the theory that these considerations call for dispensing with traditional methods of proof only in clear cases. Compare Professor Davis' conclusion that judicial notice should be a matter of convenience, subject to requirements of procedural fairness. *Id.*, 94.

This rule is consistent with Uniform Rule 9(1) and (2) which limit judicial notice of facts to those "so universally known that they cannot reasonably be the subject of dispute," those "so generally known or of such common notoriety within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute," and those "capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy." The traditional textbook treatment has included these general categories (matters of common knowledge, facts capable of verification), McCormick §§ 324, 325, and then has passed on into detailed treatment of such specific topics as facts relating to the personnel and records of the court, *Id.* § 327, and other governmental facts, *Id.* § 328. The California draftsmen, with a background of detailed statutory regulation of judicial notice, followed a somewhat similar pattern. California Evidence Code §§ 451, 452. The Uniform Rules, however, were drafted on the theory that these particular matters are included within the general categories and need no specific mention. This approach is followed in the present rule.

The phrase "propositions of generalized knowledge," found in Uniform Rule 9(1) and (2) is not included in the present rule. It was, it is believed, originally included in Model Code Rules 801 and 802 primarily in order to afford some minimum recognition to the right of the judge in his "legislative" capacity (not acting as the trier of fact) to take judicial notice of very limited categories of generalized knowledge. The limitations thus imposed have been discarded herein as undesirable, unworkable, and contrary to existing practice. What is left, then, to be considered, is the status of a "proposition of generalized knowledge" as an "adjudicative" fact to be noticed judicially and communicated by the judge to the jury. Thus viewed, it is considered to be lacking practical significance. While judges use judicial notice of "propositions of generalized knowledge" in a variety of situations: determining the validity and meaning of statutes, formulating common law rules, deciding whether evidence should be admitted, assessing the sufficiency and effect of evidence, all are essentially nonadjudicative in nature. When judicial notice is seen as a significant vehicle for progress in the law, these are the areas involved, particularly in developing fields of scientific knowledge. See McCormick 712. It is not believed that judges now instruct juries as to "propositions of generalized knowledge" derived from encyclopedias or other sources, or that they are likely to do so, or, indeed, that it is desirable that they do so. There is a vast difference between ruling on the basis of judicial notice that radar evidence of speed is admissible and explaining to the jury its principles and degree of accuracy, or between using a table of stopping distances of automobiles at various speeds in a judicial evaluation of testimony and telling the jury its precise application in the case. For cases raising doubt as to the propriety of the use of medical texts by lay triers of fact in passing on disability claims in administrative proceedings, see *Sayers* v. *Gardner*, 380 F.2d 940 (6th Cir. 1967); *Ross* v. *Gardner*, 365 F.2d 554 (6th Cir. 1966); *Sosna* v. *Celebrezze*, 234 F.Supp. 289 (E.D.Pa. 1964); *Glendenning* v. *Ribicoff*, 213 F.Supp. 301 (W.D.Mo. 1962).

*Subdivisions (c) and (d).* Under subdivision (c) the judge has a discretionary authority to take judicial notice, regardless of whether he is so requested by a party. The taking of judicial notice is mandatory, under subdivision (d), only when a party requests it and the necessary information is supplied. This scheme is believed to reflect existing practice. It is simple and workable. It avoids troublesome distinctions in the many situations in which the process of taking judicial notice is not recognized as such.

Compare Uniform Rule 9 making judicial notice of facts universally known mandatory without request, and making judicial notice of facts generally known in the jurisdiction or capable of determination by resort to accurate sources discretionary in the absence of request but mandatory if request is made and the information furnished. But see Uniform Rule 10(3), which directs the judge to decline to take judicial notice if available information fails to convince him that the matter falls clearly within Uniform Rule 9 or is insufficient to enable him to notice it judicially. Substantially the same approach is found in California Evidence Code §§ 451–453 and in New Jersey Evidence Rule 9. In contrast, the present rule treats alike all adjudicative facts which are subject to judicial notice.

*Subdivision (e).* Basic considerations of procedural fairness demand an opportunity to be heard on the propriety of taking judicial notice and the tenor of the matter noticed. The rule requires the granting of that opportunity upon request. No formal scheme of giving notice is provided. An adversely affected party may learn in advance that judicial notice is in contemplation, either by virtue of being served with a copy of a request by another party under subdivision (d) that judicial notice be taken, or through an advance indication by the judge. Or he may have no advance notice at all. The likelihood of the latter is enhanced by the frequent failure to recognize judicial notice as such. And in the absence of advance notice, a request made after the fact could not in fairness be considered untimely. See the provision for hearing on timely request in the Administrative Procedure Act, 5 U.S.C. § 556(e).

See also Revised Model State Administrative Procedure Act (1961), 9C U.L.A. § 10(4) (Supp. 1967).

*Subdivision (f).* In accord with the usual view, judicial notice may be taken at any stage of the proceedings, whether in the trial court or on appeal. Uniform Rule 12; California Evidence Code § 459; Kansas Rules of Evidence § 60-412; New Jersey Evidence Rule 12; McCormick § 330, p. 712.

*Subdivision (g).* Much of the controversy about judicial notice has centered upon the question whether evidence should be admitted in disproof of facts of which judicial notice is taken.

The writers have been divided. Favoring admissibility are Thayer, Preliminary Treatise on Evidence 308 (1898); 9 Wigmore § 2567; Davis, A System of Judicial Notice Based on Fairness and Convenience, in Perspectives of Law, 69, 76-77 (1964). Opposing admissibility are Keeffe, Landis and Shaad, Sense and Nonsense about Judicial Notice, 2 Stan.L.Rev. 664, 668 (1950); McNaughton, Judicial Notice—Excerpts Relating to the Morgan-Whitmore Controversy, 14 Vand.L.Rev. 779 (1961); Morgan, Judicial Notice, 57 Harv.L.Rev. 269, 279 (1944); McCormick 710-711. The Model Code and the Uniform Rules are predicated upon indisputability of judicially noticed facts.

The proponents of admitting evidence in disproof have concentrated largely upon legislative facts. Since the present rule deals only with judicial notice of adjudicative facts, arguments directed to legislative facts lose their relevancy.

Within its relatively narrow area of adjudicative facts, the rule contemplates there is to be no evidence before the jury in disproof. The judge instructs the jury to take judicially noticed facts as established. This position is justified by the undesirable effects of the opposite rule in limiting the rebutting party, though not his opponent, to admissible evidence, in defeating the reasons for judicial notice, and in affecting the substantive law to an extent and in ways largely unforeseeable. Ample protection and flexibility are afforded by the broad provision for opportunity to be heard on request, set forth in subdivision (e).

Authority upon the propriety of taking judicial notice against an accused in a criminal case with respect to matters other than venue is relatively meager. Proceeding upon the theory that the right of jury trial does not extend to matters which are beyond reasonable dispute, the rule does not distinguish between criminal and civil cases. *People* v. *Mayes,* 113 Cal. 618, 45 P. 860 (1896); *Ross* v. *United States,* 374 F.2d 97 (8th Cir. 1967). Cf. *State* v. *Main,* 94 R.I. 338, 180 A.2d 814 (1962); *State* v. *Lawrence,* 120 Utah 323, 234 P.2d 600 (1951).

*Note on Judicial Notice of Law.* By rules effective July 1, 1966, the method of invoking the law of a foreign country is covered elsewhere. Rule 44.1 of the Federal Rules of Civil Procedure; Rule 26.1 of the Federal Rules of Criminal Procedure. These two new admirably designed rules are founded upon the assumption that the manner in which law is fed into the judicial process is never a proper concern of the rules of evidence but rather of the rules of procedure. The Advisory Committee on Evidence, believing that this assumption is entirely correct, proposes no evidence rule with respect to judicial notice of law, and suggests that those matters of law which, in addition to foreign-country law, have traditionally been treated as requiring pleading and proof and more recently as the subject of judicial notice be left to the Rules of Civil and Criminal Procedure.

#### NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 93-650

Rule 201(g) as received from the Supreme Court provided that when judicial notice of a fact is taken, the court shall instruct the jury to accept that fact as established. Being of the view that mandatory instruction to a jury in a criminal case to accept as conclusive any fact judicially noticed is inappropriate because contrary to the spirit of the Sixth Amendment right to a jury trial, the Committee adopted the 1969 Advisory Committee draft of this subsection, allowing a mandatory instruction in civil actions and proceedings and a discretionary instruction in criminal cases.

## ARTICLE III—PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS

### Rule 301. Presumptions in General in Civil Actions and Proceedings

**In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.**

(Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1931.)

#### NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

This rule governs presumptions generally. See Rule 302 for presumptions controlled by state law and Rule 303 [deleted] for those against an accused in a criminal case.

Presumptions governed by this rule are given the effect of placing upon the opposing party the burden of establishing the nonexistence of the presumed fact, once the party invoking the presumption establishes the basic facts giving rise to it. The same considerations of fairness, policy, and probability which dictate the allocation of the burden of the various elements of a case as between the prima facie case of a plaintiff and affirmative defenses also underlie the creation of presumptions. These considerations are not satisfied by giving a lesser effect to presumptions. Morgan and Maguire, Looking Backward and Forward at Evidence, 50 Harv.L.Rev. 909, 913 (1937); Morgan, Instructing the Jury upon Presumptions and Burdon of Proof, 47 Harv.L.Rev. 59, 82 1933); Cleary, Presuming and Pleading: An Essay on Juristic Immaturity, 12 Stan.L.Rev. 5 (1959).

The so-called "bursting bubble" theory, under which a presumption vanishes upon the introduction of evidence which would support a finding of the nonexistence of the presumed fact, even though not believed, is rejected as according presumptions too "slight and evanescent" an effect. Morgan and Maguire, *supra,* at p. 913.

In the opinion of the Advisory Committee, no constitutional infirmity attends this view of presumptions. In *Mobile, J. & K.C.R. Co.* v. *Turnipseed,* 219 U.S. 35, 31 S.Ct. 136, 55 L.Ed. 78 (1910), the Court upheld a Mississippi statute which provided that in actions against railroads proof of injury inflicted by the running of trains should be prima facie evidence of negligence by the railroad. The injury in the case had resulted from a derailment. The opinion made the points (1) that the only effect of the statute was to impose on the railroad the duty of producing some evidence to the contrary, (2) that an inference may be supplied by law if there is a rational connection between the fact proved and the fact presumed, as long as the opposite party is not precluded from presenting his evidence to the contrary, and (3) that considerations of public policy arising from the character of the business justified the application in question. Nineteen years later, in *Western & Atlantic R. Co.* v. *Henderson,* 279 U.S. 639, 49 S.Ct. 445, 73 L.Ed. 884 (1929), the Court overturned a Georgia statute making railroads liable for damages done by trains, unless the railroad made it appear that reasonable care had been used, the presumption being against the railroad. The declaration alleged the death of plaintiff's husband from a grade crossing collision, due to specified acts of negligence by defendant. The jury were instructed that proof of the injury raised a presumption of negligence; the burden shifted to the railroad to prove ordinary care; and unless it did so, they should find for plaintiff. The instruction was held erroneous in an opinion stating (1) that there was no rational connection between the mere fact of collision and negligence on the part of anyone, and (2) that the statute was different from that in *Turnipseed* in imposing a burden upon the railroad. The reader is left in a state of some confusion. Is the difference between a derailment and a grade crossing collision of no significance? Would the *Turnipseed* presumption have been bad if it had imposed a burden of persuasion on defendant, although that would in nowise have impaired its "rational connection"? If *Henderson* forbids imposing a burden of persuasion on defendants, what happens to affirmative defenses?

Two factors serve to explain *Henderson.* The first was that it was common ground that negligence was indispensable to liability. Plaintiff thought so, drafted her complaint accordingly, and relied upon the presumption. But how in logic could the same presumption establish her alternative grounds of negligence that the engineer was so blind he could not see decedent's truck and that he failed to stop after he saw it? Second, take away the basic assumption of no liability without fault, as *Turnipseed* intimated might be done ("considerations of public policy arising out of the character of the business"), and the structure of the decision in *Henderson* fails. No question of logic would have arisen if the statute had simply said: a prima facie case of liability is made by proof of injury by a train; lack of negligence is an affirmative defense, to be pleaded and proved as other affirmative defenses. The problem would be one of economic due process only. While it seems likely that the Supreme Court of 1929 would have voted that due process was denied, that result today would be unlikely. See, for example, the shift in the direction of absolute liability in the consumer cases. Prosser, The Assault upon the Citadel (Strict Liability to the Consumer), 69 Yale L.J. 1099 (1960).

Any doubt as to the constitutional permissibility of a presumption imposing a burden of persuasion of the non-existence of the presumed fact in civil cases is laid at rest by *Dick* v. *New York Life Ins. Co.*, 359 U.S. 437, 79 S.Ct. 921, 3 L.Ed.2d 935 (1959). The Court unhesitatingly applied the North Dakota rule that the presumption against suicide imposed on defendant the burden of proving that the death of insured, under an accidental death clause, was due to suicide.

"Proof of coverage and of death by gunshot wound shifts the burden to the insurer to establish that the death of the insured was due to his suicide." 359 U.S. at 443, 79 S.Ct. at 925.

"In a case like this one, North Dakota presumes that death was accidental and places on the insurer the burden of proving that death resulted from suicide." *Id.* at 446, 79 S.Ct. at 927.

The rational connection requirement survives in criminal cases, *Tot* v. *United States,* 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed. 1519 (1943), because the Court has been unwilling to extend into that area the greater-includes-the-lesser theory of *Ferry* v. *Ramsey,* 277 U.S. 88, 48 S.Ct. 443, 72 L.Ed. 796 (1928). In that case the Court sustained a Kansas statute under which bank directors were personally liable for deposits made with their assent and with knowledge of insolvency, and the fact of insolvency was prima facie evidence of assent and knowledge of insolvency. Mr. Justice Holmes pointed out that the state legislature could have made the directors personally liable to depositors in every case. Since the statute imposed a less stringent liability, "the thing to be considered is the result reached, not the possibly inartificial or clumsy way of reaching it." *Id.* at 94, 48 S.Ct. at 444. Mr. Justice Sutherland dissented: though the state could have created an absolute liability, it did not purport to do so; a rational connection was necessary, but lacking, between the liability created and the prima facie evidence of it; the result might be different if the basis of the presumption were being open for business.

The Sutherland view has prevailed in criminal cases by virtue of the higher standard of notice there required. The fiction that everyone is presumed to know the law is applied to the substantive law of crimes as an alternative to complete unenforceability. But the need does not extend to criminal evidence and procedure, and the fiction does not encompass them. "Rational connection" is not fictional or artificial, and so it is reasonable to suppose that Gainey should have known that his presence at the site of an illicit still could convict him of being connected with (carrying on) the business, *United States* v. *Gainey,* 380 U.S. 63, 85 S.Ct. 754, 13 L.Ed.2d 658 (1965), but not that Romano should have known that his presence at a still could convict him of possessing it, *United States* v. *Romano,* 382 U.S. 136, 86 S.Ct. 279, 15 L.Ed.2d 210 (1965).

In his dissent in Gainey, Mr. Justice Black put it more artistically:

"It might be argued, although the Court does not so argue or hold, that Congress if it wished could make presence at a still a crime in itself, and so Congress should be free to create crimes which are called 'possession' and 'carrying on an illegal distillery business' but which are defined in such a way that unexplained presence is sufficient and indisputable evidence in all cases to support conviction for those offenses. See *Ferry* v. *Ramsey,* 277 U.S. 88, 48 S.Ct. 443, 72 L.Ed. 796. Assuming for the sake of argument that Congress could make unexplained presence a criminal act, and ignoring also the refusal of this Court in other cases to uphold a statutory presumption on such a theory, see *Heiner* v. *Donnan,* 285 U.S. 312, 52 S.Ct. 358, 76 L.Ed. 772, there is no indication here that Congress intended to adopt such a misleading method of draftsmanship, nor in my judgement could the statutory provisions if so construed escape condemnation for vagueness, under the principles applied in *Lanzetta* v. *New Jersey,* 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888, and many other cases." 380 U.S. at 84, n. 12, 85 S.Ct. at 766.

And the majority opinion in *Romano* agreed with him:

"It may be, of course, that Congress has the power to make presence at an illegal still a punishable crime, but we find no clear indication that it intended to so exercise this power. The crime remains possession, not presence, and with all due deference to the judgement of Congress, the former may not constitutionally be inferred from the latter." 382 U.S. at 144, 86 S.Ct. at 284.

The rule does not spell out the procedural aspects of its application. Questions as to when the evidence warrants submission of a presumption and what instructions are proper under varying states of fact are believed to present no particular difficulties.

### NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 93-650

Rule 301 as submitted by the Supreme Court provided that in all cases a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence. The Committee limited the scope of Rule 301 to "civil actions and proceedings" to effectuate its decision not to deal with the question of presumptions in criminal cases. (See note on [proposed] Rule 303 in discussion of Rules deleted). With respect to the weight to be given a presumption in a civil case, the Committee agreed with the judgement implicit in the Court's version that the socalled "bursting bubble" theory of presumptions, whereby a presumption vanished upon the appearance of any contradicting evidence by the other party, gives to presumptions too slight an effect. On the other hand, the Committee believed that the Rule proposed by the Court, whereby a presumption permanently alters the burden of persuasion, no matter how much contradicting evidence is introduced—a view shared by only a few courts—lends too great a force to presumptions. Accordingly, the Committee amended the Rule to adopt an intermediate position under which a presumption does not vanish upon the introduction of contradicting evidence, and does not change the burden of persuasion; instead it is merely deemed sufficient evidence of the fact presumed, to be considered by the jury or other finder of fact.

### Notes of Committee on the Judiciary, Senate Report No. 93-1277

The rule governs presumptions in civil cases generally. Rule 302 provides for presumptions in cases controlled by State law.

As submitted by the Supreme Court, presumptions governed by this rule were given the effect of placing upon the opposing party the burden of establishing the non-existence of the presumed fact, once the party invoking the presumption established the basic facts giving rise to it.

Instead of imposing a burden of persuasion on the party against whom the presumption is directed, the House adopted a provision which shifted the burden of going forward with the evidence. They further provided that "even though met with contradicting evidence, a presumption is sufficient evidence of the fact presumed, to be considered by the trier of fact." The effect of the amendment is that presumptions are to be treated as evidence.

The committee feels the House amendment is ill-advised. As the joint committees (the Standing Committee on Practice and Procedure of the Judicial Conference and the Advisory Committee on the Rules of Evidence) stated: "Presumptions are not evidence, but ways of dealing with evidence." This treatment requires juries to perform the task of considering "as evidence" facts upon which they have no direct evidence and which may confuse them in performance of their duties. California had a rule much like that contained in the House amendment. It was sharply criticized by Justice Traynor in *Speck* v. *Sarver* [20 Cal. 2d 585, 128 P. 2d 16, 21 (1942)] and was repealed after 93 troublesome years [Cal. Ev. Code 1965 § 600].

Professor McCormick gives a concise and compelling critique of the presumption as evidence rule:

* * * * *

> Another solution, formerly more popular than now, is to instruct the jury that the presumption is "evidence", to be weighed and considered with the testimony in the case. This avoids the danger that the jury may infer that the presumption is conclusive, but it probably means little to the jury, and certainly runs counter to accepted theories of the nature of evidence. [McCormick, Evidence, 669 (1954); *Id.* 825 (2d ed. 1972)].

For these reasons the committee has deleted that provision of the House-passed rule that treats presumptions as evidence. The effect of the rule as adopted by the committee is to make clear that while evidence of facts giving rise to a presumption shifts the burden of coming forward with evidence to rebut or meet the presumption, it does not shift the burden of persuasion on the existence of the presumed facts. The burden or persuasion remains on the party to whom it is allocated under the rules governing the allocation in the first instance.

The court may instruct the jury that they may infer the existence of the presumed fact from proof of the basic facts giving rise to the presumption. However, it would be inappropriate under this rule to instruct the jury that the inference they are to draw is conclusive.

### Notes of Conference Committee, House Report No. 93-1597

The House bill provides that a presumption in civil actions and proceedings shifts to the party against whom it is directed the burden of going forward wtih evidence to meet or rebut it. Even though evidence contradicting the presumption is offered, a presumption is considered sufficient evidence of the presumed fact to be considered by the jury. The Senate amendment provides that a presumption shifts to the party against whom it is directed the burden of going forward with evidence to meet or rebut the presumption, but it does not shift to that party the burden of persuasion on the existence of the presumed fact.

Under the Senate amendment, a presumption is sufficient to get a party past an adverse party's motion to dismiss made at the end of his case-in-chief. If the adverse party offers no evidence contradicting the presumed fact, the court will instruct the jury that if it finds the basic facts, it may presume the existence of the presumed fact. If the adverse party does offer evidence contradicting the presumed fact, the court cannot instruct the jury that it may *presume* the existence of the presumed fact from proof of the basic facts. The court may, however, instruct the jury that it may infer the existence of the presumed fact from proof of the basic facts.

The Conference adopts the Senate amendment.

## Rule 302. Applicability of State Law in Civil Actions and Proceedings

In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State law.

(Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1931.)

### Notes of Advisory Committee on Proposed Rules

A series of Supreme Court decisions in diversity cases leaves no doubt of the relevance of *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), to questions of burden of proof. These decisions are *Cities Service Oil Co.* v. *Dunlap*, 308 U.S. 208, 60 S.Ct. 201, 84 L.Ed. 196 (1939), *Palmer* v. *Hoffman*, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943), and *Dick* v. *New York Life Ins. Co.*, 359 U.S. 437, 79 S.Ct. 921, 3 L.Ed.2d 935 (1959). They involved burden of proof, respectively, as to status as bona fide purchasers, contributory negligence, and non-accidental death (suicide) of an insured. In each instance the state rule was held to be applicable. It does not follow, however, that all presumptions in diversity cases are governed by state law. In each case cited, the burden of proof question had to do with a substantive element of the claim or defense. Application of the state law is called for only when the presumption operates upon such an element. Accordingly the rule does not apply state law when the presumption operates upon a lesser aspect of the case, i.e. "tactical" presumptions.

The situations in which the state law is applied have been tagged for convenience in the preceding discussion as "diversity cases." The designation is not a completely accurate one since *Erie* applies to any claim or issue having its source in state law, regardless of the basis of federal jurisdiction, and does not apply to a federal claim or issue, even though jurisdiction is based on diversity. *Vestal, Erie R.R.* v. *Tompkins*: A Projection, 48 Iowa L.Rev. 248, 257 (1963); Hart and Wechsler, The Federal Courts and the Federal System, 697 (1953); 1A Moore, Federal Practice ¶ 0.305[3] (2d ed. 1965); Wright, Federal Courts, 217-218 (1963). Hence the rule employs, as appropriately descriptive, the phrase "as to which state law supplies the rule of decision." See A.L.I. Study of the Division of Jurisdiction Between State and Federal Courts, § 2344(c), p. 40, P.F.D. No. 1 (1965).

## ARTICLE IV—RELEVANCY AND ITS LIMITS

## Rule 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

(Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1931.)

### Notes of Advisory Committee on Proposed Rules

Problems of relevancy call for an answer to the question whether an item of evidence, when tested by the processes of legal reasoning, possesses sufficient probative value to justify receiving it in evidence. Thus, assessment of the probative value of evidence that a person purchased a revolver shortly prior to a fatal shooting with which he is charged is a matter of analysis and reasoning.

The variety of relevancy problems is coextensive with the ingenuity of counsel in using circumstantial evidence as a means of proof. An enormous number of cases fall in no set pattern, and this rule is designed as a guide for handling them. On the other hand, some situations recur with sufficient frequency to create patterns susceptible of treatment by specific rules. Rule 404 and those following it are of that variety; they also serve as illustrations of the application of the present rule as limited by the exclusionary principles of Rule 403.

Passing mention should be made of so-called "conditional" relevancy. Morgan, Basic Problems of Evidence 45-46 (1962). In this situation, probative value depends not only upon satisfying the basic requirement of relevancy as described above but also upon the existence of some matter of fact. For example, if evidence of a spoken statement is relied upon to prove notice, probative value is lacking unless the person sought to be charged heard the statement. The problem is one of fact, and the only rules needed are for the purpose of determining the respective functions of judge and jury. See Rules 104(b) and 901. The discussion which follows in the present note is concerned with relevancy generally, not with any particular problem of conditional relevancy.

Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case. Does the item of evidence tend to prove the matter sought to be proved? Whether the relationship exists depends upon principles evolved by experience or science, applied logically to the situation at hand. James, Relevancy, Probability and the Law, 29 Calif.L.Rev. 689, 696, n. 15 (1941), in Selected Writings on Evidence and Trial 610, 615, n. 15 (Fryer ed. 1957). The rule summarizes this relationship as a "tendency to make the existence" of the fact to be proved "more probable or less probable." Compare Uniform Rule 1(2) which states the crux of relevancy as "a tendency in reason," thus perhaps emphasizing unduly the logical process and ignoring the need to draw upon experience or science to validate the general principle upon which relevancy in a particular situation depends.

The standard of probability under the rule is "more * * * probable than it would be without the evidence." Any more stringent requirement is unworkable and unrealistic. As McCormick § 152, p. 317, says, "A brick is not a wall," or, as Falknor, Extrinsic Policies Affecting Admissibility, 10 Rutgers L.Rev. 574, 576 (1956), quotes Professor McBaine, "* * * [I]t is not to be supposed that every witness can make a home run." Dealing with probability in the language of the rule has the added virtue of avoiding confusion between questions of admissibility and questions of the sufficiency of the evidence.

The rule uses the phrase "fact that is of consequence to the determination of the action" to describe the kind of fact to which proof may properly be directed. The language is that of California Evidence Code § 210; it has the advantage of avoiding the loosely used and ambiguous word "material." Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Art. I. General Provisions), Cal. Law Revision Comm'n, Rep., Rec. & Studies, 10-11 (1964). The fact to be proved may be ultimate, intermediate, or evidentiary; it matters not, so long as it is of consequence in the determination of the action. Cf. Uniform Rule 1(2) which requires that the evidence relate to a "material" fact.

The fact to which the evidence is directed need not be in dispute. While situations will arise which call for the exclusion of evidence offered to prove a point conceded by the opponent, the ruling should be made on the basis of such considerations as waste of time and undue prejudice (see Rule 403), rather than under any general requirement that evidence is admissible only if directed to matters in dispute. Evidence which is essentially background in nature can scarcely be said to involve disputed matter, yet it is universally offered and admitted as an aid to understanding. Charts, photographs, views of real estate, murder weapons, and many other items of evidence fall in this category. A rule limiting admissibility to evidence directed to a controversial point would invite the exclusion of this helpful evidence, or at least the raising of endless questions over its admission. Cf. California Evidence Code § 210, defining relevant evidence in terms of tendency to prove a disputed fact.

## Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

(Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1931.)

### Notes of Advisory Committee on Proposed Rules

The provisions that all relevant evidence is admissible, with certain exceptions, and that evidence which is not relevant is not admissible are "a presupposition involved in the very conception of a rational system of evidence." Thayer, Preliminary Treatise on Evidence 264 (1898). They constitute the foundation upon which the structure of admission and exclusion rests. For similar provisions see California Evidence Code §§ 350, 351. Provisions that all relevant evidence is admissible are found in Uniform Rule 7(f); Kansas Code of Civil Procedure § 60-407(f); and New Jersey Evidence Rule 7(f); but the exclusion of evidence which is not relevant is left to implication.

Not all relevant evidence is admissible. The exclusion of relevant evidence occurs in a variety of situations and may be called for by these rules, by the Rules of Civil and Criminal Procedure, by Bankruptcy Rules, by Act of Congress, or by constitutional considerations.

Succeeding rules in the present article, in response to the demands of particular policies, require the exclusion of evidence despite its relevancy. In addition, Article V recognizes a number of privileges; Article VI imposes limitations upon witnesses and the manner of dealing with them; Article VII specifies requirements with respect to opinions and expert testimony; Article VIII excludes hearsay not falling within an exception; Article IX spells out the handling of authentication and identification; and Article X restricts the manner of proving the contents of writings and recordings.

The Rules of Civil and Criminal Procedure in some instances require the exclusion of relevant evidence. For example, Rules 30(b) and 32(a)(3) of the Rules of Civil Procedure, by imposing requirements of notice and unavailability of the deponent, place limits on the use of relevant depositions. Similarly, Rule 15 of the Rules of Criminal Procedure restricts the use of depositions in criminal cases, even though relevant. And the effective enforcement of the command, originally statutory and now found in Rule 5(a) of the Rules of Criminal Procedure, that an arrested person be taken without unnecessary delay before a commissioner of other similar officer is held to require the exclusion of statements elicited during detention in violation thereof. *Mallory* v. *United States*, 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed.2d 1479 (1957); 18 U.S.C. § 3501(c).

While congressional enactments in the field of evidence have generally tended to expand admissibility beyond the scope of the common law rules, in some particular situations they have restricted the admissibility of relevant evidence. Most of this legislation has consisted of the formulation of a privilege or of a prohibition against disclosure. 8 U.S.C. § 1202(f), records of refusal of visas or permits to enter United States confidential, subject to discretion of Secretary of State to make available to court upon certification of need; 10 U.S.C. § 3693, replacement certificate of honorable discharge from Army not admissible in evidence; 10 U.S.C. § 8693, same as to Air Force; 11 U.S.C. § 25(a)(10), testimony given by bankrupt on his examination not admissible in criminal proceedings against him, except that given in hearing upon objection to discharge; 11 U.S.C. § 205(a), railroad reorganization petition, if dismissed, not admissible in evidence; 11 U.S.C. § 403(a), list of creditors filed with municipal composition plan not an admission; 13 U.S.C. § 9(a), census information confidential, retained copies of reports privileged; 47 U.S.C. § 605, interception and divulgence of wire or radio communications prohibited unless authorized by sender. These statutory provisions would remain undisturbed by the rules.

The rule recognizes but makes no attempt to spell out the constitutional considerations which impose basic limitations upon the admissibility of relevant evidence. Examples are evidence obtained by unlawful search and seizure, *Weeks* v. *United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914); *Katz* v. *United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); incriminating statement elicited from an accused in violation of right to counsel, *Massiah* v. *United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964).

### Notes of Committee on the Judiciary, House Report No. 93-650

Rule 402 as submitted to the Congress contained the phrase "or by other rules adopted by the Supreme Court". To accommodate the view that the Congress should not appear to acquiesce in the Court's judgment that it has authority under the existing Rules Enabling Acts to promulgate Rules of Evidence, the Committee amended the above phrase to read "or by other rules prescribed by the Supreme Court pursuant to statutory authority" in this and other Rules where the reference appears.

## Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

(Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1932.)

### Notes of Advisory Committee on Proposed Rules

The case law recognizes that certain circumstances call for the exclusion of evidence which is of unquestioned relevance. These circumstances entail risks which range all the way from inducing decision on a purely emotional basis, at one extreme, to nothing more harmful than merely wasting time, at the other extreme. Situations in this area call for balancing the probative value of and need for the evidence against the harm likely to result from its admission. Slough, Relevancy Unraveled, 5 Kan. L. Rev. 1, 12-15 (1956); Trautman, Logical or Legal Relevancy—A Conflict in Theory, 5 Van. L. Rev. 385, 392 (1952); McCormick § 152, pp. 319-321. The rules which follow in this Article are concrete applications evolved for particular situations. However, they reflect the policies underlying the present rule, which is designed as a guide for the handling of situations for which no specific rules have been formulated.

Exclusion for risk of unfair prejudice, confusion of issues, misleading the jury, or waste of time, all find ample support in the authorities. "Unfair prejudice" within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.

The rule does not enumerate surprise as a ground for exclusion, in this respect following Wigmore's view of the common law. 6 Wigmore § 1849. Cf. McCormick § 152, p. 320, n. 29, listing unfair surprise as a ground for exclusion but stating that it is usually "coupled with the danger of prejudice and confusion of issues." While Uniform Rule 45 incorporates surprise as a ground and is followed in Kansas Code of Civil Procedure § 60-445, surprise is not included in California Evidence Code § 352 or New Jersey Rule 4, though both the latter otherwise substantially embody Uniform Rule 45. While it can scarcely be doubted that claims of unfair surprise may still be justified despite procedural requirements of notice and instrumentalities of discovery, the granting of a continuance is a more appropriate remedy than exclusion of the evidence. Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Art. VI. Extrinsic Policies Affecting Admissibility), Cal. Law Revision Comm'n, Rep., Rec. & Studies, 612 (1964). Moreover, the impact of a rule excluding evidence on the ground of surprise would be difficult to estimate.

In reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction. See Rule 106 [now 105] and Advisory Committee's Note thereunder. The availability of other means of proof may also be an appropriate factor.

## Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

(*a*) *Character evidence generally.* Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(*1*) *Character of accused.* Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(*2*) *Character of victim.* Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(*3*) *Character of witness.* Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(*b*) *Other crimes, wrongs, or acts.* Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

(Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1932.)

### Notes of Advisory Committee on Proposed Rules

*Subdivision* (*a*). This subdivision deals with the basic question whether character evidence should be admitted. Once the admissibility of character evidence in some form is established under this rule, reference must then be made to Rule 405, which follows, in order to determine the appropriate method of proof.

If the character is that of a witness, see Rules 608 and 610 for methods of proof.

Character questions arise in two fundamentally different ways. (1) Character may itself be an element of a crime, claim, or defense. A situation of this kind is commonly referred to as "character in issue." Illustrations are: the chastity of the victim under a statute specifying her chastity as an element of the crime of seduction, or the competency of the driver in an action for negligently entrusting a motor vehicle to an incompetent driver. No problem of the general relevancy of character evidence is involved, and the present rule therefore has no provision on the subject. The only question relates to allowable methods of proof, as to which see Rule 405, immediately following. (2) Character evidence is susceptible of being used for the purpose of suggesting an inference that the person acted on the occasion in question consistently with his character. This use of character is often described as "circumstantial." Illustrations are: evidence of a violent disposition to prove that the person was the aggressor in an affray, or evidence of honesty in disproof of a charge of theft. This circumstantial use of character evidence raises questions of relevancy as well as questions of allowable methods of proof.

In most jurisdictions today, the circumstantial use of character is rejected but with important exceptions: (1) an accused may introduce pertinent evidence of good character (often misleadingly described as "putting his character in issue"), in which event the prosecution may rebut with evidence of bad character; (2) an accused may introduce pertinent evidence of the character of the victim, as in support of a claim of self-defense to a charge of homicide or consent in a case of rape, and the prosecution may introduce similar evidence in rebuttal of the character evidence, or, in a homicide case, to rebut a claim that deceased was the first aggressor, however proved; and (3) the character of a witness may be gone into as bearing on his credibility. McCormick §§ 155-161. This pattern is incorporated in the rule. While its basis lies more in history and experience than in logic as underlying justification can fairly be found in terms of the relative presence and absence of prejudice in the various situations. Falknor, Extrinsic Policies Affecting Admissibility, 10 Rutger, L.Rev. 574, 584 (1956); McCormick § 157. In any event, the criminal rule is so deeply imbedded in our jurisprudence as to assume almost constitutional proportions and to override doubts of the basic relevancy of the evidence.

The limitation to pertinent traits of character, rather than character generally, in paragraphs (1) and (2) is in accordance with the prevailing view. McCormick § 158, p. 334. A similar provision in Rule 608, to which reference is made in paragraph (3), limits character evidence respecting witnesses to the trait of truthfulness or untruthfulness.

The argument is made that circumstantial use of character ought to be allowed in civil cases to the same extent as in criminal cases, i.e. evidence of good (nonprejudicial) character would be admissible in the first instance, subject to rebuttal by evidence of bad character. Falknor, Extrinsic Policies Affecting Admissibility, 10 Rutgers L.Rev. 574, 581-583 (1956); Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Art. VI. Extrinsic Policies Affecting Admissibility), Cal. Law Revision Comm'n, Rep., Rec. & Studies, 657-658 (1964). Uniform Rule 47 goes farther, in that it assumes that character evidence in general satisfies the conditions of relevancy, except as provided in Uniform Rule 48. The difficulty with expanding the use of character evidence in civil cases is set forth by the California Law Revision Commission in its ultimate rejection of Uniform Rule 47, *Id.*, 615:

"Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened."

Much of the force of the position of those favoring greater use of character evidence in civil cases is dissipated by their support of Uniform Rule 48 which excludes the evidence in negligence cases, where it could be expected to achieve its maximum usefulness. Moreover, expanding concepts of "character," which seem of necessity to extend into such areas as psychiatric evaluation and psychological testing, coupled with expanded admissibility, would open up such vistas of mental examinations as caused the Court concern in *Schlagenhauf* v. *Holder*, 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964). It is believed that those espousing change have not met the burden of persuasion.

*Subdivision (b)* deals with a specialized but important application of the general rule excluding circumstantial use of character evidence. Consistently with that rule, evidence of other crimes, wrongs, or acts is not admissible to prove character as a basis for suggesting the inference that conduct on a particular occasion was in conformity with it. However, the evidence may be offered for another purpose, such as proof of motive, opportunity, and so on, which does not fall within the prohibition. In this situation the rule does not require that the evidence be excluded. No mechanical solution is offered. The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403. Slough and Knightly, Other Vices, Other Crimes, 41 Iowa L.Rev. 325 (1956).

### NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 93-650

The second sentence of Rule 404(b) as submitted to the Congress began with the words "This subdivision does not exclude the evidence when offered". The Committee amended this language to read "It may, however, be admissible", the words used in the 1971 Advisory Committee draft, on the ground that this formulation properly placed greater emphasis on admissibility than did the final Court version.

### NOTES OF COMMITTEE ON THE JUDICIARY, SENATE REPORT NO. 93-1277

This rule provides that evidence of other crimes, wrongs, or acts is not admissible to prove character but may be admissible for other specified purposes such as proof of motive.

Although your committee sees no necessity in amending the rule itself, it anticipates that the use of the discretionary word "may" with respect to the admissibility of evidence of crimes, wrongs, or acts is not intended to confer any arbitrary discretion on the trial judge. Rather, it is anticipated that with respect to permissible uses for such evidence, the trial judge may exclude it only on the basis of those considerations set forth in Rule 403, i.e. prejudice, confusion or waste of time.

## Rule 405. Methods of Proving Character

(a) *Reputation or opinion.* In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) *Specific instances of conduct.* In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct.

(Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1932.)

### Notes of Advisory Committee on Proposed Rules

The rule deals only with allowable methods of proving character, not with the admissibility of character evidence, which is covered in Rule 404.

Of the three methods of proving character provided by the rule, evidence of specific instances of conduct is the most convincing. At the same time it possesses the greatest capacity to arouse prejudice, to confuse, to surprise, and to consume time. Consequently the rule confines the use of evidence of this kind to cases in which character is, in the strict sense, in issue and hence deserving of a searching inquiry. When character is used circumstantially and hence occupies a lesser status in the case, proof may be only by reputation and opinion. These latter methods are also available when character is in issue. This treatment is, with respect to specific instances of conduct and reputation, conventional contemporary common law doctrine. McCormick § 153.

In recognizing opinion as a means of proving character, the rule departs from usual contemporary practice in favor of that of an earlier day. See 7 Wigmore § 1986, pointing out that the earlier practice permitted opinion and arguing strongly for evidence based on personal knowledge and belief as contrasted with "the secondhand, irresponsible product of multiplied guesses and gossip which we term 'reputation'." It seems likely that the persistence of reputation evidence is due to its largely being opinion in disguise. Traditionally character has been regarded primarily in moral overtones of good and bad: chaste, peaceable, truthful, honest. Nevertheless, on occasion nonmoral considerations crop up, as in the case of the incompetent driver, and this seems bound to happen increasingly. If character is defined as the kind of person one is, then account must be taken of varying ways of arriving at the estimate. These may range from the opinion of the employer who has found the man honest to the opinion of the psychiatrist based upon examination and testing. No effective dividing line exists between character and mental capacity, and the latter traditionally has been provable by opinion.

According to the great majority of cases, on cross-examination inquiry is allowable as to whether the reputation witness has heard of particular instances of conduct pertinent to the trait in question. *Michelson* v. *United States*, 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168 (1948); Annot., 47 A.L.R.2d 1258. The theory is that, since the reputation witness relates what he has heard, the inquiry tends to shed light on the accuracy of his hearing and reporting. Accordingly, the opinion witness would be asked whether he knew, as well as whether he had heard. The fact is, of course, that these distinctions are of slight if any practical significance, and the second sentence of subdivision (a) eliminates them as a factor in formulating questions. This recognition of the propriety of inquiring into specific instances of conduct does not circumscribe inquiry otherwise into the bases of opinion and reputation testimony.

The express allowance of inquiry into specific instances of conduct on cross-examination in subdivision (a) and the express allowance of it as part of a case in chief when character is actually in issue in subdivision (b) contemplate that testimony of specific instances is not generally permissible on the direct examination of an ordinary opinion witness to character. Similarly as to witnesses to the character of witnesses under Rule 608(b). Opinion testimony on direct in these situations ought in general to correspond to reputation testimony as now given, *i.e.*, be confined to the nature and extent of observation and acquaintance upon which the opinion is based. See Rule 701.

### Notes of Committee on the Judiciary, House Report No. 93-650

Rule 405(a) as submitted proposed to change existing law by allowing evidence of character in the form of opinion as well as reputation testimony. Fearing, among other reasons, that wholesale allowance of opinion testimony might tend to turn a trial into a swearing contest between conflicting character witnesses, the Committee decided to delete from this Rule, as well as from Rule 608(a) which involves a related problem, reference to opinion testimony.

### Notes of Conference Committee, House Report No. 93-1597

The Senate makes two language changes in the nature of conforming amendments. The Conference adopts the Senate amendments.

## Rule 406. Habit; Routine Practice

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

(Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1932.)

### Notes of Advisory Committee on Proposed Rules

An oft-quoted paragraph, McCormick, § 162, p. 340, describes habit in terms effectively contrasting it with character:

"Character and habit are close akin. Character is a generalized description of one's disposition, or of one's disposition in respect to a general trait, such as honesty, temperance, or peacefulness. 'Habit,' in modern usage, both lay and psychological, is more specific. It describes one's regular response to a repeated specific situation. If we speak of character for care, we think of the person's tendency to act prudently in all the varying situations of life, in business, family life, in handling automobiles and in walking across the street. A habit, on the other hand, is the person's regular practice of meeting a particular kind of situation with a specific type of conduct, such as the habit of going down a particular stairway two stairs at a time, or of giving the hand-signal for a left turn, or of alighting from railway cars while they are moving. The doing of the habitual acts may become semi-automatic." Equivalent behavior on the part of a group is designated "routine practice of an organization" in the rule.

Agreement is general that habit evidence is highly persuasive as proof of conduct on a particular occasion. Again quoting McCormick § 162, p. 341:

"Character may be thought of as the sum of one's habits though doubtless it is more than this. But unquestionably the uniformity of one's response to habit is far greater than the consistency with which one's conduct conforms to character or disposition. Even though character comes in only exceptionally as evidence of an act, surely any sensible man in investigating whether X did a particular act would be greatly helped in his inquiry by evidence as to whether he was in the habit of doing it."

When disagreement has appeared, its focus has been upon the question what constitutes habit, and the reason for this is readily apparent. The extent to which instances must be multiplied and consistency of behavior maintained in order to rise to the status of habit inevitably gives rise to differences of opinion. Lewan, Rationale of Habit Evidence, 16 Syracuse L.Rev. 39, 49 (1964). While adequacy of sampling and uniformity of response are key factors, precise standards for measuring their sufficiency for evidence purposes cannot be formulated.

The rule is consistent with prevailing views. Much evidence is excluded simply because of failure to achieve the status of habit. Thus, evidence of intemperate "habits" is generally excluded when offered as proof of drunkenness in accident cases, Annot., 46 A.L.R.2d 103, and evidence of other assaults is inadmissible to prove the instant one in a civil assault action, Annot., 66 A.L.R.2d 806. In *Levin* v. *United States*, 119 U.S.App.D.C. 156, 338 F.2d 265 (1964), testimony as to the religious "habits" of the accused, offered as tending to prove that he was at home observing the Sabbath rather than out obtaining money through larcency by trick, was held properly excluded;

"It seems apparent to us that an individual's religious practices would not be the type of activities which would lend themselves to the characterization of 'invariable regularity.' [1 Wigmore 520.] Certainly the very volitional basis of the activity raises serious questions as to its invariable nature, and hence its probative value." *Id.* at 272.

These rulings are not inconsistent with the trend towards admitting evidence of business transactions between one of the parties and a third person as tending to prove that he made the same bargain or proposal in the litigated situation. Slough, Relevancy Unraveled, 6 Kan.L.Rev. 38-41 (1957). Nor are they inconsistent with such cases as *Whittemore* v. *Lockheed Aircraft Corp.*, 65 Cal.App.2d 737, 151 P.2d 670 (1944), upholding the admission of evidence that plaintiff's intestate had on four other occasions flown planes from defendant's factory for delivery to his employer airline, offered to prove that he was piloting rather than a guest on a plane which crashed and killed all on board while en route for delivery.

A considerable body of authority has required that evidence of the routine practice of an organization be corroborated as a condition precedent to its admission in evidence. Slough, Relevancy Unraveled, 5 Kan.L.Rev. 404, 449 (1957). This requirement is specifically rejected by the rule on the ground that it relates to the sufficiency of the evidence rather than admissibility. A similar position is taken in New Jersey Rule 49. The rule also rejects the requirement of the absence of eyewitnesses, sometimes encountered with respect to admitting habit evidence to prove freedom from contributory negligence in wrongful death cases. For comment critical of the requirements see Frank, J., in *Cereste* v. *New York, N.H. & H.R. Co.*, 231 F.2d 50 (2d Cir. 1956), cert. denied 351 U.S. 951, 76 S.Ct. 848, 100 L.Ed 1475, 10 Vand.L.Rev. 447 (1957); McCormick § 162, p. 342. The omission of the requirement from the California Evidence Code is said to have effected its elimination. Comment, Cal.Ev.Code § 1105.

### Rule 407. Subsequent Remedial Measures

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

(Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1932.)

#### Notes of Advisory Committee on Proposed Rules

The rule incorporates conventional doctrine which excludes evidence of subsequent remedial measures as proof of an admission of fault. The rule rests on two grounds. (1) The conduct is not in fact an admission, since the conduct is equally consistent with injury by mere accident or through contributory negligence. Or, as Baron Bramwell put it, the rule rejects the notion that "because the world gets wiser as it gets older, therefore it was foolish before." *Hart* v. *Lancashire & Yorkshire Ry. Co.*, 21 L.T.R. N.S. 261, 263 (1869). Under a liberal theory of relevancy this ground alone would not support exclusion as the inference is still a possible one. (2) The other, and more impressive, ground for exclusion rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety. The courts have applied this principle to exclude evidence of subsequent repairs, installation of safety devices, changes in company rules, and discharge of employees, and the language of the present rules is broad enough to encompass all of them. See Falknor, Extrinsic Policies Affecting Admissibility, 10 Rutgers L.Rev. 574, 590 (1956).

The second sentence of the rule directs attention to the limitations of the rule. Exclusion is called for only when the evidence of subsequent remedial measures is offered as proof of negligence or culpable conduct. In effect it rejects the suggested inference that fault is admitted. Other purposes are, however, allowable, including ownership or control, existence of duty, and feasibility of precautionary measures, if controverted, and impeachment. 2 Wigmore § 283; Annot., 64 A.L.R.2d 1296. Two recent federal cases are illustrative. *Boeing Airplane Co.* v. *Brown*, 291 F.2d 310 (9th Cir. 1961), an action against an airplane manufacturer for using an allegedly defectively designed alternator shaft which caused a plane crash, upheld the admission of evidence of subsequent design modification for the purpose of showing that design changes and safeguards were feasible. And *Powers* v. *J. B. Michael & Co.*, 329 F.2d 674 (6th Cir. 1964), an action against a road contractor for negligent failure to put out warning signs, sustained the admission of evidence that defendant subsequently put out signs to show that the portion of the road in question was under defendant's control. The requirement that the other purpose be controverted calls for automatic exclusion unless a genuine issue be present and allows the opposing party to lay the groundwork for exclusion by making an admission. Otherwise the factors of undue prejudice, confusion of issues, misleading the jury, and waste of time remain for consideration under Rule 403.

For comparable rules, see Uniform Rule 51; California Evidence Code § 1151; Kansas Code of Civil Procedure § 60-451; New Jersey Evidence Rule 51.

### Rule 408. Compromise and Offers to Compromise

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

(Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1933.)

#### Notes of Advisory Committee on Proposed Rules

As a matter of general agreement, evidence of an offer-to compromise a claim is not receivable in evidence as an admission of, as the case may be, the validity or invalidity of the claim. As with evidence of subsequent remedial measures, dealt with in Rule 407, exclusion may be based on two grounds. (1) The evidence is irrelevant, since the offer may be motivated by a desire for peace rather than from any concession of weakness of position. The validity of this position will vary as the amount of the offer varies in relation to the size of the claim and may also be influenced by other circumstances. (2) a more consistently impressive ground is promotion of the public policy favoring the compromise and settlement of disputes. McCormick §§ 76, 251. While the rule is ordinarily phrased in terms of offers of compromise, it is apparent that a similar attitude must be taken with respect to completed compromises when offered against a party thereto. This latter situation will not, of course, ordinarily occur except when a party to the present litigation has compromised with a third person.

The same policy underlies the provision of Rule 68 of the Federal Rules of Civil Procedure that evidence of an unaccepted offer of judgment is not admissible except in a proceeding to determine costs.

The practical value of the common law rule has been greatly diminished by its inapplicability to admissions of fact, even though made in the course of compromise negotiations, unless hypothetical, stated to be "without prejudice," or so connected with the offer as to be inseparable from it. McCormick § 251, pp. 540-541. An inevitable effect is to inhibit freedom of communication with respect to compromise, even among lawyers. Another effect is the generation of controversy over whether a given statement falls within or without the protected area. These considerations account for the expansion of the rule herewith to include evidence of conduct or statements made in compromise negotiations, as well as the offer or completed compromise itself. For similar provisions see California Evidence Code §§ 1152, 1154.

The policy considerations which underlie the rule do not come into play when the effort is to induce a creditor to settle an admittedly due amount for a lessor sum. McCormick § 251, p. 540. Hence the rule requires that the claim be disputed as to either validity or amount.

The final sentence of the rule serves to point out some limitations upon its applicability. Since the rule excludes only when the purpose is proving the validity or invalidity of the claim or its amount, an offer for another purpose is not within the rule. The illustrative situations mentioned in the rule are supported by the authorities. As to proving bias or prejudice of a witness, see Annot., 161 A.L.R. 395, *contra*, *Fenberg* v. *Rosenthal*, 348 Ill. App. 510, 109 N.E.2d 402 (1952), and negativing a contention of lack of due diligence in presenting a claim, 4 Wigmore § 1061. An effort to "buy off" the prosecution or a prosecuting witness in a criminal case is not within the policy of the rule of exclusion. McCormick § 251, p. 542.

For other rules of similar import, see Uniform Rules 52 and 53; California Evidence Code § 1152, 1154; Kansas Code of Civil Procedure §§ 60-452, 60-453; New Jersey Evidence Rules 52 and 53.

### Notes of Committee on the Judiciary, House Report No. 93-650

Under existing federal law evidence of conduct and statements made in compromise negotiations is admissible in subsequent litigation between the parties. The second sentence of Rule 408 as submitted by the Supreme Court proposed to reverse that doctrine in the interest of further promoting non-judicial settlement of disputes. Some agencies of government expressed the view that the Court formulation was likely to impede rather than assist efforts to achieve settlement of disputes. For one thing, it is not always easy to tell when compromise negotiations begin, and informal dealings end. Also, parties dealing with government agencies would be reluctant to furnish factual information at preliminary meetings; they would wait until "compromise negotiations" began and thus hopefully effect an immunity for themselves with respect to the evidence supplied. In light of these considerations, the Committee recast the Rule so that admissions of liability or opinions given during compromise negotiations continue inadmissible, but evidence of unqualified factual assertions is admissible. The latter aspect of the Rule is drafted, however, so as to preserve other possible objections to the introduction of such evidence. The Committee intends no modification of current law whereby a party may protect himself from future use of his statements by couching them in hypothetical conditional form.

### Notes of Committee on the Judiciary, Senate Report No. 93-1277

This rule as reported makes evidence of settlement or attempted settlement of a disputed claim inadmissible when offered as an admission of liability or the amount of liability. The purpose of this rule is to encourage settlements which would be discouraged if such evidence were admissible.

Under present law, in most jurisdictions, statements of fact made during settlement negotiations, however, are excepted from this ban and are admissible. The only escape from admissibility of statements of fact made in a settlement negotiation is if the declarant or his representative expressly states that the statement is hypothetical in nature or is made without prejudice. Rule 408 as submitted by the Court reversed the traditional rule. It would have brought statements of fact within the ban and made them, as well as an offer of settlement, inadmissible.

The House amended the rule and would continue to make evidence of facts disclosed during compromise negotiations admissible. It thus reverted to the traditional rule. The House committee report states that the committee intends to preserve current law under which a party may protect himself by couching his statements in hypothetical form [See House Report No. 93-650 above]. The real impact of this amendment, however, is to deprive the rule of much of its salutary effect. The exception for factual admissions was believed by the Advisory Committee to hamper free communication between parties and thus to constitute an unjustifiable restraint upon efforts to negotiate settlements—the encouragement of which is the purpose of the rule. Further, by protecting hypothetically phrased statements, it constituted a preference for the sophisticated, and a trap for the unwary.

Three States which had adopted rules of evidence patterned after the proposed rules prescribed by the Supreme Court opted for versions of rule 408 identical with the Supreme Court draft with respect to the inadmissibility of conduct or statements made in compromise negotiations. [Nev. Rev. Stats. § 48.105; N. Mex. Stats. Anno. (1973 Supp.) § 20-4-408; West's Wis. Stats. Anno. (1973 Supp.) § 904.08].

For these reasons, the committee has deleted the House amendment and restored the rule to the version submitted by the Supreme Court with one additional amendment. This amendment adds a sentence to insure that evidence, such as documents, is not rendered inadmissible merely because it is presented in the course of compromise negotiations if the evidence is otherwise discoverable. A party should not be able to immunize from admissibility documents otherwise discoverable merely by offering them in a compromise negotiation.

### Notes of Conference Committee, House Report No. 93-1597

The House bill provides that evidence of admissions of liability or opinions given during compromise negotiations is not admissible, but that evidence of facts disclosed during compromise negotiations is not inadmissible by virtue of having been first disclosed in the compromise negotiations. The Senate amendment provides that evidence of conduct or statements made in compromise negotiations is not admissible. The Senate amendment also provides that the rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.

The House bill was drafted to meet the objection of executive agencies that under the rule as proposed by the Supreme Court, a party could present a fact during compromise negotiations and thereby prevent an opposing party from offering evidence of that fact at trial even though such evidence was obtained from independent sources. The Senate amendment expressly precludes this result.

The Conference adopts the Senate amendment.

### Rule 409. Payment of Medical and Similar Expenses

Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

(Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1933.)

#### NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

The considerations underlying this rule parallel those underlying Rules 407 and 408, which deal respectively with subsequent remedial measures and offers of compromise. As stated in Annot., 20 A.L.R.2d 291, 293:

"[G]enerally, evidence of payment of medical, hospital, or similar expenses of an injured party by the opposing party, is not admissible, the reason often given being that such payment or offer is usually made from humane impulses and not from an admission of liability, and that to hold otherwise would tend to discourage assistance to the injured person."

Contrary to Rule 408, dealing with offers of compromise, the present rule does not extend to conduct or statements not a part of the act of furnishing or offering or promising to pay. This difference in treatment arises from fundamental differences in nature. Communication is essential if compromises are to be effected, and consequently broad protection of statements is needed. This is not so in cases of payments or offers or promises to pay medical expenses, where factual statements may be expected to be incidental in nature.

For rules on the same subject, but phrased in terms of "humanitarian motives," see Uniform Rule 52; California Evidence Code § 1152; Kansas Code of Civil Procedure § 60-452; New Jersey Evidence Rule 52.

### Rule 410. Inadmissibility of Pleas, Offers of Pleas, and Related Statements

Except as otherwise provided in this rule, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, a plea of nolo contendere, or an offer to plead guilty or nolo contendere to the crime charged or any other crime, is admissible in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

(Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1933; Pub. L. 94-149, § 1(9), Dec. 12, 1975, 89 Stat. 805.)

#### NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

Withdrawn pleas of guilty were held inadmissible in federal prosecutions in *Kercheval* v. *United States*, 274 U.S. 220, 47 S.Ct. 582, 71 L.Ed. 1009 (1927). The Court pointed out that to admit the withdrawn plea would effectively set at naught the allowance of withdrawal and place the accused in a dilemma utterly inconsistent with the decision to award him a trial. The New York Court of Appeals, in *People* v. *Spitaleri*, 9 N.Y.2d 168, 212 N.Y.S.2d 53, 173 N.E.2d 35 (1961), reexamined and overturned its earlier decisions which had allowed admission. In addition to the reasons set forth in Kercheval, which was quoted at length, the court pointed out that the effect of admitting the plea was to compel defendant to take the stand by way of explanation and to open the way for the prosecution to call the lawyer who had represented him at the time of entering the plea. State court decisions for and against admissibility are collected in Annot., 86 A.L.R.2d 326.

Pleas of *nolo contendere* are recognized by Rule 11 of the Rules of Criminal Procedure, although the law of numerous States is to the contrary. The present rule gives effect to the principal traditional characteristic of the *nolo* plea, i.e., avoiding the admission of guilt which is inherent in pleas of guilty. This position is consistent with the construction of Section 5 of the Clayton Act, 15 U.S.C. § 16(a), recognizing the inconclusive and compromise nature of judgments based on *nolo* pleas. *General Electric Co.* v. *City of San Antonio*, 334 F.2d 480 (5th Cir. 1964); *Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co.*, 323 F.2d 412 (7th Cir. 1963), cert. denied 376 U.S. 939, 84 S.Ct. 794, 11 L.Ed.2d 659; *Armco Steel Corp.* v. *North Dakota*, 376 F.2d 206 (8th Cir. 1967); *City of Burbank* v. *General Electric Co.*, 329 F.2d 825 (9th Cir. 1964). See also state court decisions in Annot., 18 A.L.R.2d 1287, 1314.

Exclusion of offers to plead guilty or *nolo* has as its purpose the promotion of disposition of criminal cases by compromise. As pointed out in McCormick § 251, p. 543

"Effective criminal law administration in many localities would hardly be possible if a large proportion of the charges were not disposed of by such compromises."

See also *People* v. *Hamilton*, 60 Cal.2d 105, 32 Cal.Rptr. 4, 383 P.2d 412 (1963), discussing legislation designed to achieve this result. As with compromise offers generally, Rule 408, free communication is needed, and security against having an offer of compromise or related statement admitted in evidence effectively encourages it.

Limiting the exclusionary rule to use against the accused is consistent with the purpose of the rule, since the possibility of use for or against other persons will not impair the effectiveness of withdrawing pleas or the freedom of discussion which the rule is designed to foster. See A.B.A. Standards Relating to Pleas of Guilty § 2.2 (1968). See also the narrower provisions of New Jersey Evidence Rule 52(2) and the unlimited exclusion provided in California Evidence Code § 1153.

#### NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 93-650

The Committee added the phrase "Except as otherwise provided by Act of Congress" to Rule 410 as submitted by the Court in order to preserve particular congressional policy judgments as to the effect of a plea of guilty or of nolo contendere. See 15 U.S.C. 16(a). The Committee intends that its amendment refers to both present statutes and statutes subsequently enacted.

#### NOTES OF THE COMMITTEE ON THE JUDICIARY, SENATE REPORT NO. 93-1277

As adopted by the House, rule 410 would make inadmissible pleas of guilty or nolo contendere subsequently withdrawn as well as offers to make such pleas. Such a rule is clearly justified as a means of encouraging pleading. However, the House rule would then go on to render inadmissible for any purpose statements made in connection with these pleas or offers as well.

The committee finds this aspect of the House rule unjustified. Of course, in certain circumstances such statements should be excluded. If, for example, a plea is vitiated because of coercion, statements made in connection with the plea may also have been coerced and should be inadmissible on that basis. In other cases, however, voluntary statements of an accused made in court on the record, in connection with a plea, and determined by a court to be reliable should be admissible even though the plea is subsequently withdrawn. This is particularly true in those cases where, if the House rule were in effect, a defendent would be able to contradict his previous statements and thereby lie with impunity [See *Harris* v. *New York*, 401 U.S. 222 (1971)]. To prevent such an injustice, the rule has been modified to permit the use of such statements for the limited purposes of impeachment and in subsequent perjury or false statement prosecutions.

### Notes of Conference Committee, House Report No. 93-1597

The House bill provides that evidence of a guilty or nolo contendere plea, of an offer of either plea, or of statements made in connection with such pleas or offers of such pleas, is inadmissible in any civil or criminal action, case or proceeding against the person making such plea or offer. The Senate amendment makes the rule inapplicable to a voluntary and reliable statement made in court on the record where the statement is offered in a subsequent prosecution of the declarant for perjury or false statement.

The issues raised by Rule 410 are also raised by proposed Rule 11(e)(6) of the Federal Rules of Criminal Procedure presently pending before Congress. This proposed rule, which deals with the admissibility of pleas of guilty or nolo contendere, offers to make such pleas, and statements made in connection with such pleas, was promulgated by the Supreme Court on April 22, 1974, and in the absence of congressional action will become effective on August 1, 1975. The conferees intend to make no change in the presently-existing case law until that date, leaving the courts free to develop rules in this area on a case-by-case basis.

The Conferees further determined that the issues presented by the use of guilty and nolo contendere pleas, offers of such pleas, and statements made in connection with such pleas or offers, can be explored in greater detail during Congressional consideration of Rule 11(e)(6) of the Federal Rules of Criminal Procedure. The Conferees believe, therefore, that it is best to defer its effective date until August 1, 1975. The Conferees intend that Rule 410 would be superseded by any subsequent Federal Rule of Criminal Procedure or Act of Congress with which it is inconsistent, if the Federal Rule of Criminal Procedure or Act of Congress takes effect or becomes law after the date of the enactment of the act establishing the rules of evidence.

The conference adopts the Senate amendment with an amendment that expresses the above intentions.

### Amendments

1975—Pub. L. 94-149 substituted heading reading "Inadmissibility of Pleas, Offers of Pleas, and Related Statements" for "Offer to Plead Guilty; Nolo Contendere; Withdrawn Pleas of Guilty"; substituted in first sentence "provided in this rule" for "provided by Act of Congress", inserted therein ", and relevant to," following 'in connection with", and deleted therefrom "action, case, or" preceding "proceeding"; added second sentence relating to admissibility of statements in criminal proceedings for perjury or false statements; deleted former second sentence providing that "This rule shall not apply to the introduction of voluntary and reliable statements made in court on the record in connection with any of the foregoing pleas or offers where offered for impeachment purposes or in a subsequent prosecution of the declarant for perjury or false statement."; and deleted former second par. providing that "This rule shall not take effect until August 1, 1975, and shall be superseded by any amendment to the Federal Rules of Criminal Procedure which is inconsistent with this rule, and which takes effect after the date of the enactment of the Act establishing these Federal Rules of Evidence."

### Rule 411. Liability Insurance

Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

(Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1933.)

### Notes of Advisory Committee on Proposed Rules

The courts have with substantial unanimity rejected evidence of liability insurance for the purpose of proving fault, and absence of liability insurance as proof of lack of fault. At best the inference of fault from the fact of insurance coverage is a tennuous one, as is its converse. More important, no doubt, has been the feeling that knowledge of the presence or absence of liability insurance would induce juries to decide cases on improper grounds. McCormick § 168; Annot., 4 A.L.R.2d 761. The rule is drafted in broad terms so as to include contributory negligence or other fault of a plaintiff as well as fault of a defendant.

The second sentence points out the limits of the rule, using well established illustrations. *Id.*

For similar rules see Uniform Rule 54; California Evidence Code § 1155; Kansas Code of Civil Procedure § 60-454; New Jersey Evidence Rule 54.

## ARTICLE V—PRIVILEGES

### Rule 501. General Rule

Except as otherwise required by the Constitution of the United States as provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

(Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1933.)

### Notes of Committee on the Judiciary, House Report No. 93-650

Article V as submitted to Congress contained thirteen Rules. Nine of those Rules defined specific non-constitutional privileges which the federal courts must recognize (i.e. required reports, lawyer-client, psychotherapist-patient, husband-wife, communications to clergymen, political vote, trade secrets, secrets of state and other official information, and identity of informer). Another Rule provided that only those privileges set forth in Article V or in some other Act of Congress could be recognized by the federal courts. The three remaining Rules addressed collateral problems as to waiver of privilege by voluntary disclosure, privileged matter disclosed under compulsion or without opportunity to claim privilege, comment upon or inference from a claim of privilege, and jury instruction with regard thereto.

The Committee amended Article V to eliminate all of the Court's specific Rules on privileges. Instead, the Committee, through a single Rule, 501, left the law of privileges in its present state and further provided that privileges shall continue to be developed by the courts of the United States under a uniform standard applicable both in civil and criminal cases. That standard, derived from Rule 26 of the Federal Rules of Criminal Procedure, mandates the application of the principles of the common law as interpreted by the Courts of the United States in the light of reason and experience. The words "person, government, State, or political subdivision thereof" were added by the Committee to the lone term "witness" used in Rule 26 to make clear that, as under present law, not only witnesses may have privileges. The Committee also included in its amendment a proviso modeled after Rule 302 and similar to language added by the Committee to Rule 601 relating to the competency of witnesses. The proviso is designed to require the application of State privilege law in civil actions and proceedings governed by *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), a result in accord with current federal court decisions. See *Republic Gear Co.* v. *Borg-Warner Corp.*, 381 F.2d 551, 555–556 n.2 (2nd Cir. 1967). The Committee deemed the proviso to be necessary in the light of the Advisory Committee's view (see its note to Court [proposed] Rule 501) that this result is not mandated under *Erie*.

The rationale underlying the proviso is that federal law should not supersede that of the States in substantive areas such as privilege absent a compelling reason. The Committee believes that in civil cases in the federal courts where an element of a claim or defense is not grounded upon a federal question, there is no federal interest strong enough to justify departure from State policy. In addition, the Committee considered that the Court's proposed Article V would have promoted forum shopping in some civil actions, depending upon differences in the privilege law applied as among the State and federal courts. The Committee's proviso, on the other hand, under which the federal courts are bound to apply the State's privilege law in actions founded upon a State-created right or defense removes the incentive to "shop".

### Notes of Committee on the Judiciary, Senate Report No. 93-1277

Article V as submitted to Congress contained 13 rules. Nine of those rules defined specific nonconstitutional privileges which the Federal courts must recognize (i.e., required reports, lawyer-client, psychotherapist-patient, husband-wife, communications to clergymen, political vote, trade secrets, secrets of state and other official information, and identity of informer). Many of these rules contained controversial modifications or restrictions upon common law privileges. As noted supra, the House amended article V to eliminate all of the Court's specific rules on privileges. Through a single rule, 501, the House provided that privileges shall be governed by the principles of the common law as interpreted by the courts of the United States in the light of reason and experience (a standard derived from rule 26 of the Federal Rules of Criminal Procedure) except in the case of an element of a civil claim or defense as to which State law supplies the rule of decision, in which event state privilege law was to govern.

The committee agrees with the main thrust of the House amendment: that a federally developed common law based on modern reason and experience shall apply except where the State nature of the issues renders deference to State privilege law the wiser course, as in the usual diversity case. The committee understands that thrust of the House amendment to require that State privilege law be applied in "diversity" cases (actions on questions of State law between citizens of different States arising under 28 U.S.C. § 1332). The language of the House amendment, however, goes beyond this in some respects, and falls short of it in others: State privilege law applies even in nondiversity. Federal question civil cases, where an issue governed by State substantive law is the object of the evidence (such issues do sometimes arise in such cases); and, in all instances where State privilege law is to be applied, e.g., on proof of a State issue in a diversity case, a close reading reveals that State privilege law is not to be applied unless the matter to be proved is an element of that state claim or defense, as distinguished from a step along the way in the proof of it.

The committee is concerned that the language used in the House amendment could be difficult to apply. It provides that "in civil actions * * * with respect to an element of a claim or defense as to which State law supplies the rule of decision," State law on privilege applies. The question of what is an element of a claim or defense is likely to engender considerable litigation. If the matter in question constitutes an element of a claim, State law supplies the privilege rule; whereas if it is a mere item of proof with respect to a claim, then, even though State law might supply the rule of decision, Federal law on the privilege would apply. Further, disputes will arise as to how the rule should be applied in an antitrust action or in a tax case where the Federal statute is silent as to a particular aspect of the substantive law in question, but Federal cases had incorporated State law by reference to State law. [For a discussion of reference to State substantive law, see note on Federal Incorporation by Reference of State Law, Hart & Wechsler, The Federal Courts and the Federal System, pp. 491–494 (2d ed. 1973).] Is a claim (or defense) based on such a reference a claim or defense as to which federal or State law supplies the rule of decision?

Another problem not entirely avoidable is the complexity or difficulty the rule introduces into the trial of a Federal case containing a combination of Federal and State claims and defenses, e.g. an action involving Federal antitrust and State unfair competition claims. Two different bodies of privilege law would need to be consulted. It may even develop that the same witness-testimony might be relevant on both counts and privileged as to one but not the other. [The problems with the House formulation are discussed in Rothstein, The Proposed Amendments to the Federal Rules of Evidence, 62 Georgetown University Law Journal 125 (1973) at notes 25, 26 and 70–74 and accompanying text.]

The formulation adopted by the House is pregnant with litigious mischief. The committee has, therefore, adopted what we believe will be a clearer and more practical guideline for determining when courts should respect State rules of privilege. Basically, it provides that in criminal and Federal question civil cases, federally evolved rules on privilege should apply since it is Federal policy which is being enforced. [It is also intended that the Federal law of privileges should be applied with respect to pendant State law claims when they arise in a Federal question case.] Conversely, in diversity cases where the litigation in question turns on a substantive question of State law, and is brought in the Federal courts because the parties reside in different States, the committee believes it is clear that State rules of privilege should apply unless the proof is directed at a claim or defense for which Federal law supplies the rule of decision (a situation which would not commonly arise.) [While such a situation might require use of two bodies of privilege law, federal and state, in the same case, nevertheless the occasions on which this would be required are considerably reduced as compared with the House version, and confined to situations where the Federal and State interests are such as to justify application of neither privilege law to the case as a whole. If the rule proposed here results in two conflicting bodies of privilege law applying to the same piece of evidence in the same case, it is contemplated that the rule favoring reception of the evidence should be applied. This policy is based on the present rule 43(a) of the Federal Rules of Civil Procedure which provides:

In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made.] It is intended that the State rules of privilege should apply equally in original diversity actions and diversity actions removed under 28 U.S.C. § 1441(b).

Two other comments on the privilege rule should be made. The committee has received a considerable volume of correspondence from psychiatric organizations and psychiatrists concerning the deletion of rule 504 of the rule submitted by the Supreme Court. It should be clearly understood that, in approving this general rule as to privileges, the action of Congress should not be understood as disapproving any recognition of a psychiatrist-patient, or husband-wife, or any other of the enumerated privileges contained in the Supreme Court rules. Rather, our action should be understood as reflecting the view that the recognition of a privilege based on a confidential relationship and other privileges should be determined on a case-by-case basis.

Further, we would understand that the prohibition against spouses testifying against each other is considered a rule of privilege and covered by this rule and not by rule 601 of the competency of witnesses.

### Notes of the Conference Committee, House Report No. 93-1597

Rule 501 deals with the privilege of a witness not to testify. Both the House and Senate bills provide that federal privilege law applies in criminal cases. In civil actions and proceedings, the House bill provides that state privilege law applies "to an element of a claim or defense as to which State law supplies the rule of decision." The Senate bill provides that "in civil actions and proceedings arising under 28 U.S.C. § 1332 or 28 U.S.C. § 1335, or between citizens of different States and removed under 28 U.S.C. § 1441(b) the privilege of a witness, person, government, State or political subdivision thereof is determined in accordance with State law, unless with respect to the particular claim or defense, Federal law supplies the rule of decision."

The wording of the House and Senate bills differs in the treatment of civil actions and proceedings. The rule in the House bill applies to evidence that relates to "an element of a claim or defense." If an item of proof tends to support or defeat a claim or defense, or an element of a claim or defense, and if state law supplies the rule of decision for that claim or defense, then state privilege law applies to that item of proof.

Under the provision in the House bill, therefore, state privilege law will usually apply in diversity cases. There may be diversity cases, however, where a claim or defense is based upon federal law. In such instances, Federal privilege law will apply to evidence relevant to the federal claim or defense. See *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U.S. 173 (1942).

In nondiversity jurisdiction civil cases, federal privilege law will generally apply. In those situations where a fedeal court adopts or incorporates state law to fill interstices or gaps in federal statutory phrases, the court generally will apply federal privilege law. As Justice Jackson has said:

> A federal court sitting in a non-diversity case such as this does not sit as a local tribunal. In some cases it may see fit for special reasons to give the law of a particular state highly persuasive or even controlling effect, but in the last analysis its decision turns upon the law of the United States, not that of any state.

*D'Oench, Duhme & Co.* v. *Federal Deposit Insurance Corp.*, 315 U.S. 447, 471 (1942) (Jackson, J., concurring). When a federal court chooses to absorb state law, it is applying the state law as a matter of federal common law. Thus, state law does not supply the rule of decision (even though the federal court may apply a rule derived from state decisions), and state privilege law would not apply. See C. A. Wright, Federal Courts 251-252 (2d ed. 1970); *Holmberg* v. *Armbrecht*, 327 U.S. 392 (1946); *DeSylva* v. *Ballentine*, 351 U.S. 570, 581 (1956); 9 Wright & Miller, Federal Rules and Procedure § 2408.

In civil actions and proceedings, where the rule of decision as to a claim or defense or as to an element of a claim or defense is supplied by state law, the House provision requires that state privilege law apply.

The Conference adopts the House provision.

## ARTICLE VI—WITNESSES

### Rule 601. General Rule of Competency

Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.

(Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1934.)

### Notes of Advisory Committee on Proposed Rules

This general ground-clearing eliminates all grounds of incompetency not specifically recognized in the succeeding rules of this Article. Included among the grounds thus abolished are religious belief, conviction of crime, and connection with the litigation as a party or interested person or spouse of a party or interested person. With the exception of the so-called Dead Man's Acts, American jurisdictions generally have ceased to recognize these grounds.

The Dead Man's Acts are surviving traces of the common law disqualification of parties and interested persons. They exist in variety too great to convey conviction of their wisdom and effectiveness. These rules contain no provision of this kind. For the reasoning underlying the decision not to give effect to state statutes in diversity cases, see the Advisory Committee's Note to Rule 501.

No mental or moral qualifications for testifying as a witness are specified. Standards of mental capacity have proved elusive in actual application. A leading commentator observes that few witnesses are disqualified on that ground. Weihofen, Testimonial Competence and Credibility, 34 Geo. Wash.L.Rev. 53 (1965). Discretion is regularly exercised in favor of allowing the testimony. A witness wholly without capacity is difficult to imagine. The question is one particularly suited to the jury as one of weight and credibility, subject to judicial authority to review the sufficiency of the evidence. 2 Wigmore §§ 501, 509. Standards of moral qualification in practice consist essentially of evaluating a person's truthfulness in terms of his own answers about it. Their principal utility is in affording an opportunity on voir dire examination to impress upon the witness his moral duty. This result may, however, be accomplished more directly, and without haggling in terms of legal standards, by the manner of administering the oath or affirmation under Rule 603.

Admissibility of religious belief as a ground of impeachment is treated in Rule 610. Conviction of crime as a ground of impeachment is the subject of Rule 609. Marital relationship is the basis for privilege under Rule 505. Interest in the outcome of litigation and mental capacity are, of course, highly relevant to credibility and require no special treatment to render them admissible along with other matters bearing upon the perception, memory, and narration of witnesses.

### Notes of Committee on the Judiciary, House Report No. 93-650

Rule 601 as submitted to the Congress provided that "Every person is competent to be a witness except as otherwise provided in these rules." One effect of the Rule as proposed would have been to abolish age, mental capacity, and other grounds recognized in some State jurisdictions as making a person incompetent as a witness. The greatest controversy centered around the Rule's rendering inapplicable in the federal courts the so-called Dead Man's Statutes which exist in some States. Acknowledging that there is substantial disagreement as to the merit of Dead Man's Statutes, the Committee nevertheless believed that where such statutes have been enacted they represent State policy which should not be overturned in the absence of a compelling federal interest. The Committee therefore amended the Rule to make competency in civil actions determinable in accordance with State law with respect to elements of claims or defenses as to which State law supplies the rule of decision. Cf. *Courtland* v. *Walston & Co., Inc.*, 340 F.Supp. 1076, 1087-1092 (S.D.N.Y. 1972).

### Notes of Committee on the Judiciary, Senate Report No. 93-1277

The amendment to rule 601 parallels the treatment accorded rule 501 discussed immediately above.

### Notes of Conference Committee, House Report No. 93-1597

Rule 601 deals with competency of witnesses. Both the House and Senate bills provide that federal competency law applies in criminal cases. In civil actions and proceedings, the House bill provides that state competency law applies "to an element of a claim or defense as to which State law supplies the rule of decision." The Senate bill provides that "in civil actions and proceedings arising under 28 U.S.C. § 1332 or 28 U.S.C. § 1335, or between citizens of different States and removed under 28 U.S.C. § 1441(b) the competency of a witness, person, government, State or political subdivision thereof is determined in accordance with State law, unless with respect to the particular claim or defense, Federal law supplies the rule of decision."

The wording of the House and Senate bills differs in the treatment of civil actions and proceedings. The rule in the House bill applies to evidence that relates to "an element of a claim or defense." If an item of proof tends to support or defeat a claim or defense, or an element of a claim or defense, and if state law supplies the rule of decision for that claim or defense, then state competency law applies to that item of proof.

For reasons similar to those underlying its action on Rule 501, the Conference adopts the House provision.

## Rule 602. Lack of Personal Knowledge

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.

(Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1934.)

### Notes of Advisory Committee on Proposed Rules

"* * * [T]he rule requiring that a witness who testifies to a fact which can be perceived by the senses must have had an opportunity to observe, and must have actually observed the fact" is a "most prevasive manifestation" of the common law insistence upon "the most reliable sources of information." McCormick § 10, p. 19. These foundation requirements may, of course, be furnished by the testimony of the witness himself; hence personal knowledge is not an absolute but may consist of what the witness thinks he knows from personal perception. 2 Wigmore § 650. It will be observed that the rule is in fact a specialized application of the provisions of Rule 104(b) on conditional relevancy.

This rule does not govern the situation of a witness who testifies to a hearsay statement as such, if he has personal knowledge of the making of the statement. Rules 801 and 805 would be applicable. This rule would, however, prevent him from testifying to the subject matter of the hearsay statement, as he has no personal knowledge of it.

The reference to Rule 703 is designed to avoid any question of conflict between the present rule and the provisions of that rule allowing an expert to express opinions based on facts of which he does not have personal knowledge.

## Rule 603. Oath or Affirmation

Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so.

(Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1934.)

### Notes of Advisory Committee on Proposed Rules

The rule is designed to afford the flexibility required in dealing with religious adults, atheists, conscientious objectors, mental defectives, and children. Affirmation is simply a solemn undertaking to tell the truth; no special verbal formula is required. As is true generally, affirmation is recognized by federal law. "Oath" includes affirmation, 1 U.S.C. § 1; judges and clerks may administer oaths and affirmations, 28 U.S.C. §§ 459, 953; and affirmations are acceptable in lieu of oaths under Rule 43(d) of the Federal Rules of Civil Procedure. Perjury by a witness is a crime, 18 U.S.C. § 1621.

## Rule 604. Interpreters

An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation that he will make a true translation.

(Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1934.)

### Notes of Advisory Committee on Proposed Rules

The rule implements Rule 43(f) of the Federal Rules of Civil Procedure and Rule 28(b) of the Federal Rules of Criminal Procedure, both of which contain provisions for the appointment and compensation of interpreters.

## Rule 605. Competency of Judge as Witness

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

(Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1934.)

### Notes of Advisory Committee on Proposed Rules

In view of the mandate of 28 U.S.C. § 455 that a judge disqualify himself in "any case in which he * * * is or has been a material witness," the likelihood that the presiding judge in a federal court might be called to testify in the trial over which he is presiding is slight. Nevertheless the possibility is not totally eliminated.

The solution here presented is a broad rule of incompetency, rather than such alternatives as incompetency only as to material matters, leaving the matter to the discretion of the judge, or recognizing no incompetency. The choice is the result of inability to evolve satisfactory answers to questions which arise when the judge abandons the bench for the witness stand. Who rules on objections? Who compels him to answer? Can he rule impartially on the weight and admissibility of his own testimony? Can he be impeached or cross-examined effectively? Can he, in a jury trial, avoid conferring his seal of approval on one side in the eyes of the jury? Can he, in a bench trial, avoid an involvement destructive of impartiality? The rule of general incompetency has substantial support. See Report of the Special Committee on the Propriety of Judges Appearing as Witnesses, 36 A.B.A.J. 630 (1950); cases collected in Annot. 157 A.L.R. 311; McCormick § 68, p. 147; Uniform Rule 42; California Evidence Code § 703; Kansas Code of Civil Procedure § 60-442; New Jersey Evidence Rule 42. Cf. 6 Wigmore § 1909, which advocates leaving the matter to the discretion of the judge, and statutes to that effect collected in Annot. 157 A.L.R. 311.

The rule provides an "automatic" objection. To require an actual objection would confront the opponent with a choice between not objecting, with the result of allowing the testimony, and objecting, with the probable result of excluding the testimony but at the price of continuing the trial before a judge likely to feel that his integrity had been attacked by the objector.

### Rule 606. Competency of Juror as Witness

**(a) *At the trial.* A member of the jury may not testify as a witness before that jury in the trial of the case in which he is sitting as a juror. If he is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.**

**(b) *Inquiry into validity of verdict or indictment.* Upon an inquiry into the validity of a verict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencinb him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.**

**(Pub. L. 93-593, § 1, Jan. 2, 1975, 88 Stat. 1934; Pub. L. 94-149, § 1(10), Dec. 12, 1975, 89 Stat. 805.)**

#### NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

*Subdivision* (*a*). The considerations which bear upon the permissibility of testimony by a juror in the trial in which he is sitting as juror bear an obvious similarity to those evoked when the judge is called as a witness. See Advisory Committee's Note to Rule 605. The judge is not, however in this instance so involved as to call for departure from usual principles requiring objection to be made; hence the only provision on objection is that opportunity be afforded for its making out of the presence of the jury. Compare Rules 605.

*Subdivision* (*b*). Whether testimony, affidavits, or statements of jurors should be received for the purpose of invalidating or supporting a verdict or indictment, and if so, under what circumstances, has given rise to substantial differences of opinion. The familiar rubric that a juror may not impeach his own verdict, dating from Lord Mansfield's time, is a gross oversimplification. The values sought to be promoted by excluding the evidence include freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment. *McDonald* v. *Piess*, 238 U.S. 264, 35 S.Ct. 785, 59 L.Ed. 1300 (1915). On the other hand, simply putting verdicts beyond effective reach can only promote irregularity and injustice. The rule offers an accommodation between these competing considerations.

The mental operations and emotional reactions of jurors in arriving at a given result would, if allowed as a subject of inquiry, place every verdict at the mercy of jurors and invite tampering and harassment. See *Grenz* v. *Werre*, 129 N.W.2d 681 (N.D. 1964). The authorities are in virtually complete accord in excluding the evidence. Fryer, Note on Disqualification of Witnesses, Selected Writings on Evidence and Trial 345, 347 (Fryer ed. 1957); Maguire, Weinstein, et al., Cases on Evidence 887 (5th ed. 1965); 8 Wigmore § 2340 (McNaughton Rev. 1961). As to matters other than mental operations and emotional reactions of jurors, substantial authority refuses to allow a juror to disclose irregularities which occur in the jury room, but allows his testimony as to irregularities occurring outside and allows outsiders to testify as to occurrances both inside and out. 8 Wigmore § 2354 (McNaughton Rev. 1961). However, the door of the jury room is not necessarily a satisfactory dividing point, and the Supreme Court has refused to accept it for every situation. *Mattox* v. *United States*, 146 U.S. 140, 13 S.Ct. 50, 36 L.Ed. 917 (1892).

Under the federal decisions the central focus has been upon insulation of the manner in which the jury reached its verdict, and this protection extends to each of the components of deliberation, including arguments, statements, discussions, mental and emotional reactions, votes, and any other feature of the process. Thus testimony or affidavits of jurors have been held incompetent to show a compromise verdict, *Hyde* v. *United States*, 225 U.S. 347, 382 (1912); a quotient verdict, *McDonald* v. *Piess*, 238 U.S. 264 (1915); speculation as to insurance coverage, *Holden* v. *Porter*, 495 F.2d 878 (10th Cir.1969), *Farmers Coop. Elev. Ass'n* v. *Strand*, 382 F.2d 224, 230 (8th Cir. 1967), cert. denied 389 U.S. 1014; misinterpretations of instructions, *Farmers Coop. Elev. Ass'n* v. *Strand*, *supra;* mistake in returning verdict, *United States* v. *Chereton*, 309 F.2d 197 (6th Cir. 1962); interpretation of guilty plea by one defendant as implicating others, *United States* v. *Crosby*, 294 F.2d 928, 949 (2d Cir. 1961). The policy does not, however, foreclose testimony by jurors as to prejudicial extraneous information or influences injected into or brought to bear upon the deliberative process. Thus a juror is recognized as competent to testify to statements by the baliff or the introduction of a prejudicial newspaper account into the jury room, *Mattox* v. *United States*, 146 U.S. 140 (1892). See also *Parker* v. *Gladden*, 385 U.S. 363 (1966).

This rule does not purport to specify the substantive grounds for setting aside verdicts for irregularity; it deals only with the competency of jurors to testify concerning those grounds. Allowing them to testify as to matters oher than their own inner reactions involves no particular hazard to the values sought to be protected. The rules is based upon this conclusion. It makes no attempt to specify the substantive grounds for setting aside verdicts for irregularity.

See also Rule 6(e) of the Federal Rules of Criminal Procedure and 18 U.S.C. § 3500, governing the secrecy of grand jury proceedings. The present rules does not relate to secrecy and disclosure but to the competency of certain witnesses and evidence.

#### NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 93-650

As proposed by the Court, Rule 606(b) limited testimony by a juror in the course of an inquiry into the validity of a verdict or indictment. He could testify as to the influence of extraneous prejudicial information brought to the jury's attention (e.g. a radio newscast or a newspaper account) or an outside influence which improperly had been brought to bear upon a juror (e.g. a threat to the safety of a member of his family), but he could not testify as to other irregularities which occurred in the jury room. Under this formulation a quotient verdict could not be attacked through the testimony of a juror, nor could a juror testify to the drunken condition of a fellow juror which so disabled him that he could not participate in the jury's deliberations.

The 1969 and 1971 Advisory Committee drafts would have permitted a member of the jury to testify concerning these kinds of irregularities in the jury room. The Advisory Committee note in the 1971 draft stated that "* * * the door of the jury room is not a satisfactory dividing point, and the Supreme Court has refused to accept it." The Advisory Committee further commented that—

> The trend has been to draw the dividing line between testimony as to mental processes, on the one hand, and as to the existence of conditions or occurrences of events calculated improperly to influence the verdict, on the other hand, without regard to whether the happening is within or without the jury room. * * * The jurors are the persons who know what really happened. Allowing them to testify as to matters other than their own reactions involves no particular hazard to the values sought to be protect-

ed. The rule is based upon this conclusion. It makes no attempt to specify the substantive grounds for setting aside verdicts for irregularity.

Objective jury misconduct may be testified to in California, Florida, Iowa, Kansas, Nebraska, New Jersey, North Dakota, Ohio, Oregon, Tennessee, Texas, and Washington.

Persuaded that the better practice is that provided for in the earlier drafts, the Committee amended subdivision (b) to read in the text of those drafts.

### NOTES OF COMMITTEE ON THE JUDICIARY, SENATE REPORT No. 93-1277

As adopted by the House, this rule would permit the impeachment of verdicts by inquiry into, not the mental processes of the jurors, but what happened in terms of conduct in the jury room. This extension of the ability to impeach a verdict is felt to be unwarranted and ill-advised.

The rule passed by the House embodies a suggestion by the Advisory Committee of the Judicial Conference that is considerably broader than the final version adopted by the Supreme Court, which embodies long-accepted Federal law. Although forbidding the impeachment of verdicts by inquiry into the jurors' mental processes, it deletes from the Supreme Court version the proscription against testimony "as to any matter or statement occurring during the course of the jury's deliberations." This deletion would have the effect of opening verdicts up to challenge on the basis of what happened during the jury's internal deliberations, for example, where a juror alleged that the jury refused to follow the trial judge's instructions or that some of the jurors did not take part in deliberations.

Permitting an individual to attack a jury verdict based upon the jury's internal deliberations has long been recognized as unwise by the Supreme Court. In *McDonald* v. *Pless*, the Court stated:

* * * * *

> [L]et it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference [238 U.S. 264, at 267 (1914)].

* * * * *

As it stands then, the rule would permit the harassment of former jurors by losing parties as well as the possible exploitation of disgruntled or otherwise badly-motivated ex-jurors.

Public policy requires a finality to litigation. And common fairness requires that absolute privacy be preserved for jurors to engage in the full and free debate necessary to the attainment of just verdicts. Jurors will not be able to function effectively if their deliberations are to be scrutinized in post-trial litigation. In the interest of protecting the jury system and the citizens who make it work, rule 606 should not permit any inquiry into the internal deliberations of the jurors.

### NOTES OF CONFERENCE COMMITTEE, HOUSE REPORT No. 93-1597

Rule 606(b) deals with juror testimony in an inquiry into the validity of a verdict or indictment. The House bill provides that a juror cannot testify about his mental processes or about the effect of anything upon his or another juror's mind as influencing him to assent to or dissent from a verdict or indictment. Thus, the House bill allows a juror to testify about objective matters occurring during the jury's deliberation, such as the misconduct of another juror or the reaching of a quotient verdict. The Senate bill does not permit juror testimony about any matter or statement occurring during the course of the jury's deliberations. The Senate bill does provide, however, that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention and on the question whether any outside influence was improperly brought to bear on any juror.

The Conference adopts the Senate amendment. The Conferees believe that jurors should be encouraged to be conscientious in promptly reporting to the court misconduct that occurs during jury deliberations.

### AMENDMENTS

1975—Subd. (b). Pub. L. 94-149 substituted in last sentence "which" for "what".

## Rule 607. Who May Impeach

The credibility of a witness may be attacked by any party, including the party calling him.

(Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1934.)

### NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

The traditional rule against impeaching one's own witness is abandoned as based on false premises. A party does not hold out his witnesses as worthy of belief, since he rarely has a free choice in selecting them. Denial of the right leaves the party at the mercy of the witness and the adversary. If the impeachment is by a prior statement, it is free from hearsay dangers and is excluded from the category of hearsay under Rule 801(d)(1). Ladd, Impeachment of One's Own Witness—New Developments 4 U.Chi.L.Rev. 69 (1936); McCormick § 38; 3 Wigmore §§ 896-918. The substantial inroads into the old rule made over the years by decisions, rules, and statutes are evidence of doubts as to its basic soundness and workability. Cases are collected in 3 Wigmore § 905. Revised Rule 32(a)(1) of the Federal Rules of Civil Procedure allows any party to impeach a witness by means of his deposition, and Rule 43(b) has allowed the calling and impeachment of an adverse party or person identified with him. Illustrative statutes allowing a party to impeach his own witness under varying circumstances are Ill.Rev. Stats.1967, c. 110, § 60; Mass.Laws Annot. 1959, c. 233 § 23; 20 N.M.Stats. Annot. 1953, § 20-2-4; N.Y. CPLR § 4514 (McKinney 1963); 12 Vt.Stats. Annot. 1959, §§ 1641a, 1642. Complete judicial rejection of the old rule is found in United States v. Freeman, 302 F.2d 347 (2d Cir. 1962). The same result is reached in Uniform Rule 20; California Evidence Code § 785; Kansas Code of Civil Procedure § 60-420. See also New Jersey Evidence Rule 20.

## Rule 608. Evidence of Character and Conduct of Witness

(a) *Opinion and reputation evidence of character.* The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) *Specific instances of conduct.* Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evi-

**dence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.**

**The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.**

(Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1935.)

### Notes of Advisory Committee on Proposed Rules

*Subdivision (a).* In Rule 404(a) the general position is taken that character evidence is not admissible for the purpose of proving that the person acted in conformity therewith, subject, however, to several exceptions, one of which is character evidence of a witness as bearing upon his credibility. The present rule develops that exception.

In accordance with the bulk of judicial authority, the inquiry is strictly limited to character for veracity, rather than allowing evidence as to character generally. The result is to sharpen relevancy, to reduce surprise, waste of time, and confusion, and to make the lot of the witness somewhat less unattractive. McCormick § 44.

The use of opinion and reputation evidence as means of proving the character of witnesses is consistent with Rule 405(a). While the modern practice has purported to exclude opinion witnesses who testify to reputation seem in fact often to be giving their opinions, disguised somewhat misleadingly as reputation. See McCormick § 44. And even under the modern practice, a common relaxation has allowed inquiry as to whether the witnesses would believe the principal witness under oath. *United States* v. *Walker*, 313 F.2d 236 (6th Cir. 1963), and cases cited therein; McCormick § 44, pp. 94–95, n. 3.

Character evidence in support of credibility is admissible under the rule only after the witness' character has first been attacked, as has been the case at common law. Maguire, Weinstein, et al., Cases on Evidence 295 (5th ed. 1965); McCormick § 49, p. 105; 4 Wigmore § 1104. The enormous needless consumption of time which a contrary practice would entail justifies the limitation. Opinion or reputation that the witness is untruthful specifically qualifies as an attack under the rule, and evidence or misconduct, including conviction of crime, and of corruption also fall within this category. Evidence of bias or interest does not. McCormick § 49; 4 Wigmore §§ 1106, 1107. Whether evidence in the form of contradiction is an attack upon the character of the witness must depend §§ 1108, 1109.

As to the use of specific instances on direct by an opinion witness, see the Advisory Committee's Note to Rule 405, *supra.*

*Subdivision (b).* In conformity with Rule 405, which forecloses use of evidence of specific incidents as proof in chief of character unless character is an issue in the case, the present rule generally bars evidence of specific instances of conduct of a witness for the purpose of attacking or supporting his credibility. There are, however, two exceptions: (1) specific instances are provable when they have been the subject of criminal conviction, and (2) specific instances may be inquired into on cross-examination of the principal witness or of a witness giving an opinion of his character for truthfulness.

(1) Conviction of crime as a technique of impeachment is treated in detail in Rule 609, and here is merely recognized as an exception to the general rule excluding evidence of specific incidents for impeachment purposes.

(2) Particular instances of conduct, though not the subject of criminal conviction, may be inquired into on cross-examination of the principal witness himself or of a witness who testifies concerning his character for truthfulness. Effective cross-examination demands that some allowance be made for going into matters of this kind, but the possibilities of abuse are substantial. Consequently safeguards are erected in the form of specific requirements that the instances inquired into be probative of truthfulness or its opposite and not remote in time. Also, the overriding protection of Rule 403 requires that probative value not be outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury, and that of Rule 611 bars harassment and undue embarrassment.

The final sentence constitutes a rejection of the doctrine of such cases as *People* v. *Sorge*, 301 N.Y. 198, 93 N.E.2d 637 (1950), that any past criminal act relevant to credibility may be inquired into on cross-examination, in apparent disregard of the privilege against self-incrimination. While it is clear that an ordinary witness cannot make a partial disclosure of incriminating matter and then invoke the privilege on cross-examination, no tenable contention can be made that merely by testifying he waives his right to foreclose inquiry on cross-examination into criminal activities for the purpose of attacking his credibility. So to hold would reduce the privilege to a nullity. While it is true that an accused, unlike an ordinary witness, has an option whether to testify, if the option can be exercised only at the price of opening up inquiry as to any and all criminal acts committed during his lifetime, the right to testify could scarcely be said to possess much vitality. In *Griffin* v. *California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965), the Court held that allowing comment on the election of an accused not to testify exacted a constitutionally impermissible price, and so here. While no specific provision in terms confers constitutional status on the right of an accused to take the stand in his own defense, the existence of the right is so completely recognized that a denial of it or substantial infringement upon it would surely be of due process dimensions. See *Ferguson* v. *Georgia*, 365 U.S. 570, 81 S.Ct. 756, 5 L.Ed.2d 783 (1961); McCormick § 131; 8 Wigmore § 2276 (McNaughton Rev. 1961). In any event, wholly aside from constitutional considerations, the provision represents a sound policy.

### Notes of Committee on the Judiciary, House Report No. 93-650

Rule 608(a) as submitted by the Court permitted attack to be made upon the character for truthfulness or untruthfulness of a witness either by reputation or opinion testimony. For the same reasons underlying its decision to eliminate the admissibility of opinion testimony in Rule 405(a), the Committee amended Rule 608(a) to delete the reference to opinion testimony.

The second sentence of Rule 608(b) as submitted by the Court permitted specific instances of misconduct of a witness to be inquired into on cross-examination for the purpose of attacking his credibility, if probative of truthfulness or untruthfulness, "and not remote in time". Such cross-examination could be of the witness himself or of another witness who testifies as to "his" character for truthfulness or untruthfulness.

The Committee amended the Rule to emphasize the discretionary power of the court in permitting such testimony and deleted the reference to remoteness in time as being unnecessary and confusing (remoteness from time of trial or remoteness from the incident involved?). As recast, the Committee amendment also makes clear the antecedent of "his" in the original Court proposal.

### Notes of Conference Committee, House Report No. 93-1597

The Senate amendment adds the words "opinion or" to conform the first sentence of the rule with the remainder of the rule.

The Conference adopts the Senate amendment.

### Rule 609. Impeachment by Evidence of Conviction of Crime

(*a*) *General rule.* For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

(*b*) *Time limit.* Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(*c*) *Effect of pardon, annulment, or certificate of rehabilitation.* Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(*d*) *Juvenile adjudications.* Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(*e*) *Pendency of appeal.* The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

(Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1935.)

#### NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

As a means of impeachment, evidence of conviction of crime is significant only because it stands as proof of the commission of the underlying criminal act. There is little dissent from the general proposition that at least some crimes are relevant to credibility but much disagreement among the cases and commentators about which crimes are usable for this purpose. See McCormick § 43; 2 Wright, Federal Practice and Procedure; Criminal § 416 (1969). The weight of traditional authority has been to allow use of felonies generally, without regard to the nature of the particular offense, and of *crimen falsi* without regard to the grade of the offense. This is the view accepted by Congress in the 1970 amendment of § 14-305 of the District of Columbia Code, P.L. 91-358, 84 Stat. 473. Uniform Rule 21 and Model Code Rule 106 permit only crimes involving "dishonesty or false statement." Others have thought that the trial judge should have discretion to exclude convictions if the probative value of the evidence of the crime is substantially outweighed by the danger of unfair prejudice. *Luck* v. *United States*, 121 U.S.App.D.C. 151, 348 F.2d 763 (1965); McGowan, Impeachment of Criminal Defendants by Prior Convictions, 1970 Law & Soc. Order 1. Whatever may be the merits of those views, this rule is drafted to accord with the Congressional policy manifested in the 1970 legislation.

The proposed rule incorporates certain basic safeguards, in terms applicable to all witnesses but of particular significance to an accused who elects to testify. These protections include the imposition of definite time limitations, giving effect to demonstrated rehabilitation, and generally excluding juvenile adjudications.

*Subdivision* (*a*). For purposes of impeachment, crimes are divided into two categories by the rule: (1) those of what is generally regarded as felony grade, without particular regard to the nature of the offense, and (2) those involving dishonesty or false statement, without regard to the grade of the offense. Provable convictions are not limited to violations of federal law. By reason of our constitutional structure, the federal catalog of crimes is far from being a complete one, and resort must be had to the laws of the states for the specification of many crimes. For example, simple theft as compared with theft from interstate commerce. Other instances of borrowing are the Assimilative Crimes Act, making the state law of crimes applicable to the special territorial and maritime jurisdiction of the United States, 18 U.S.C. § 13, and the provision of the Judicial Code disqualifying persons as jurors on the grounds of state as well as federal convictions, 28 U.S.C. § 1865. For evaluation of the crime in terms of seriousness, reference is made to the congressional measurement of felony (subject to imprisonment in excess of one year) rather than adopting state definitions which vary considerably. See 28 U.S.C. § 1865, *supra*, disqualifying jurors for conviction in state or federal court of crime punishable by imprisonment for more than one year.

*Subdivision* (*b*). Few statutes recognize a time limit on impeachment by evidence of conviction. However, practical considerations of fairness and relevancy demand that some boundary be recognized. See Ladd, Credibility Tests—Current Trends, 89 U.Pa.L.Rev. 166, 176–177 (1940). This portion of the rule is derived from the proposal advanced in Recommendation Proposing in Evidence Code, § 788(5), p. 142, Cal.Law Rev.Comm'n (1965), though not adopted. See California Evidence Code § 788.

*Subdivision* (*c*). A pardon or its equivalent granted solely for the purpose of restoring civil rights lost by virtue of a conviction has no relevance to an inquiry into character. If, however, the pardon or other proceeding is hinged upon a showing of rehabilitation the situation is otherwise. The result under the rule is to render the conviction inadmissible. The alternative of allowing in evidence both the conviction and the rehabilitation has not been adopted for reasons of policy, economy of time, and difficulties of evaluation.

A similar provision is contained in California Evidence Code § 788. Cf. A.L.I. Model Penal Code, Proposed Official Draft § 306.6(3)(e) (1962), and discussion in A.L.I. Proceedings 310 (1961).

Pardons based on innocence have the effect, of course, of nullifying the conviction *ab initio*.

*Subdivision* (*d*). The prevailing view has been that a juvenile adjudication is not usable for impeachment. *Thomas* v. *United States*, 74 App.D.C. 167, 121 F.2d 905 (1941); *Cotton* v. *United States*, 355 F.2d 480 (10th Cir. 1966). This conclusion was based upon a variety of circumstances. By virtue of its informality, frequently diminished quantum of required proof, and other departures from accepted standards for criminal trials under the theory of *parens patriae*, the juvenile adjudication was considered to lack the precision and general probative value of the criminal conviction. While *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967), no doubt eliminates these characteristics insofar as objectionable, other obstacles remain. Practical problems of administration are raised by the common provisions in juvenile legislation that records be kept confidential and that they be destroyed after a short time. While *Gault* was skeptical as to the realities of confidentiality of juvenile records, it also saw no constitutional obstacles to improvement. 387 U.S. at 25, 87 S.Ct. 1428. See also Note, Rights and Rehabilitation in the Juvenile Courts, 67 Colum.L.Rev. 281, 289 (1967). In addition, policy considerations much akin to those which dictate exclusion of adult convictions after rehabilitation has been established strongly suggest a rule of excluding juvenile adjudications. Admittedly, however, the rehabilitative process may in a given case be a demonstrated failure, or the strategic importance of a given witness may be so great as to require the overriding of general policy in the interests of particular justice. See *Giles* v. *Maryland*, 386 U.S. 66, 87 S.Ct. 793, 17 L.Ed.2d 737 (1967). Wigmore was outspoken in his condemnation of the disallowance of juvenile adjudications to impeach, especially when the witness is the complainant in a case of molesting a minor. 1 Wigmore § 196; 3 *Id.* §§ 924a, 980. The rule recognizes discretion in the judge to effect an accommodation among these various factors by departing from the general principle of exclusion. In deference to the general pattern and policy of juvenile statutes, however, no discretion is accorded when the witness is the accused in a criminal case.

*Subdivision (e).* The presumption of correctness which ought to attend judicial proceedings supports the position that pendency of an appeal does not preclude use of a conviction for impeachment. *United States* v. *Empire Packing Co.*, 174 F.2d 16 (7th Cir. 1949), cert. denied 337 U.S. 959, 69 S.Ct. 1534, 93 L.Ed. 1758; *Bloch* v. *United States*, 226 F.2d 185 (9th Cir. 1955), cert. denied 350 U.S. 948, 76 S.Ct. 323, 100 L.Ed. 826 and 353 U.S. 959, 77 S.Ct. 868, 1 L.Ed.2d 910; and see *Newman* v. *United States*, 331 F.2d 968 (8th Cir. 1964), *Contra*, *Campbell* v. *United States*, 85 U.S.App.D.C. 133, 176 F.2d 45 (1949). The pendency of an appeal is, however, a qualifying circumstance properly considerable.

### NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 93-650

Rule 609(a) as submitted by the Court was modeled after Section 133(a) of Public Law 91-358, 14 D.C. Code 305(b)(1), enacted in 1970. The Rule provided that:

> For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted or (2) involved dishonesty or false statement regardless of the punishment.

As reported to the Committee by the Subcommittee, Rule 609(a) was amended to read as follows:

> For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible only if the crime (1) was punishable by death or imprisonment in excess of one year, unless the court determines that the danger of unfair prejudice outweighs the probative value of the evidence of the conviction, or (2) involved dishonesty or false statement.

In full committee, the provision was amended to permit attack upon the credibility of a witness by prior conviction only if the prior crime involved dishonesty or false statement. While recognizing that the prevailing doctrine in the federal courts and in most States allows a witness to be impeached by evidence of prior felony convictions without restriction as to type, the Committee was of the view that, because of the danger of unfair prejudice in such practice and the deterrent effect upon an accused who might wish to testify, and even upon a witness who was not the accused, cross-examination by evidence of prior conviction should be limited to those kinds of convictions bearing directly on credibility, *i.e.*, crimes involving dishonesty or false statement.

Rule 609(b) as submitted by the Court was modeled after Section 133(a) of Public Law 91-358, 14 D.C. Code 305(b)(2)(B), enacted in 1970. The Rule provided:

> Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the release of the witness from confinement imposed for his most recent conviction, or the expiration of the period of his parole, probation, or sentence granted or imposed with respect to his most recent conviction, whichever is the later date.

Under this formulation, a witness' entire past record of criminal convictions could be used for impeachment (provided the conviction met the standard of subdivision (a)), if the witness had been most recently released from confinement, or the period of his parole or probation had expired, within ten years of the conviction.

The Committee amended the Rule to read in the text of the 1971 Advisory Committee version to provide that upon the expiration of ten years from the date of a conviction of a witness, or of his release from confinement for that offense, that conviction may no longer be used for impeachment. The Committee was of the view that after ten years following a person's release from confinement (or from the date of his conviction) the probative value of the conviction with respect to that person's credibility diminished to a point where it should no longer be admissible.

Rule 609(c) as submitted by the Court provided in part that evidence of a witness' prior conviction is not admissible to attack his credibility if the conviction was the subject of a pardon, annulment, or other equivalent procedure, based on a showing of rehabilitation, and the witness has not been convicted of a subsequent crime. The Committee amended the Rule to provide that the "subsequent crime" must have been "punishable by death or imprisonment in excess of one year", on the ground that a subsequent conviction of an offense not a felony is insufficient to rebut the finding that the witness has been rehabilitated. The Committee also intends that the words "based on a finding of the rehabilitation of the person convicted" apply not only to "certificate of rehabilitation, or other equivalent procedure," but also to "pardon" and "annulment."

### NOTES OF COMMITTEE ON THE JUDICIARY, SENATE REPORT NO. 93-1277

As proposed by the Supreme Court, the rule would allow the use of prior convictions to impeach if the crime was a felony or a misdemeanor if the misdemeanor involved dis- honesty or false statement. As modified by the House, the rule would admit prior convictions for impeachment purposes only if the offense, whether felony or misdemeanor, involved dishonesty or false statement.

The committee has adopted a modified version of the House-passed rule. In your committee's view, the danger of unfair prejudice is far greater when the accused, as opposed to other witnesses, testifies, because the jury may be prejudiced not merely on the question of credibility but also on the ultimate question of guilt or innocence. Therefore, with respect to defendants, the committee agreed with the House limitation that only offenses involving false statement or dishonesty may be used. By that phrase, the committee means crimes such as perjury or subordination of perjury, false statement, criminal fraud, embezzlement or false pretense, or any other offense, in the nature of crimen falsi the commission of which involves some element of untruthfulness, deceit, or falsification bearing on the accused's propensity to testify truthfully.

With respect to other witnesses, in addition to any prior conviction involving false statement or dishonesty, any other felony may be used to impeach if, and only if, the court finds that the probative value of such evidence outweighs its prejudicial effect against the party offering that witness.

Notwithstanding this provision, proof of any prior offense otherwise admissible under rule 404 could still be offered for the purposes sanctioned by that rule. Furthermore, the committee intends that notwithstanding this rule, a defendant's misrepresentation regarding the existence or nature of prior convictions may be met by rebuttal evidence, including the record of such prior convictions. Similarly, such records may be offered to rebut representations made by the defendant regarding his attitude toward or willingness to commit a general category of offense, although denials or other representations by the defendant regarding the specific conduct which forms the basis of the charge against him shall not make prior convictions admissible to rebut such statement.

In regard to either type of representation, of course, prior convictions may be offered in rebuttal only if the defendant's statement is made in response to defense counsel's questions or is made gratuitiously in the course of cross-examination. Prior convictions may not be offered as rebuttal evidence if the prosecution has sought to circumvent the purpose of this rule by asking questions which elicit such representations from the defendant.

One other clarifying amendment has been added to this subsection, that is, to provide that the admissibility of evidence of a prior conviction is permitted only upon cross-examination of a witness. It is not admissible if a person does not testify. It is to be understood, however, that a court record of a prior conviction is admissible to prove that conviction if the witness has forgotten or denies its existence.

Although convictions over ten years old generally do not have much probative value, there may be exceptional circumstances under which the conviction substantially bears on the credibility of the witness. Rather than exclude all convictions over 10 years old, the committee adopted an amendment in the form of a final clause to the section granting the court discretion to admit convictions over 10 years old, but only upon a determination by the court that the probative value of the conviction supported by specific facts and circumstances, substantially outweighs its prejudicial effect.

It is intended that convictions over 10 years old will be admitted very rarely and only in exceptional circumstances. The rules provide that the decision be supported by specific facts and circumstances thus requiring the court to make specific findings on the record as to the particular facts and circumstances it has considered in determining that the probative value of the conviction substantially outweighs its prejudicial impact. It is expected that, in fairness, the court will give the party against whom the conviction is introduced a full and adequate opportunity to contest its admission.

### NOTES OF CONFERENCE COMMITTEE, HOUSE REPORT NO. 93-1597

Rule 609 defines when a party may use evidence of a prior conviction in order to impeach a witness. The Senate amendments make changes in two subsections of Rule 609.

The House bill provides that the credibility of a witness can be attacked by proof of prior conviction of a crime only if the crime involves dishonesty or false statement. The Senate amendment provides that a witness' credibility may be attacked if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted or (2) involves dishonesty or false statement, regardless of the punishment.

The Conference adopts the Senate amendment with an amendment. The Conference amendment provides that the credibility of a witness, whether a defendant or someone else, may be attacked by proof of a prior conviction but only if the crime: (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted and the court determines that the probative value of the conviction outweighs its prejudicial effect to the defendant; or (2) involved dishonesty or false statement regardless of the punishment.

By the phrase "dishonesty and false statement" the Conference means crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of crimen falsi, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully.

The admission of prior convictions involving dishonesty and false statement is not within the discretion of the Court. Such convictions are peculiarly probative of credibility and, under this rule, are always to be admitted. Thus, judicial discretion granted with respect to the admissibility of other prior convictions is not applicable to those involving dishonesty or false statement.

With regard to the discretionary standard established by paragraph (1) of rule 609(a), the Conference determined that the prejudicial effect to be weighed against the probative value of the conviction is specifically the prejudicial effect *to the defendant*. The danger of prejudice to a witness other than the defendant (such as injury to the witness' reputation in his community) was considered and rejected by the Conference as an element to be weighed in determining admissibility. It was the judgment of the Conference that the danger of prejudice to a nondefendant witness is outweighed by the need for the trier of fact to have as much relevant evidence on the issue of credibility as possible. Such evidence should only be excluded where it presents a danger of improperly influencing the outcome of the trial by persuading the trier of fact to convict the defendant on the basis of his prior criminal record.

The House bill provides in subsection (b) that evidence of conviction of a crime may not be used for impeachment purposes under subsection (a) if more than ten years have elapsed since the date of the conviction or the date the witness was released from confinement imposed for the conviction, whichever is later. The Senate amendment permits the use of convictions older than ten years, if the court determines, in the interests of justice, that the probative value of the conviction, supported by specific facts and circumstances, substantially outweighs its prejudicial effect.

The Conference adopts the Senate amendment with an amendment requiring notice by a party that he intends to request that the court allow him to use a conviction older than ten years. The Conferees anticipate that a written notice, in order to give the adversary a fair opportunity to contest the use of the evidence, will ordinarily include such information as the date of the conviction, the jurisdiction, and the offense or statute involved. In order to eliminate the possibility that the flexibility of this provision may impair the ability of a party-opponent to prepare for trial, the Conferees intend that the notice provision operate to avoid surprise.

## Rule 610. Religious Beliefs or Opinions

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature his credibility is impaired or enhanced.

(Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1936.)

### NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

While the rule forecloses inquiry into the religious beliefs or opinions of a witness for the purpose of showing that his character for truthfulness is affected by their nature, an inquiry for the purpose of showing interest or bias because of them is not within the prohibition. Thus disclosure of affiliation with a church which is a party to the litigation would be allowable under the rule. Cf. *Tucker* v. *Reil*, 51 Ariz. 357, 77 P.2d 203 (1938). To the same effect, though less specifically worded, is California Evidence Code § 789. See 3 Wigmore § 936.

### Rule 611. Mode and Order of Interrogation and Presentation

(*a*) *Control by court.* The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(*b*) *Scope of cross-examination.* Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(*c*) *Leading questions.* Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

(Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1936.)

#### NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

*Subdivision (a).* Spelling out detailed rules to govern the mode and order of interrogating witnesses presenting evidence is neither desirable nor feasible. The ultimate responsibility for the effective working of the adversary system rests with the judge. The rule sets forth the objectives which he should seek to attain.

Item (1) restates in broad terms the power and obligation of the judge as developed under common law principles. It covers such concerns as whether testimony shall be in the form of a free narrative or responses to specific questions, McCormick § 5, the order of calling witnesses and presenting evidence, 6 Wigmore § 1867, the use of demonstrative evidence, McCormick § 179, and the many other questions arising during the course of a trial which can be solved only by the judge's common sense and fairness in view of the particular circumstances.

Item (2) is addressed to avoidance of needless consumption of time, a matter of daily concern in the disposition of cases. A companion piece is found in the discretion vested in the judge to exclude evidence as a waste of time in Rule 403(b).

Item (3) calls for a judgement under the particular circumstances whether interrogation tactics entail harassment or undue embarrassment. Pertinent circumstances include the importance of the testimony, the nature of the inquiry, its relevance to credibility, waste of time, and confusion. McCormick § 42. In *Alford* v. *United States*, 282 U.S. 687, 694, 51 S.Ct. 218, 75 L.Ed. 624 (1931), the Court pointed out that, while the trial judge should protect the witness from questions which "go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate," this protection by no means forecloses efforts to discredit the witness. Reference to the transcript of the prosecutor's cross-examination in *Berger* v. *United States*, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935), serves to lay at rest any doubts as to the need for judicial control in this area.

The inquiry into specific instances of conduct of a witness allowed under Rule 608(b) is, of course, subject to this rule.

*Subdivision (b).* The tradition in the federal courts and in numerous state courts has been to limit the scope of cross-examination to matters testified to on direct, plus matters bearing upon the credibility of the witness. Various reasons have been advanced to justify the rule of limited cross-examination. (1) A party vouches for his own witness but only to the extent of matters elicited on direct. *Resurrection Gold Mining Co.* v. *Fortune Gold Mining Co.*, 129 F. 668, 675 (8th Cir. 1904), quoted in Maguire, Weinstein, et al., Cases on Evidence 277, n. 38 (5th ed. 1965). But the concept of vouching is discredited, and Rule 607 rejects it. (2) A party cannot ask his own witness leading questions. This is a problem properly solved in terms of what is necessary for a proper development of the testimony rather than by a mechanistic formula similar to the vouching concept. See discussion under subdivision (c). (3) A practice of limited cross-examination promotes orderly presentation of the case. *Finch* v. *Weiner*, 109 Conn. 616, 145 A. 31 (1929). While this latter reason has merit, the matter is essentially one of the order of presentation and not one in which involvement at the appellate level is likely to prove fruitful. See for example, *Moyer* v. *Aetna Life Ins. Co.*, 126 F.2d 141 (3rd Cir. 1942); *Butler* v. *New York Central R. Co.*, 253 F.2d 281 (7th Cir. 1958); *United States* v. *Johnson*, 285 F.2d 35 (9th Cir. 1960); *Union Automobile Indemnity Ass'n.* v. *Capitol Indemnity Ins. Co.*, 310 F.2d 318 (7th Cir. 1962). In evaluating these considerations, McCormick says:

"The foregoing considerations favoring the wide-open or restrictive rules may well be thought to be fairly evenly balanced. There is another factor, however, which seems to swing the balance overwhelmingly in favor of the wide-open rule. This is the consideration of economy of time and energy. Obviously, the wide-open rule presents little or no opportunity for dispute in its application. The restrictive practice in all its forms, on the other hand, is productive in many court rooms, of continual bickering over the choice of the numerous variations of the 'scope of the direct' criterion, and of their application to particular cross-questions. These controversies are often reventilated on appeal, and reversals for error in their determination are frequent. Observance of these vague and ambiguous restrictions is a matter of constant and hampering concern to the cross-examiner. If these efforts, delays and misprisions were the necessary incidents to the guarding of substantive rights or the fundamentals of fair trial, they might be worth the cost. As the price of the choice of an obviously debatable regulation of the order of evidence, the sacrifice seems misguided. The American Bar Association's Committee for the Improvement of the Law of Evidence for the year 1937-38 said this:

"The rule limiting cross-examination to the precise subject of the direct examination is probably the most frequent rule (except the Opinion rule) leading in the trial practice today to refined and technical quibbles which obstruct the progress of the trial, confuse the jury, and give rise to appeal on technical grounds only. Some of the instances in which Supreme Courts have ordered new trials for the mere transgression of this rule about the order of evidence have been astounding.

"We recommend that the rule allowing questions upon any part of the issue known to the witness * * * be adopted. * * *'" McCormick, § 27, p. 51. See also 5 Moore's Federal Practice ¶ 43.10 (2nd ed. 1964).

The provision of the second sentence, that the judge may in the interests of justice limit inquiry into new matters on cross-examination, is designed for those situations in which the result otherwise would be confusion, complication, or protraction of the case, not as a matter of rule but as demonstrable in the actual development of the particular case.

The rule does not purport to determine the extent to which an accused who elects to testify thereby waives his privilege against self-incrimination. The question is a constitutional one, rather than a mere matter of administering the trial. Under *Simmons* v. *United States*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968), no general waiver occurs when the accused testifies on such preliminary matters as the validity of a search and seizure or the admissibility of a confession. Rule 104(d), *supra*. When he testifies on the merits, however, can he foreclose inquiry into an aspect or element of the crime by avoiding it on direct? The affirmative answer given in *Tucker* v. *United States*, 5 F.2d 818 (8th Cir. 1925), is inconsistent with the description of the waiver as extending to "all other relevant facts" in *Johnson* v. *United States*, 318 U.S. 189, 195, 63 S.Ct. 549, 87 L.Ed. 704 (1943). See also *Brown* v. *United States*, 356 U.S. 148, 78 S.Ct. 622, 2 L.Ed.2d 589 (1958). The situation of an accused who desires to testify on some but not all counts of a multiple-count indictment is one to be approached, in the first instance at least, as a problem of severance under Rule 14 of the Federal Rules of Criminal Procedure. *Cross* v. *United States*, 118 U.S.App.D.C. 324, 335 F.2d 987 (1964). Cf. *United States* v. *Baker*, 262 F.Supp. 657, 686 (D.D.C. 1966). In all events, the extent of the waiver of the privilege against self-incrimination ought not to be determined as a by-product of a rule on scope of cross-examination.

*Subdivision* (c). The rule continues the traditional view that the suggestive powers of the leading question are as a general proposition undesirable. Within this tradition, however, numerous exceptions have achieved recognition: The witness who is hostile, unwilling, or biased; the child witness or the adult with communication problems; the witness whose recollection is exhausted; and undisputed preliminary matters. 3 Wigmore §§ 774–778. An almost total unwillingness to reverse for infractions has been manifested by appellate courts. See cases cited in 3 Wigmore § 770. The matter clearly falls within the area of control by the judge over the mode and order of interrogation and presentation and accordingly is phrased in words of suggestion rather than command.

The rule also conforms to tradition in making the use of leading questions on cross-examination a matter of right. The purpose of the qualification "ordinarily" is to furnish a basis for denying the use of leading questions when the cross-examination is cross-examination in form only and not in fact, as for example the "cross-examination" of a party by his own counsel after being called by the opponent (savoring more of re-direct) or of an insured defendant who proves to be friendly to the plaintiff.

The final sentence deals with categories of witnesses automatically regarded and treated as hostile. Rule 43(b) of the Federal Rules of Civil Procedure has included only "an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party." This limitation virtually to persons whose statements would stand as admissions is believed to be an unduly narrow concept of those who may safely be regarded as hostile without further demonstration. See, for example, *Maryland Casualty Co.* v. *Kador*, 225 F.2d 120 (5th Cir. 1955), and *Degelos* v. *Fidelity and Casualty Co.*, 313 F.2d 809 (5th Cir. 1963), holding despite the language of Rule 43(b) that an insured fell within it, though not a party in an action under the Louisiana direct action statute. The phrase of the rule, "witness identified with" an adverse party, is designed to enlarge the category of persons thus callable.

### NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 93-650

As submitted by the Court, Rule 611(b) provided:

> A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. In the interests of justice, the judge may limit cross-examination with respect to matters not testified to on direct examination.

The Committee amended this provision to return to the rule which prevails in the federal courts and thirty-nine State jurisdictions. As amended, the Rule is in the text of the 1969 Advisory Committee draft. It limits cross-examination to credibility and to matters testified to on direct examination, unless the judge permits more, in which event the cross-examiner must proceed as if on direct examination. This traditional rule facilitates orderly presentation by each party at trial. Further, in light of existing discovery procedures, there appears to be no need to abandon the traditional rule.

The third sentence of Rule 611(c) as submitted by the Court provided that:

> In civil cases, a party is entitled to call an adverse party or witness identified with him and interrogate by leading questions.

The Committee amended this Rule to permit leading questions to be used with respect to any hostile witness, not only an adverse party or person identified with such adverse party. The Committee also substituted the word "When" for the phrase "In civil cases" to reflect the possibility that in criminal cases a defendant may be entitled to call witnesses identified with the government, in which event the Committee believed the defendant should be permitted to inquire with leading questions.

### NOTES OF COMMITTEE ON THE JUDICIARY, SENATE REPORT NO. 93-1277

Rule 611(b) as submitted by the Supreme Court permitted a broad scope of cross-examination: "cross-examination on any matter relevant to any issue in the case" unless the judge, in the interests of justice, limited the scope of cross-examination.

The House narrowed the Rule to the more traditional practice of limiting cross-examination to the subject matter of direct examination (and credibility), but with discretion in the judge to permit inquiry into additional matters in situations where that would aid in the development of the evidence or otherwise facilitate the conduct of the trial.

The committee agrees with the House amendment. Although there are good arguments in support of broad cross-examination from perspectives of developing all relevant evidence, we believe the factors of insuring an orderly and predictable development of the evidence weigh in favor of the narrower rule, especially when discretion is given to the trial judge to permit inquiry into additional matters. The committee expressly approves this discretion and believes it will permit sufficient flexibility allowing a broader scope of cross-examination whenever appropriate.

The House amendment providing broader discretionary cross-examination permitted inquiry into additional matters only as if on direct examination. As a general rule, we concur with this limitation, however, we would understand that this limitation would not preclude the utilization of leading questions if the conditions of subsection (c) of this rule were met, bearing in mind the judge's discretion in any case to limit the scope of cross-examination [see McCormick on Evidence, §§ 24–26 (especially 24) (2d ed. 1972)].

Further, the committee has received correspondence from Federal judges commenting on the applicability of this rule to section 1407 of title 28. It is the committee's judgment that this rule as reported by the House is flexible enough to provide sufficiently broad cross-examination in appropriate situations in multidistrict litigation.

As submitted by the Supreme Court, the rule provided: "In civil cases, a party is entitled to call an adverse party or witness identified with him and interrogate by leading questions."

The final sentence of subsection (c) was amended by the House for the purpose of clarifying the fact that a "hostile witness"—that is a witness who is hostile in fact—could be subject to interrogation by leading questions. The rule as submitted by the Supreme Court declared certain witnesses hostile as a matter of law and thus subject to interrogation by leading questions without any showing of hostility in fact. These were adverse parties or witnesses identified with adverse parties. However, the wording of the first sentence of subsection (c) while generally, prohibiting the use of leading questions on direct examination, also provides "except as may be necessary to develop his testimony." Further, the first paragraph of the Advisory Committee note explaining the subsection makes clear that they intended that leading questions could be asked of a hostile witness or a witness who was unwilling or biased and even though that witness was not associated with an adverse party. Thus, we question whether the House amendment was necessary.

However, concluding that it was not intended to affect the meaning of the first sentence of the subsection and was intended solely to clarify the fact that leading questions are permissible in the interrogation of a witness, who is hostile in fact, the committee accepts that House amendment.

The final sentence of this subsection was also amended by the House to cover criminal as well as civil cases. The committee accepts this amendment, but notes that it may be difficult in criminal cases to determine when a witness is "identified with an adverse party," and thus the rule should be applied with caution.

### Rule 612. Writing Used To Refresh Memory

Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh his memory for the purpose of testifying, either—

(1) while testifying, or

(2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,

an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

(Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1936.)

#### NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

The treatment of writings used to refresh recollection while on the stand is in accord with settled doctrine. McCormick § 9, p. 15. The bulk of the case law has, however, denied the existence of any right to access by the opponent when the writing is used prior to taking the stand, though the judge may have discretion in the matter. *Goldman* v. *United States*, 316 U.S. 129, 62 S.Ct. 993, 86 L.Ed. 1322 (1942); *Needelman* v. *United States*, 261 F.2d 802 (5th Cir. 1958), cert. dismissed 362 U.S. 600, 80 S.Ct. 960, 4 L.Ed.2d 980, rehearing denied 363 U.S. 858, 80 S.Ct. 1606, 4 L.Ed.2d 1739, Annot., 82 A.L.R.2d 473, 562 and 7 A.L.R.3d 181, 247. An increasing group of cases has repudiated the distinction, *People* v. *Scott*, 29 Ill.2d 97, 193 N.E.2d 814 (1963); *State* v. *Mucci*, 25 N.J. 423, 136 A.2d 761 (1957); *State* v. *Hunt*, 25 N.J. 514, 138 A.2d 1 (1958); *State* v. *Desolvers*, 40 R.I. 89, 100, A. 64 (1917), and this position is believed to be correct. As Wigmore put it, "the risk of imposition and the need of safeguard is just as great" in both situations. 3 Wigmore § 762, p. 111. To the same effect is McCormick § 9, p. 17.

The purpose of the phrase "for the purpose of testifying" is to safeguard against using the rule as a pretext for wholesale exploration of an opposing party's files and to insure that access is limited only to those writings which may fairly be said in fact to have an impact upon the testimony of the witness.

The purpose of the rule is the same as that of the *Jencks* statute, 18 U.S.C. § 3500: to promote the search of credibiltiy and memory. The same sensitivity to disclosure of government files may be involved; hence the rule is expressly made subject to the statute, subdivision (a) of which provides: "In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of a subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case." Items falling within the purview of the statute are producible only as provided by its terms, *Palermo* v. *United States*, 360 U.S. 343, 351 (1959), and disclosure under the rule is limited similarly by the statutory conditions. With this limitation in mind, some differences of application may be noted. The *Jencks* statute applies only to statements of witnesses; the rule is not so limited. The statute applies only to criminal cases; the rule applies to all cases. The statute applies only to government witnesses; the rule applies to all witnesses. The statute contains no requirement that the statement be consulted for purposes of refreshment before or while testifying; the rule so requires. Since many writings would qualify under either statute or rule, a substantial overlap exists, but the identity of procedures makes this of no importance.

The consequences of nonproduction by the government in a criminal case are those of the *Jencks* statute, striking the testimony or in exceptional cases a mistrial. 18 U.S.C. § 3500(d). In other cases these alternatives are unduly limited, and such possibilities as contempt, dismissal, finding issues against the offender, and the like are available. See Rule 16(g) of the Federal Rules of Criminal Procedure and Rule 37(b) of the Federal Rules of Civil Procedure for appropriate sanctions.

#### NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 93-650

As submitted to Congress, Rule 612 provided that except as set forth in 18 U.S.C. 3500, if a witness uses a writing to refresh his memory for the purpose of testifying, "either before or while testifying," an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness on it, and to introduce in evidence those portions relating to the witness' testimony. The Committee amended the Rule so as still to require the production of writings used by a witness while testifying, but to render the production of writings used by a witness to refresh his memory before testifying discretionary with the court in the interests of justice, as is the case under existing federal law. See *Goldman* v. *United States*, 316 U.S. 129 (1942). The Committee considered that permitting an adverse party to require the production of writings used before testifying could result in fishing expeditions among a multitude of papers which a witness may have used in preparing for trial.

The Committee intends that nothing in the Rule be construed as barring the assertion of a privilege with respect to writings used by a witness to refresh his memory.

### Rule 613. Prior Statements of Witnesses

(a) *Examining witness concerning prior statement.* In examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) *Extrinsic evidence of prior inconsistent statement of witness.* Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).

(Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1936.)

#### NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

*Subdivision (a).* The Queen's Case, 2 Br. & B. 284, 129 Eng. Rep. 976 (1820), laid down the requirement that a cross-examiner, prior to questioning the witness about his own prior statement in writing, must first show it to the witness. Abolished by statute in the country of its origin, the requirement nevertheless gained currency in the United States. The rule abolishes this useless impediment, to cross-examination. Ladd, Some Observations on Credibility: Impeachment of Witnesses, 52 Cornell L.Q. 239, 246-247 (1967); McCormick § 28; 4 Wigmore §§ 1259-1260. Both oral and written statements are included.

The provision for disclosure to counsel is designed to protect against unwarranted insinuations that a statement has been made when the fact is to the contrary.

The rule does not defeat the application of Rule 1002 relating to production of the original when the contents of a writing are sought to be proved. Nor does it defeat the application of Rule 26(b)(3) of the Rules of Civil Procedure, as revised, entitling a person on request to a copy of his own statement, though the operation of the latter may be suspended temporarily.

*Subdivision (b).* The familiar foundation requirement that an impeaching statement first be shown to the witness before it can be proved by extrinsic evidence is preserved but with some modifications. See Ladd, Some Observations on Credibility: Impeachment of Witnesses, 52 Cornell L.Q. 239, 247 (1967). The traditional insistence that the attention of the witness be directed to the statement on cross-examination is relaxed in favor of simply providing the witness an opportunity to explain and the opposite party an opportunity to examine on the statement, with no specification of any particular time or sequence. Under this procedure, several collusive witnesses can be examined before disclosure of a joint prior inconsistent statement. See Comment to California Evidence Code § 770. Also, dangers of oversight are reduced.

See McCormick § 37, p. 68.

In order to allow for such eventualities as the witness becoming unavailable by the time the statement is discovered, a measure of discretion is conferred upon the judge. Similar provisions are found in California Evidence Code § 770 and New Jersey Evidence Rule 22(b).

Under principles of *expression unius* the rule does not apply to impeachment by evidence of prior inconsistent conduct. The use of inconsistent statements to impeach a hearsay declaration is treated in Rule 806.

### Rule 614. Calling and Interrogation of Witnesses by Court

(a) *Calling by court.* The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.

(b) *Interrogation by court.* The court may interrogate witnesses, whether called by itself or by a party.

(c) *Objections.* Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.

(Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1937.)

#### NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

*Subdivision (a).* While exercised more frequently in criminal than in civil cases, the authority of the judge to call witnesses is well established. McCormick § 8, p. 14; Maguire, Weinstein, et al., Cases on Evidence 303-304 (5th ed. 1965); 9 Wigmore § 2484. One reason for the practice, the old rule against impeaching one's own witness, no longer exists by virtue of Rule 607, *supra*. Other reasons remain, however, to justify the continuation of the practice of calling court's witnesses. The right to cross-examine, with all it implies, is assured. The tendency of juries to associate a witness with the party calling him, regardless of technical aspects of vouching, is avoided. And the judge is not imprisoned within the case as made by the parties.

*Subdivision (b).* The authority of the judge to question witnesses is also well established. McCormick § 8, pp. 12-13; Maguire, Weinstein, et al., Cases on Evidence 737-739 (5th ed. 1965); 3 Wigmore § 784. The authority is, of course, abused when the judge abandons his proper role and assumes that of advocate, but the manner in which interrogation should be conducted and the proper extent of its exercise are not susceptible of formulation in a rule. The omission in no sense precludes courts of review from continuing to reverse for abuse.

*Subdivision (c).* The provision relating to objections is designed to relieve counsel of the embarrassment attendant upon objecting to questions by the judge in the presence of the jury, while at the same time assuring that objections are made in apt time to afford the opportunity to take possible corrective measures. Compare the "automatic" objection feature of Rule 605 when the judge is called as a witness.

### Rule 615. Exclusion of Witnesses

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause.

(Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1937.)

#### NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

The efficacy of excluding or sequestering witnesses has long been recognized as a means of discouraging and exposing fabrication, inaccuracy, and collusion. 6 Wigmore §§ 1837-1838. The authority of the judge is admitted, the only question being whether the matter is committed to his discretion or one of right. The rule takes the latter position. No time is specified for making the request.

Several categories of persons are excepted. (1) Exclusion of persons who are parties would raise serious problems of confrontation and due process. Under accepted practice they are not subject to exclusion. 6 Wigmore § 1841. (2) As the equivalent of the right of a natural-person party to be present, a party which is not a natural person is entitled to have a representative present. Most of the cases have involved allowing a police officer who has been in charge of an investigation to remain in court despite the fact that he will be a witness. *United States* v. *Infanzon*, 235 F.2d 318 (2d Cir. 1956); *Portomene* v. *United States*, 221 F.2d 582 (5th Cir. 1955); *Powell* v. *United States*, 208 F.2d 618

(6th Cir. 1953); *Jones* v. *United States*, 252 F.Supp. 781 (W.D.Okl. 1966). Designation of the representative by the attorney rather than by the client may at first glance appear to be an inversion of the attorney-client relationship, but it may be assumed that the attorney will follow the wishes of the client, and the solution is simple and workable. See California Evidence Code § 777. (3) The category contemplates such persons as an agent who handled the transaction being litigated or an expert needed to advise counsel in the management of the litigation. See 6 Wigmore § 1841, n. 4.

### NOTES OF COMMITTEE ON THE JUDICIARY, SENATE REPORT No. 93-1277

Many district courts permit government counsel to have an investigative agent at counsel table throughout the trial although the agent is or may be a witness. The practice is permitted as an exception to the rule of exclusion and compares with the situation defense counsel finds himself in—he always has the client with him to consult during the trial. The investigative agent's presence may be extremely important to government counsel, especially when the case is complex or involves some specialized subject matter. The agent, too, having lived with the case for a long time, may be able to assist in meeting trial surprises where the best-prepared counsel would otherwise have difficulty. Yet, it would not seem the Government could often meet the burden under rule 615 of showing that the agent's presence is essential. Furthermore, it could be dangerous to use the agent as a witness as early in the case as possible, so that he might then help counsel as a nonwitness, since the agent's testimony could be needed in rebuttal. Using another, nonwitness agent from the same investigative agency would not generally meet government counsel's needs.

This problem is solved if it is clear that investigative agents are within the group specified under the second exception made in the rule, for "an officer or employee of a party which is not a natural person designated as its representative by its attorney." It is our understanding that this was the intention of the House committee. It is certainly this committee's construction of the rule.

## ARTICLE VII—OPINIONS AND EXPERT TESTIMONY

### Rule 701. Testimony by Lay Witnesses

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

(Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1937.)

### NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

The rule retains the traditional objective of putting the trier of fact in possession of an accurate reproduction of the event.

Limitation (a) is the familiar requirement of first-hand knowledge or observation.

Limitation (b) is phrased in terms of requiring testimony to be helpful in resolving issues. Witnesses often find difficulty in expressing themselves in language which is not that of an opinion or conclusion. While the courts have made concessions in certain recurring situations, necessity as a standard for permitting opinions and conclusions has proved too elusive and too unadaptable to particular situations for purposes of satisfactory judicial administration. McCormick § 11. Moreover, the practical impossibility of determinating by rule what is a "fact," demonstrated by a century of litigation of the question of what is a fact for purposes of pleading under the Field Code, extends into evidence also. 7 Wigmore § 1919. The rule assumes that the natural characteristics of the adversary system will generally lead to an acceptable result, since the detailed account carries more conviction than the broad assertion, and a lawyer can be expected to display his witness to the best advantage. If he fails to do so, cross-examination and argument will point up the weakness. See Ladd, Expert Testimony, 5 Vand.L.Rev. 414, 415–417 (1952). If, despite these considerations, attempts are made to introduce meaningless assertions which amount to little more than choosing up sides, exclusion for lack of helpfulness is called for by the rule.

The language of the rule is substantially that of Uniform. Rule 56(1). Similar provisions are California Evidence Code § 800; Kansas Code of Civil Procedure § 60-456(a); New Jersey Evidence Rule 56(1).

### Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

(Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1937.)

### NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

An intelligent evaluation of facts is often difficult or impossible without the application of some scientific, technical, or other specialized knowledge. The most common source of this knowledge is the expert witness, although there are other techniques for supplying it.

Most of the literature assumes that experts testify only in the form of opinions. The assumption is logically unfounded. The rule accordingly recognizes that an expert on the stand may give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts. Since much of the criticism of expert testimony has centered upon the hypothetical question, it seems wise to recognize that opinions are not indispensable and to encourage the use of expert testimony in non-opinion form when counsel believes the trier can itself draw the requisite inference. The use of opinions is not abolished by the rule, howeever. It will continue to be permissible for the experts to take the further step of suggesting the inference which should be drawn from applying the specialized knowledge to the facts. See Rules 703 to 705.

Whether the situation is a proper one for the use of expert testimony is to be determined on the basis of assisting the trier. "There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute." Ladd, Expert Testimony, 5 Vand.L.Rev. 414, 418 (1952). When opinions are excluded, it is because they are unhelpful and therefore superfluous and a waste of time. 7 Wigmore § 1918.

The rule is broadly phrased. The fields of knowledge which may be drawn upon are not limited merely to the "scientific" and "technical" but extend to all "specialized" knowledge. Similarly, the expert is viewed, not in a narrow sense, but as a person qualified by "knowledge, skill, experience, training or education." Thus within the scope of the rule are not only experts in the strictest sense of the word, e.g., physicians, physicists, and architects, but also the large group sometimes called "skilled" witnesses, such as bankers or landowners testifying to land values.

### Rule 703. Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

(Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1937.)

### NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

Facts or data upon which expert opinions are based may, under the rule, be derived from three possible sources. The first is the firsthand observation of the witness, with opinions based thereon traditionally allowed. A treating physician affords an example. Rheingold, The Basis of Medical Testimony, 15 Vand.L.Rev. 473, 489 (1962). Whether he must first relate his observations is treated in Rule 705. The second source, presentation at the trial, also reflects existing practice. The technique may be the familiar hypothetical question or having the expert attend the trial and hear the testimony establishing the facts. Problems of determining what testimony the expert relied upon, when the latter technique is employed and the testimony is in conflict, may be resolved by resort to Rule 705. The third source contemplated by the rule consists of presentation of data to the expert outside of court and other than by his own perception. In this respect the rule is designed to broaden the basis for expert opinions beyond that current in many jurisdictions and to bring the judicial practice into line with the practice of the experts themselves when not in court. Thus a physician in his own practice bases his diagnosis on information from numerous sources and of considerable variety, including statements by patients and relatives, reports and opinions from nurses, technicians and other doctors, hospital records, and X rays. Most of them are admissible in evidence, but only with the expenditure of substantial time in producing and examining various authenticating witnesses. The physician makes life-and-death decisions in reliance upon them. His validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes. Rheingold, *supra*, at 531; McCormick § 15. A similar provision is California Evidence Code § 801(b).

The rule also offers a more satisfactory basis for ruling upon the admissibility of public opinion poll evidence. Attention is directed to the validity of the techniques employed rather than to relatively fruitless inquiries whether hearsay is involved. See Judge Feinberg's careful analysis in *Zippo Mfg. Co.* v. *Rogers Imports, Inc.*, 216 F.Supp. 670 (S.D.N.Y. 1963) See also Blum et al, The Art of Opinion Research: A Lawyer's Appraisal of an Emerging Service, 24 U.Chi.L.Rev. 1 (1956); Bonynge, Trademark Surveys and Techniques and Their Use in Litigation, 48 A.B.A.J. 329 (1962); Zeisel, The Uniqueness of Survey Evidence, 45 Cornell L.Q. 322 (1960); Annot., 76 A.L.R.2d 919.

If it be feared that enlargement of permissible data may tend to break down the rules of exclusion unduly, notice should be taken that the rule requires that the facts or data "be of a type reasonably relied upon by experts in the particular field." The language would not warrant admitting in evidence the opinion of an "accidentologist" as to the point of impact in an automobile collision based on statements of bystanders, since this requirement is not satisfied. See Comment, Cal.Law Rev.Comm'n, Recommendation Proposing an Evidence Code 148-150 (1965).

## Rule 704. Opinion on Ultimate Issue

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1937.)

### NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

The basic approach to opinions, lay and expert, in these rules is to admit them when helpful to the trier of fact. In order to render this approach fully effective and to allay any doubt on the subject, the so-called "ultimate issue" rule is specifically abolished by the instant rule.

The older cases often contained strictures against allowing witnesses to express opinions upon ultimate issues, as a particular aspect of the rule against opinions. The rule was unduly restrictive, difficult of application, and generally served only to deprive the trier of fact of useful information. 7 Wigmore §§ 1920, 1921; McCormick § 12. The basis usually assigned for the rule, to prevent the witness from "usurping the province of the jury," is aptly characterized as "empty rhetoric." 7 Wigmore § 1920, p. 17. Efforts to meet the felt needs of particular situations led to odd verbal circumlocutions which were said not to violate the rule. Thus a witness could express his estimate of the criminal responsibility of an accused in terms of sanity or insanity, but not in terms of ability to tell right from wrong or other more modern standard. And in cases of medical causation, witnesses were sometimes required to couch their opinions in cautious phrases of "might or could," rather than "did," though the result was to deprive many opinions of the positiveness to which they were entitled, accompanied by the hazard of a ruling of insufficiency to support a verdict. In other instances the rule was simply disregarded, and, as concessions to need, opinions were allowed upon such matters as intoxication, speed, handwriting, and value, although more precise coincidence with an ultimate issue would scarcely be possible.

Many modern decisions illustrate the trend to abandon the rule completely. *People* v. *Wilson*, 25 Cal.2d 341, 153 P.2d 720 (1944), whether abortion necessary to save life of patient; *Clifford-Jacobs Forging Co.* v. *Industrial Comm.*, 19 Ill.2d 236, 166 N.E.2d 582 (1960), medical causation; *Dowling* v. *L. H. Shattuck, Inc.*, 91 N.H. 234, 17 A.2d 529 (1941), proper method of shoring ditch; *Schweiger* v. *Solbeck*, 191 Or. 454, 230 P.2d 195 (1951), cause of landslide. In each instance the opinion was allowed.

The abolition of the ultimate issue rule does not lower the bars so as to admit all opinions. Under Rules 701 and 702, opinions must be helpful to the trier of fact, and Rule 403 provides for exclusion of evidence which wastes time. These provisions afford ample assurances against the admission of opinions which would merely tell the jury what result to reach, somewhat in the manner of the oath-helpers of an earlier day. They also stand ready to exclude opinions phrased in terms of inadequately explored legal criteria. Thus the question, "Did T have capacity to make a will?" would be excluded, while the question, "Did T have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution?" would be allowed. McCormick § 12.

For similar provisions see Uniform Rule 56(4); California Evidence Code § 805; Kansas Code of Civil Procedures § 60-456(d); New Jersey Evidence Rule 56(3).

## Rule 705. Disclosure of Facts or Data Underlying Expert Opinion

The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

(Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1938.)

### NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

The hypothetical question has been the target of a great deal of criticism as encouraging partisan bias, affording an opportunity for summing up in the middle of the case, and as complex and time consuming. Ladd, Expert Testimony, 5 Vand.L.Rev. 414, 426–427 (1952). While the rule allows counsel to make disclosure of the underlying facts or data as a preliminary to the giving of an expert opinion, if he chooses, the instances in which he is required to do so are reduced. This is true whether the expert bases his opinion on data furnished him at secondhand or observed by him at firsthand.

The elimination of the requirement of preliminary disclosure at the trial of underlying facts or data has a long background of support. In 1937 the Commissioners on Uniform State Laws incorporated a provision to this effect in the Model Expert Testimony Act, which furnished the basis for Uniform Rules 57 and 58. Rule 4515, N.Y. CPLR (McKinney 1963), provides:

> "Unless the court orders otherwise, questions calling for the opinion of an expert witness need not be hypothetical in form, and the witness may state his opinion and reasons without first specifying the data upon which it is based. Upon cross-examination, he may be required to specify the data * * *."

See also California Evidence Code § 802; Kansas Code of Civil Procedure §§ 60–456, 60–457; New Jersey Evidence Rules 57, 58.

If the objection is made that leaving it to the cross-examiner to bring out the supporting data is essentially unfair, the answer is that he is under no compulsion to bring out any facts or data except those unfavorable to the opinion. The answer assumes that the cross-examiner has the advance knowledge which is essential for effective cross-examination. This advance knowledge has been afforded, though imperfectly, by the traditional foundation requirement. Rule 26(b)(4) of the Rules of Civil Procedure, as revised, provides for substantial discovery in this area, obviating in large measure the obstacles which have been raised in some instances to discovery of findings, underlying data, and even the identity of the experts. Friedenthal, Discovery and Use of an Adverse Party's Expert Information, 14 Stan.L.Rev. 455 (1962).

These safeguards are reinforced by the discretionary power of the judge to require preliminary disclosure in any event.

### Rule 706. Court Appointed Experts

(*a*) *Appointment.* The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act. A witness so appointed shall be informed of his duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any; his deposition may be taken by any party; and he may be called to testify by the court or any party. He shall be subject to cross-examination by each party, including a party calling him as a witness.

(*b*) *Compensation.* Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(*c*) *Disclosure of appointment.* In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(*d*) *Parties' experts of own selection.* Nothing in this rule limits the parties in calling expert witnesses of their own selection.

(Pub. L. 93–595, § 1, Jan. 2, 1975, 88 Stat. 1938.)

#### NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

The practice of shopping for experts, the venality of some experts, and the reluctance of many reputable experts to involve themselves in litigation, have been matters of deep concern. Though the contention is made that court appointed experts acquire an aura of infallibility to which they are not entitled. Levy, Impartial Medical Testimony—Revisited, 34 Temple L.Q. 416 (11961), the trend is increasingly to provide for their use. While experience indicates that actual appointment is a relatively infrequent occurrence, the assumption may be made that the availability of the procedure in itself decreases the need for resorting to it. The ever-present possibility that the judge may appoint an expert in a given case must inevitably exert a sobering effect on the expert witness of a party and upon the person utilizing his services.

The inherent power of a trial judge to appoint an expert of his own choosing is virtually unquestioned. *Scott* v. *Spanjer Bros., Inc.*, 298 F.2d 928 (2d Cir. 1962); *Danville Tobacco Assn.* v. *Bryant-Buckner Associates, Inc.*, 333 F.2d 202 (4th Cir. 1964); Sink, The Unused Power of a Federal Judge to Call His Own Expert Witnesses, 29 S.Cal.L.Rev. 195 (1956); 2 Wigmore § 563, 9 *Id.* § 2484; Annot., 95 A.L.R.2d 383. Hence the problem becomes largely one of detail.

The New York plan is well known and is described in Report by Special Committee of the Association of the Bar of the City of New York: Impartial Medical Testimony (1956). On recommendation of the Section of Judicial Administration, local adoption of an impartial medical plan was endorsed by the American Bar Association. 82 A.B.A.Rep. 184–185 (1957). Descriptions and analyses of plans in effect in various parts of the country are found in Van Dusen, A United States District Judge's View of the Impartial Medical Expert System, 322 F.R.D. 498 (1963); Wick and Kightlinger, Impartial Medical Testimony Under the Federal Civil Rules: A Tale of Three Doctors, 34 Ins. Counsel J. 115 (1967); and numerous articles collected in Klein, Judicial Administration and the Legal Profession 393 (1963). Statutes and rules include California Evidence Code §§ 730–733; Illinois Supreme Court Rule 215(d), Ill.Rev.Stat.1969, c. 110A, § 215(d); Burns Indiana Stats. 1956, § 9–1702; Wisconsin Stats.Annot.1958, § 957.27.

In the federal practice, a comprehensive scheme for court appointed experts was initiated with the adoption of Rule 28 of the Federal Rules of Criminal Procedure in 1946. The Judicial Conference of the United States in 1953 considered court appointed experts in civil cases, but only with respect to whether they should be compensated from public funds, a proposal which was rejected. Report of the Judicial Conference of the United States 23 (1953). The present rule expands the practice to include civil cases.

*Subdivision* (*a*) is based on Rule 28 of the Federal Rules of Criminal Procedure, with a few changes, mainly in the interest of clarity. Language has been added to provide specifically for the appointment either on motion of a party or on the judge's own motion. A provision subjecting the court appointed expert to deposition procedures has been incorporated. The rule has been revised to make definite the right of any party, including the party calling him, to cross-examine.

*Subdivision* (*b*) combines the present provision for compensation in criminal cases with what seems to be a fair and feasible handling of civil cases, originally found in the Model Act and carried from there into Uniform Rule 60. See also California Evidence Code

§§ 730-731. The special provision for Fifth Amendment compensation cases is designed to guard against reducing constitutionally guaranteed just compensation by requiring the recipient to pay costs. See Rule 71A(*l*) of the Rules of Civil Procedure.

*Subdivision* (*c*) seems to be essential if the use of court appointed experts is to be fully effective. Uniform Rule 61 so provides.

*Subdivision* (*d*) is in essence the last sentence of Rule 28(a) of the Federal Rules of Criminal Procedure.

## ARTICLE VIII—HEARSAY

### Notes of Advisory Committee on Proposed Rules

### Introductory Note: The Hearsay Problem

The factors to be considered in evaluating the testimony of a witness are perception, memory, and narration. Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 Harv.L.Rev. 177 (1948), Selected Writings on Evidence and Trial 764, 765 (Fryer ed. 1957); Shientag, Cross-Examination—A Judge's Viewpoint, 3 Record 12 (1948); Strahorn, A Reconsideration of the Hearsay Rule and Admissions, 85 U.Pa.L.Rev. 484, 485 (1937), Selected Writings, *supra*, 756, 757; Weinstein, Probative Force of Hearsay, 46 Iowa L.Rev. 331 (1961). Sometimes a fourth is added, sincerity, but in fact it seems merely to be an aspect of the three already mentioned.

In order to encourage the witness to do his best with respect to each of these factors, and to expose any inaccuracies which may enter in, the Anglo-American tradition has evolved three conditions under which witnesses will ideally be required to testify: (1) under oath, (2) in the personal presence of the trier of fact, (3) subject to cross-examination.

(1) Standard procedure calls for the swearing of witnesses. While the practice is perhaps less effective than in an earlier time, no disposition to relax the requirement is apparent, other than to allow affirmation by persons with scruples against taking oaths.

(2) The demeanor of the witness traditionally has been believed to furnish trier and opponent with valuable clues. *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 495–496, 71 S.Ct. 456, 95 L.Ed. 456 (1951); Sahm, Demeanor Evidence: Elusive and Intangible Imponderables, 47 A.B.A.J. 580 (1961), quoting numerous authorities. The witness himself will probably be impressed with the solemnity of the occasion and the possibility of public disgrace. Willingness to falsify may reasonably become more difficult in the presence of the person against whom directed. Rules 26 and 43(a) of the Federal Rules of Criminal and Civil Procedure, respectively, include the general requirement that testimony be taken orally in open court. The Sixth Amendment right of confrontation is a manifestation of these beliefs and attitudes.

(3) Emphasis on the basis of the hearsay rule today tends to center upon the condition of cross-examination. All may not agree with Wigmore that cross-examination is "beyond doubt the greatest legal engine ever invented for the discovery of truth," but all will agree with his statement that it has become a "vital feature" of the Anglo-American system. 5 Wigmore § 1367, p. 29. The belief, or perhaps hope, that cross-examination is effective in exposing imperfections of perception, memory, and narration is fundamental. Morgan, Foreword to Model Code of Evidence 37 (1942).

The logic of the preceding discussion might suggest that no testimony be received unless in full compliance with the three ideal conditions. No one advocates this position. Common sense tells that much evidence which is not given under the three conditions may be inherently superior to much that is. Moreover, when the choice is between evidence which is less than best and no evidence at all, only clear folly would dictate an across-the-board policy of doing without. The problem thus resolves itself into effecting a sensible accommodation between these considerations and the desirability of giving testimony under the ideal conditions.

The solution evolved by the common law has been a general rule excluding hearsay but subject to numerous exceptions under circumstances supposed to furnish guarantees of trustworthiness. Criticisms of this scheme are that it is bulky and complex, fails to screen good from bad hearsay realistically, and inhibits the growth of the law of evidence.

Since no one advocates excluding all hearsay, three possible solutions may be considered: (1) abolish the rule against hearsay and admit all hearsay; (2) admit hearsay possessing sufficient probative force, but with procedural safeguards; (3) revise the present system of class exceptions.

(1) Abolition of the hearsay rule would be the simplest solution. The effect would not be automatically to abolish the giving of testimony under ideal conditions. If the declarant were available, compliance with the ideal conditions would be optional with either party. Thus the proponent could call the declarant as a witness as a form of presentation more impressive than his hearsay statement. Or the opponent could call the declarant to be cross-examined upon his statement. This is the tenor of Uniform Rule 63(1), admitting the hearsay declaration of a person "who is present at the hearing and available for cross-examination." Compare the treatment of declarations of available declarants in Rule 801(d)(1) of the instant rules. If the declarant were unavailable, a rule of free admissibility would make no distinctions in terms of degrees of noncompliance with the ideal conditions and would exact no liquid pro quo in the form of assurances of trustworthiness. Rule 503 of the Model Code did exactly that, providing for the admissibility of any hearsay declaration by an unavailable declarant, finding support in the Massachusetts act of 1898, enacted at the instance of Thayer, Mass.Gen.L.1932, c. 233 § 65, and in the English act of 1938, St.1938, c. 28, Evidence. Both are limited to civil cases. The draftsmen of the Uniform Rules chose a less advanced and more conventional position. Comment, Uniform Rule 63. The present Advisory Committee has been unconvinced of the wisdom of abandoning the traditional requirement of some particular assurance of credibility as a condition precedent to admitting the hearsay declaration of an unavailable declarant.

In criminal cases, the Sixth Amendment requirement of confrontation would no doubt move into a large part of the area presently occupied by the hearsay rule in the event of the abolition of the latter. The resultant split between civil and criminal evidence is regarded as an undesirable development.

(2) Abandonment of the system of class exceptions in favor of individual treatment in the setting of the particular case, accompanied by procedural safeguards, has been impressively advocated. Weinstein, The Probative Force of Hearsay, 46 Iowa L.Rev. 331 (1961). Admissibility would be determined by weighing the probative force of the evidence against the possibility of prejudice, waste of time, and the availability of more satisfactory evidence. The bases of the traditional hearsay exceptions would be helpful in assessing probative force. Ladd, The Relationship of the Principles of Exclusionary Rules of Evidence to the Problem of Proof, 18 Minn.L.Rev. 506 (1934). Procedural safeguards would consist of notice of intention to use hearsay, free comment by the judge on the weight of the evidence, and a greater measure of authority in both trial and appellate judges to deal with evidence on the basis of weight. The Advisory Committee has rejected this approach to hearsay as involving too great a measure of judicial discretion, minimizing the predictability of rulings, enhancing the difficulties of preparation for trial, adding a further element to the already over-complicated congeries of pretrial procedures, and requiring substantially different rules for civil and criminal cases. The only way in which the probative force of hearsay differs from the probative force of other testimony is in the absence of oath, demeanor, and cross-examination as aids in de-

termining credibility. For a judge to exclude evidence because he does not believe it has been described as "altogether atypical, extraordinary. * * *" Chadbourn, Bentham and the Hearsay Rule—A Benthamic View of Rule 63(4)(c) of the Uniform Rules of Evidence, 75 Harv.L.Rev. 932, 947 (1962).

(3) The approach to hearsay in these rules is that of the common law, i.e., a general rule excluding hearsay, with exceptions under which evidence is not required to be excluded even though hearsay. The traditional hearsay exceptions are drawn upon for the exceptions, collected under two rules, one dealing with situations where availability of the declarant is regarded as immaterial and the other with those where unavailability is made a condition to the admission of the hearsay statement. Each of the two rules concludes with a provision for hearsay statements not within one of the specified exceptions "but having comparable circumstantial guarantees of trustworthiness." Rules 803(24) and 804(b)(6). This plan is submitted as calculated to encourage growth and development in this area of the law, while conserving the values and experience of the past as a guide to the future.

### Confrontation and Due Process

Until very recently, decisions invoking the confrontation clause of the Sixth Amendment were surprisingly few, a fact probably explainable by the former inapplicability of the clause to the states and by the hearsay rule's occupancy of much the same ground. The pattern which emerges from the earlier cases invoking the clause is substantially that of the hearsay rule, applied to criminal cases: an accused is entitled to have the witnesses against him testify under oath, in the presence of himself and trier, subject to cross-examination; yet considerations of public policy and necessity require the recognition of such exceptions as dying declarations and former testimony of unavailable witnesses. *Mattox* v. *United States*, 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895); *Motes* v. *United States*, 178 U.S. 458, 20 S.Ct. 993, 44 L.Ed. 1150 (1900); *Delaney* v. *United States*, 263 U.S. 586, 44 S.Ct. 206, 68 L.Ed. 462 (1924). Beginning with *Snyder* v. *Massachusetts*, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674 (1934), the Court began to speak of confrontation as an aspect of procedural due process, thus extending its applicability to state cases and to federal cases other than criminal. The language of *Snyder* was that of an elastic concept of hearsay. The deportation case of *Bridges* v. *Wixon*, 326 U.S. 135, 65 S.Ct. 1443, 89 L.Ed. 2103 (1945), may be read broadly as imposing a strictly construed right of confrontation in all kinds of cases or narrowly as the product of a failure of the Immigration and Naturalization Service to follow its own rules. *In re Oliver*, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948), ruled that cross-examination was essential to due process in a state contempt proceeding, but in *United States* v. *Nugent*, 346 U.S. 1, 73 S.Ct. 991, 97 L.Ed. 1417 (1953), the court held that it was not an essential aspect of a "hearing" for a conscientious objector under the Selective Service Act. *Stein* v. *New York*, 346 U.S. 156, 196, 73 S.Ct. 1077, 97 L.Ed. 1522 (1953), disclaimed any purpose to read the hearsay rule into the Fourteenth Amendment, but in *Greene* v. *McElroy*, 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959), revocation of security clearance without confrontation and cross-examination was held unauthorized, and a similar result was reached in *Willner* v. *Committee on Character*, 373 U.S. 96, 83 S.Ct. 1175, 10 L.Ed.2d 224 (1963). Ascertaining the constitutional dimensions of the confrontation-hearsay aggregate against the background of these cases is a matter of some difficulty, yet the general pattern is at least not inconsistent with that of the hearsay rule.

In 1965 the confrontation clause was held applicable to the states. *Pointer* v. *Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). Prosecution use of former testimony given at a preliminary hearing where petitioner was not represented by counsel was a violation of the clause. The same result would have followed under conventional hearsay doctrine read in the light of a constitutional right to counsel, and nothing in the opinion suggests any difference in essential outline between the hearsay rule and the right of confrontation. In the companion case of *Douglas* v. *Alabama*, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965), however, the result reached by applying the confrontation clause is one reached less readily via the hearsay rule. A confession implicating petitioner was put before the jury by reading it to the witness in portions and asking if he made that statement. The witness refused to answer on grounds of self-incrimination. The result, said the Court, was to deny cross-examination, and hence confrontation. True, it could broadly be said that the confession was a hearsay statement which for all practical purposes was put in evidence. Yet a more easily accepted explanation of the opinion is that its real thrust was in the direction of curbing undesirable prosecutorial behavior, rather than merely applying rules of exclusion, and that the confrontation clause was the means selected to achieve this end. Comparable facts and a like result appeared in *Brookhart* v. *Janis*, 384 U.S. 1, 86 S.Ct. 1245, 16 L.Ed.2d 314 (1966).

The pattern suggested in *Douglas* was developed further and more distinctly in a pair of cases at the end of the 1966 term. *United States* v. *Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967), and *Gilbert* v. *California*, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967., hinged upon practices followed in identifying accused persons before trial. This pretrial identification was said to be so decisive an aspect of the case that accused was entitled to have counsel present; a pretrial identification made in the absence of counsel was not itself receivable in evidence and, in addition, might fatally infect a courtroom identification. The presence of counsel at the earlier identification was described as a necessary prerequisite for "a meaningful confrontation at trial." *United States* v. *Wade*, *supra*, 388 U.S. at p. 236, 87 S.Ct. at p. 1937. *Wade* involved no evidence of the fact of a prior identification and hence was not susceptible of being decided on hearsay grounds. In *Gilbert*, witnesses did testify to an earlier identification, readily classifiable as hearsay under a fairly strict view of what constitutes hearsay. The Court, however, carefully avoided basing the decision on the hearsay ground, choosing confrontation instead. 388 U.S. 263, 272, n. 3, 87 S.Ct. 1951. See also *Parker* v. *Gladden*, 385 U.S. 363 87 S.Ct. 468, 17 L.Ed.2d 420 (1966), holding that the right of confrontation was violated when the bailiff made prejudicial statements to jurors, and Note, 75, Yale L.J. 1434 (1966).

Under the earlier cases, the confrontation clause may have been little more than a constitutional embodiment of the hearsay rule, even including traditional exceptions but with some room for expanding them along similar lines. But under the recent cases the impact of the clause clearly extends beyond the confines of the hearsay rule. These considerations have led the Advisory Committee to conclude that a hearsay rule can function usefully as an adjunct to the confrontation right in constitutional areas and independently in nonconstitutional areas. In recognition of the separateness of the confrontation clause and the hearsay rule, and to avoid inviting collisions between them or between the hearsay rule and other exclusionary principles, the exceptions set forth in Rules 803 and 804 are stated in terms of exemption from the general exclusionary mandate of the hearsay rule, rather than in positive terms of admissibility. See Uniform Rule 63(1) to (31) and California Evidence Code §§ 1200–1340.

## Rule 801. Definitions

The following definitions apply under this article:

(*a*) *Statement*. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

(*b*) *Declarant*. A "declarant" is a person who makes a statement.

(c) *Hearsay.* "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) *Statements which are not hearsay.* A statement is not hearsay if—

(*1*) *Prior statement by witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving him; or

(*2*) *Admission by party-opponent.* The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

(Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1938; Pub. L. 94-113, § 1, Oct. 16, 1975, 89 Stat. 576.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

*Subdivision* (*a*). The definition of "statement" assumes importance because the term is used in the definition of hearsay in subdivision (c). The effect of the definition of "statement" is to exclude from the operation of the hearsay rule all evidence of conduct, verbal or nonverbal, not intended as an assertion. The key to the definition is that nothing is an assertion unless intended to be one.

It can scarcely be doubted that an assertion made in words is intended by the declarant to be an assertion. Hence verbal assertions readily fall into the category of "statement." Whether nonverbal conduct should be regarded as a statement for purposes of defining hearsay requires further consideration. Some nonverbal conduct, such as the act of pointing to identify a suspect in a lineup, is clearly the equivalent of words, assertive in nature, and to be regarded as a statement. Other nonverbal conduct, however, may be offered as evidence that the person acted as he did because of his belief in the existence of the condition sought to be proved, from which belief the existence of the condition may be inferred. This sequence is, arguably, in effect an assertion of the existence of the condition and hence properly includable within the hearsay concept. See Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 Harv.L. Rev. 177, 214, 217 (1948), and the elaboration in Finman, Implied Assertions as Hearsay: Some Criticisms of the Uniform Rules of Evidence, 14 Stan.L.Rev. 682 (1962). Admittedly evidence of this character is untested with respect to the perception, memory, and narration (or their equivalents) of the actor, but the Advisory Committee is of the view that these dangers are minimal in the absence of an intent to assert and do not justify the loss of the evidence on hearsay grounds. No class of evidence is free of the possibility of fabrication, but the likelihood is less with nonverbal than with assertive verbal conduct. The situations giving rise to the nonverbal conduct are such as virtually to eliminate questions of sincerity. Motivation, the nature of the conduct, and the presence or absence of reliance will bear heavily upon the weight to be given the evidence. Falknor, The "Hear-Say" Rule as a "See-Do" Rule: Evidence of Conduct, 33 Rocky Mt.L.Rev. 133 (1961). Similar considerations govern nonassertive verbal conduct and verbal conduct which is assertive but offered as a basis for inferring something other than the matter asserted, also excluded from the definition of hearsay by the language of subdivision (c).

When evidence of conduct is offered on the theory that it is not a statement, and hence not hearsay, a preliminary determination will be required to determine whether an assertion is intended. The rule is so worded as to place the burden upon the party claiming that the intention existed; ambiguous and doubtful cases will be resolved against him and in favor of admissibility. The determination involves no greater difficulty than many other preliminary questions of fact. Maguire, The Hearsay System: Around and Through the Thicket, 14 Vand.L.Rev. 741, 765-767 (1961).

For similar approaches, see Uniform Rule 62(1); California Evidence Code §§ 225, 1200; Kansas Code of Civil Procedure § 60-459(a); New Jersey Evidence Rule 62(1)

*Subdivision* (*c*). The definition follows along familiar lines in including only statements offered to prove the truth of the matter asserted. McCormick § 225; 5 Wigmore § 1361, 6 *id.* § 1766. If the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay. *Emich Motors Corp.* v. *General Motors Corp.*, 181 F.2d 70 (7th Cir. 1950), rev'd on other grounds 340 U.S. 558, 71 S.Ct. 408, 95 L.Ed 534, letters of complaint from customers offered as a reason for cancellation of dealer's franchise, to rebut contention that franchise was revoked for refusal to finance sales through affiliated finance company. The effect is to exclude from hearsay the entire category of "verbal acts" and "verbal parts of an act," in which the statement itself affects the legal rights of the parties or is a circumstance bearing on conduct affecting their rights.

The definition of hearsay must, of course, be read with reference to the definition of statement set forth in subdivision (a).

Testimony given by a witness in the course of court proceedings is excluded since there is compliance with all the ideal conditions for testifying.

*Subdivision* (*d*). Several types of statements which would otherwise literally fall within the definition are expressly excluded from it:

(1) *Prior statement by witness.* Considerable controversy has attended the question whether a prior out-of-court statement by a person now available for cross-examination concerning it, under oath and in the presence of the trier of fact, should be classed as hearsay. If the witness admits on the stand that he made the statement and that it was true, he adopts the statement and there is no hearsay problem. The hearsay problem arises when the witness on the stand denies having made the statement or admits having made it but denies its truth. The argument in favor of treating these latter statements as hearsay is based upon the ground that the conditions of oath, cross-examination, and demeanor observation did not prevail at the time the statement was made and cannot adequately be supplied by the later examination. The logic of the situation is troublesome. So far as concerns the oath, its mere presence has never been regarded as sufficient to remove a statement from the hearsay category, and it receives much less emphasis than cross-examination as a truth-compelling device. While strong expressions are found to the effect that no conviction can be had or important right taken away on the basis of statements not made under fear of prosecution for perjury, *Bridges* v. *Wixon*, 326 U.S. 135, 65 S.Ct. 1443, 89 L.Ed. 2103 (1945), the fact is that, of the many common law exceptions to the hearsay rule, only that for reported testimony has required the statement to have been made under oath. Nor is it satisfactorily explained

why cross-examination cannot be conducted subsequently with success. The decisions contending most vigorously for its inadequacy in fact demonstrate quite thorough exploration of the weaknesses and doubts attending the earlier statement. *State* v. *Saporen*, 205 Minn. 358, 285 N.W. 898 (1939); *Ruhala* v. *Roby*, 379 Mich. 102, 150 N.W.2d 146 (1967); *People* v. *Johnson*, 68 Cal.2d 646, 68 Cal.Rptr. 599, 441 P.2d 111 (1968). In respect to demeanor, as Judge Learned Hand observed in *Di Carlo* v. *United States*, 6 F.2d 364 (2d Cir. 1925), when the jury decides that the truth is not what the witness says now, but what he said before, they are still deciding from what they see and hear in court. The bulk of the case law nevertheless has been against allowing prior statements of witnesses to be used generally as substantive evidence. Most of the writers and Uniform Rule 63(1) have taken the opposite position.

The position taken by the Advisory Committee in formulating this part of the rule is founded upon an unwillingness to countenance the general use of prior prepared statements as substantive evidence, but with a recognition that particular circumstances call for a contrary result. The judgment is one more of experience than of logic. The rule requires in each instance, as a general safeguard, that the declarant actually testify as a witness, and it then enumerates three situations in which the statement is excepted from the category of hearsay. Compare Uniform Rule 63(1) which allows any out-of-court statement of a declarant who is present at the trial and available for cross-examination.

(A) Prior inconsistent statements traditionally have been admissible to impeach but not as substantive evidence. Under the rule they are substantive evidence. As has been said by the California Law Revision Commission with respect to a similar provision:

"Section 1235 admits inconsistent statements of witnesses because the dangers against which the hearsay rule is designed to protect are largely nonexistent. The declarant is in court and may be examined and cross-examined in regard to his statements and their subject matter. In many cases, the inconsistent statement is more likely to be true than the testimony of the witness at the trial because it was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversy that gave rise to the litigation. The trier of fact has the declarant before it and can observe his demeanor and the nature of his testimony as he denies or tries to explain away the inconsistency. Hence, it is in as good a position to determine the truth or falsity of the prior statement as it is to determine the truth or falsity of the inconsistent testimony given in court. Moreover, Section 1235 will provide a party with desirable protection against the 'turncoat' witness who changes his story on the stand and deprives the party calling him of evidence essential to his case." Comment, California Evidence Code § 1235. See also McCormick § 39. The Advisory Committee finds these views more convincing than those expressed in *People* v. *Johnson*, 68 Cal.2d 646, 68 Cal.Rptr. 599, 441 P.2d 111 (1968). The constitutionality of the Advisory Committee's view was upheld in *California* v. *Green*, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970). Moreover, the requirement that the statement be inconsistent with the testimony given assures a thorough exploration of both versions while the witness is on the stand and bars any general and indiscriminate use of previously prepared statements.

(B) Prior consistent statements traditionally have been admissible to rebut charges of recent fabrication or improper influence or motive but not as substantive evidence. Under the rule they are substantive evidence. The prior statement is consistent with the testimony given on the stand, and, if the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally.

(C) The admission of evidence of identification finds substantial support, although it falls beyond a doubt in the category of prior out-of-court statements. Illustrative are *People* v. *Gould*, 54 Cal.2d 621, 7 Cal.Rptr. 273, 354 P.2d 865 (1960); *Judy* v. *State*, 218 Md. 168, 146 A.2d 29 (1958); *State* v. *Simmons*, 63 Wash.2d 17, 385 P.2d 389 (1963); California Evidence Code § 1238; New Jersey Evidence Rule 63(1)(c); N.Y. Code of Criminal Procedure § 393-b. Further cases are found in 4 Wigmore § 1130. The basis is the generally unsatisfactory and inconclusive nature of courtroom identifications as compared with those made at an earlier time under less suggestive conditions. The Supreme Court considered the admissibility of evidence of prior identification in *Gilbert* v. *California*, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967). Exclusion of lineup identification was held to be required because the accused did not then have the assistance of counsel. Significantly, the Court carefully refrained from placing its decision on the ground that testimony as to the making of a prior out-of-court identification ("That's the man") violated either the hearsay rule or the right of confrontation because not made under oath, subject to immediate cross-examination, in the presence of the trier. Instead the Court observed:

"There is a split among the States concerning the admissibility of prior extra-judicial identifications, as independent evidence of identity, both by the witness and third parties present at the prior identification. See 71 ALR2d 449. It has been held that the prior identification is hearsay, and, when admitted through the testimony of the identifier, is merely a prior consistent statement. The recent trend, however, is to admit the prior identification under the exception that admits as substantive evidence a prior communication by a witness who is available for cross-examination at the trial. See 5 ALR2d Later Case Service 1225–1228. * * *" 388 U.S. at 272, n. 3, 87 S.Ct. at 1956.

(2) *Admissions.* Admissions by a party-opponent are excluded from the category of hearsay on the theory that their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule. Strahorn, A Reconsideration of the Hearsay Rule and Admissions, 85 U.Pa.L.Rev. 484, 564 (1937); Morgan, Basic Problems of Evidence 265 (1962); 4 Wigmore § 1048. No guarantee of trustworthiness is required in the case of an admission. The freedom which admissions have enjoyed from technical demands of searching for an assurance of trustworthiness in some against-interest circumstance, and from the restrictive influences of the opinion rule and the rule requiring firsthand knowledge, when taken with the apparently prevalent satisfaction with the results, calls for generous treatment of this avenue to admissibility.

The rule specifies five categories of statements for which the responsibility of a party is considered sufficient to justify reception in evidence against him:

(A) A party's own statement is the classic example of an admission. If he has a representative capacity and the statement is offered against him in that capacity, no inquiry whether he was acting in the representative capacity in making the statement is required; the statement need only be relevant to represent affairs. To the same effect in California Evidence Code § 1220. Compare Uniform Rule 63(7), requiring a statement to be made in a representative capacity to be admissible against a party in a representative capacity.

(B) Under established principles an admission may be made by adopting or acquiescing in the statement of another. While knowledge of contents would ordinarily be essential, this is not inevitably so: "X is a reliable person and knows what he is talking about." See McCormick § 246, p. 527, n. 15. Adoption or acquiescence may be manifested in any appropriate manner. When silence is relied upon, the theory is that the person would, under the circumstances, protest the statement made in his presence, if untrue. The decision in each case calls for an evaluation in terms of probable human behavior. In civil cases, the results have generally been satisfactory. In criminal cases, however, troublesome questions have been raised by decisions holding that failure to deny is an admission: the inference is a fairly weak one, to begin with; silence may be motivated by advice of counsel or realization that "anything you say may be used against you"; unusual opportunity is afforded to manufacture evidence; and encroachment upon the privilege against self-incrimination seems inescapably to be involved. However, recent decisions of the Supreme Court relating to custodial interrogation and the right to counsel appear to resolve these difficulties. Hence the rule contains no special provisions concerning failure to deny in criminal cases.

(C) No authority is required for the general proposition that a statement authorized by a party to be made should have the status of an admission by the party. However, the question arises whether only statements to third persons should be so regarded, to the exclusion of statements by the agent to the principal. The rule is phrased broadly so as to encompass both. While it may be argued that the agent authorized to make statements to his principal does not speak for him, Morgan, Basic Problems of Evidence 273 (1962), communication to an outsider has not generally been thought to be an essential characteristic of an admission. Thus a party's books or records are usable against him, without regard to any intent to disclose to third persons. 5 Wigmore § 1557. See also McCormick § 78, pp. 159–161. In accord is New Jersey Evidence Rule 63(8)(a). Cf. Uniform Rule 63(8)(a) and California Evidence Code § 1222 which limit status as an admission in this regard to statements authorized by the party to be made "for" him, which is perhaps an ambiguous limitation to statements to third persons. Falknor, Vicarious Admissions and the Uniform Rules, 14 Vand.L. Rev. 855, 860–861 (1961).

(D) The tradition has been to test the admissibility of statements by agents, as admissions, by applying the usual test of agency. Was the admission made by the agent acting in the scope of his employment? Since few principals employ agents for the purpose of making damaging statements, the usual result was exclusion of the statement. Dissatisfaction with this loss of valuable and helpful evidence has been increasing. A substantial trend favors admitting statements related to a matter within the scope of the agency or employment. *Grayson* v. *Williams*, 256 F.2d 61 (10th Cir. 1958); *Koninklijke Luchtvaart Maatschappij N.V. KLM Royal Dutch Airlines* v. *Tuller*, 110 U.S.App.D.C. 282, 292 F.2d 775, 784 (1961); *Martin* v. *Savage Truck Lines, Inc.*, 121 F.Supp. 417 (D.D.C. 1054), and numerous state court decisions collected in 4 Wigmore, 1964 Supp., pp. 66–73, with comments by the editor that the statements should have been excluded as not within scope of agency. For the traditional view see *Northern Oil Co.* v. *Socony Mobile Oil Co.*, 347 F.2d 81, 85 (2d Cir. 1965) and cases cited therein. Similar provisions are found in Uniform Rule 63(9)(a), Kansas Code of Civil Procedure § 60-460(i)(1), and New Jersey Evidence Rule 63(9)(a).

(E) The limitation upon the admissibility of statements of co-conspirators to those made "during the course and in furtherance of the conspiracy" is in the accepted pattern. While the broadened view of agency taken in item (iv) might suggest wider admissibility of statements of co-conspirators, the agency theory of conspiracy is at best a fiction and ought not to serve as a basis for admissibility beyond that already established. See Levie, Hearsay and Conspiracy, 52 Mich.L.Rev. 1159 (1954); Comment, 25 U.Chi.L.Rev. 530 (1958). The rule is consistent with the position of the Supreme Court in denying admissibility to statements made after the objectives of the conspiracy have either failed or been achieved. *Krulewitch* v. *United States*, 336 U.S. 440, 69 S.Ct. 716, 93 L.Ed. 790 (1949); *Wong Sun* v. *United States*, 371 U.S. 471, 490, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). For similarly limited provisions see California Evidence Code § 1223 and New Jersey Rule 63(9)(b). Cf. Uniform Rule 63(9)(b).

### Notes of Committee on the Judiciary, House Report No. 93–650

Present federal law, except in the Second Circuit, permits the use of prior inconsistent statements of a witness for impeachment only. Rule 801(d)(1) as proposed by the Court would have permitted all such statements to be admissible as substantive evidence, an approach followed by a small but growing number of State jurisdictions and recently held constitutional in *California* v. *Green*, 399 U.S. 149 (1970). Although there was some support expressed for the Court Rule, based largely on the need to counteract the effect of witness intimidation in criminal cases, the Committee decided to adopt a compromise version of the Rule similar to the position of the Second Circuit. The Rule as amended draws a distinction between types of prior inconsistent statements (other than statements of identification of a person made after perceiving him which are currently admissible, see *United States* v. *Anderson*, 406 F.2d 719, 720 (4th Cir.), cert. denied, 395 U.S. 967 (1969)) and allows only those made while the declarant was subject to cross-examination at a trial or hearing or in a deposition, to be admissible for their truth. Compare *United States* v. *DeSisto*, 329 F.2d 929 (2nd Cir.), cert. denied, 377 U.S. 979 (1964); *United States* v. *Cunningham*, 446 F.2d 194 (2nd Cir. 1971) (restricting the admissibility of prior inconsistent statements as substantive evidence to those made under oath in a formal proceeding, but not requiring that there have been an opportunity for cross-examination). The rationale for the Committee's decision is that (1) unlike in most other situations involving unsworn or oral statements, there can be no dispute as to whether the prior statement was made; and (2) the context of a formal proceeding, an oath, and the opportunity for cross-examination provide firm additional assurances of the reliability of the prior statement.

### Notes of Committee on the Judiciary, Senate Report No. 93–1277

Rule 801 defines what is and what is not hearsay for the purpose of admitting a prior statement as substantive evidence. A prior statement of a witness at a trial or hearing which is inconsistent with his testimony is, of course, always admissible for the purpose of impeaching the witness' credibility.

As submitted by the Supreme Court, subdivision (d)(1)(A) made admissible as substantive evidence the prior statement of a witness inconsistent with his present testimony.

The House severely limited the admissibility of prior inconsistent statements by adding a requirement that the prior statement must have been subject to cross-examination, thus precluding even the use of grand jury statements. The requirement that the prior statement must have been subject to cross-examination appears unnecessary since this rule comes into play only when the witness testifies in the present trial. At that time, he is on the stand and can explain an earlier position and be cross-examined as to both.

The requirement that the statement be under oath also appears unnecessary. Notwithstanding the absence of an oath contemporaneous with the statement, the witness, when on the stand, qualifying or denying the prior statement, is under oath. In any event, of all the many recognized exceptions to the hearsay rule, only one (former testimony) requires that the out-of-court statement have been made under oath. With respect to the lack of evidence of the demeanor of the witness at the time of the prior statement, it would be difficult to improve upon Judge Learned Hand's observation that when the jury decides that the truth is not what the witness says now but what he said before, they are still deciding from what they see and hear in court [*Di Carlo* v. *U.S.*, 6 F.2d 364 (2d Cir. 1925)].

The rule as submitted by the Court has positive advantages. The prior statement was made nearer in time to the events, when memory was fresher and intervening influences had not been brought into play. A realistic method is provided for dealing with the turncoat witness who changes his story on the stand [see Comment, California Evidence Code § 1235; McCormick, Evidence, § 38 (2nd ed. 1972)].

New Jersey, California, and Utah have adopted a rule similar to this one; and Nevada, New Mexico, and Wisconsin have adopted the identical Federal rule.

For all of these reasons, we think the House amendment should be rejected and the rule as submitted by the Supreme Court reinstated. [It would appear that some of the opposition to this Rule is based on a concern that a person could be convicted solely upon evidence admissible under this Rule. The Rule, however, is not addressed to the question of the sufficiency of evidence to send a case to the jury, but merely as to its admissibility. Factual circumstances could well arise where, if this were the sole evidence, dismissal would be appropriate].

As submitted by the Supreme Court and as passed by the House, subdivision (d)(1)(c) of rule 801 made admissible the prior statement identifying a person made after perceiving him. The committee decided to delete this provision because of the concern that a person could be convicted solely upon evidence admissible under this subdivision.

The House approved the long-accepted rule that "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy" is not hearsay as it was submitted by the Supreme Court. While the rule refers to a coconspirator, it is this committee's understanding that the rule is meant to carry forward the universally accepted doctrine that a joint venturer is considered as a coconspirator for the purposes of this rule even though no conspiracy has been charged. *United States* v. *Rinaldi*, 393 F.2d 97, 99 (2d Cir.), cert. denied 393 U.S. 913 (1968); *United States* v. *Spencer*, 415 F.2d 1301, 1304 (7th Cir. 1969).

### Notes of Conference Committee, House Report No. 93-1597

Rule 801 supplies some basic definitions for the rules of evidence that deal with hearsay. Rule 801(d)(1) defines certain statements as not hearsay. The Senate amendments make two changes in it.

The House bill provides that a statement is not hearsay if the declarant testifies and is subject to cross-examination concerning the statement and if the statement is inconsistent with his testimony and was given under oath subject to cross-examination and subject to the penalty of perjury at a trial or hearing or in a deposition. The Senate amendment drops the requirement that the prior statement be given under oath subject to cross-examination and subject to the penalty of perjury at a trial or hearing or in a deposition.

The Conference adopts the Senate amendment with an amendment, so that the rule now requires that the prior inconsistent statement be given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition. The rule as adopted covers statements before a grand jury. Prior inconsistent statements may, of course, be used for impeaching the credibility of a witness. When the prior inconsistent statement is one made by a defendant in a criminal case, it is covered by Rule 801(d)(2).

The House bill provides that a statement is not hearsay if the declarant testifies and is subject to cross-examination concerning the statement and the statement is one of identification of a person made after perceiving him. The Senate amendment eliminated this provision.

The Conference adopts the Senate amendment.

### Amendments

1975—Subd. (d)(1). Pub. L. 94-113 added cl. (C).

### Effective Date of 1975 Amendment

Section 2 of Pub. L. 94-113 provided that: "This Act [enacting subd. (d)(1)(C)] shall become effective on the fifteenth day after the date of the enactment of this Act [Oct. 16, 1975]."

## Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

(Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1939.)

### Notes of Advisory Committee on Proposed Rules

The provision excepting from the operation of the rule hearsay which is made admissible by other rules adopted by the Supreme Court or by Act of Congress continues the admissibility thereunder of hearsay which would not qualify under these Evidence Rules. The following examples illustrate the working of the exception:

#### Federal Rules of Civil Procedure

Rule 4(g): proof of service by affidavit.

Rule 32: admissibility of depositions.

Rule 43(e): affidavits when motion based on facts not appearing of record.

Rule 56: affidavits in summary judgment proceedings.

Rule 65(b): showing by affidavit for temporary restraining order.

#### Federal Rules of Criminal Procedure

Rule 4(a): affidavits to show grounds for issuing warrants.

Rule 12(b)(4): affidavits to determine issues of fact in connection with motions.

#### Acts of Congress

10 U.S.C. § 7730: affidavits of unavailable witnesses in actions for damages caused by vessel in naval service, or towage or salvage of same, when taking of testimony or bringing of action delayed or stayed on security grounds.

29 U.S.C. § 161(4): affidavit as proof of service in NLRB proceedings.

38 U.S.C. § 5206: affidavit as proof of posting notice of sale of unclaimed property by Veterans Administration.

## Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(*1*) *Present sense impression.* A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(*2*) *Excited utterance.* A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(*3*) *Then existing mental, emotional, or physical condition.* A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(*4*) *Statements for purposes of medical diagnosis or treatment.* Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(*5*) *Recorded recollection.* A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) *Records of regularly conducted activity.* A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) *Absence of entry in records kept in accordance with the provisions of paragraph (6).* Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) *Public records and reports.* Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) *Records of vital statistics.* Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) *Absence of public record or entry.* To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) *Records of religious organizations.* Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) *Marriage, baptismal, and similar certificates.* Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) *Family records.* Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) *Records of documents affecting an interest in property.* The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) *Statements in documents affecting an interest in property.* A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) *Statements in ancient documents.* Statements in a document in existence twenty years or more the authenticity of which is established.

(17) *Market reports, commercial publications.* Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) *Learned treatises.* To the extent called to the attention of an expert witness upon cross-examination or relief upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) *Reputation concerning personal or family history.* Reputation among members of his family by blood, adoption, or marriage, or among his associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of his personal or family history.

**(20) *Reputation concerning boundaries or general history.*** **Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.**

**(21) *Reputation as to character.*** **Reputation of a person's character among his associates or in the community.**

**(22) *Judgment of previous conviction.*** **Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in execess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.**

**(23) *Judgment as to personal, family, or general history, or boundaries.*** **Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.**

**(24) *Other exceptions.*** **A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.**

(Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1939; Pub. L. 94-149, § 1(11), Dec. 12, 1975, 89 Stat. 805.)

### NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

The exceptions are phrased in temrs of nonapplication of the hearsay rule, rather than in positive terms of admissibility, in order to repel any implication that other possible grounds for exclusion are eliminated from consideration.

The present rule proceeds upon the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he may be available. The theory finds vast support in the many exceptions to the hearsay rule developed by the common law in which unavailability of the declarant is not a relevant factor. The present rule is a synthesis of them, with revision where modern developments and conditions are believed to make that course appropriate.

In a hearsay situation, the declarant is, of course, a witness, and neither this rule nor Rule 804 dispenses with the requirement of firsthand knowledge. It may appear from his statement or be inferable from circumstances.

See Rule 602.

Exceptions (1) and (2). In considerable measure these two examples overlap, though based on somewhat different theories. The most significant practical difference will lie in the time lapse allowable between event and statement.

The underlying theory of Exception [paragraph] (1) is that substantial contemporaneity of event and statement negative the likelihood of deliberate of conscious misrepresentation. Moreover, if the witness is the declarant, he may be examined on the statement. If the witness is not the declarant, he may be examined as to the circumstances as an aid in evaluating the statement. Morgan, Basic Problems of Evidence 340-341 (1962).

The theory of Exception [paragraph] (2) is simply that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication. 6 Wigmore § 1747, p. 135. Spontaneity is the key factor in each instance, though arrived at by somewhat different routes. Both are needed in order to avoid needless niggling.

While the theory of Exception [paragraph] (2) has been criticized on the ground that excitement impairs accuracy of observation as well as eliminating conscious fabrication, Hutchins and Slesinger, Some Observations on the Law of Evidence: Spontaneous Exclamations, 28 Colum.L.Rev. 432 (1928), it finds support in cases without number. See cases in 6 Wigmore § 1750; Annot., 53 A.L.R.2d 1245 (statements as to cause of or responsibility for motor vehicle accident); Annot., 4 A.L.R.3d 149 (accusatory statements by homicide victims). Since unexciting events are less likely to evoke comment, decisions involving Exception [paragraph] (1) are far less numerous. Illustrative are *Tampa Elec. Co.* v. *Getrost,* 151 Fla. 558, 10 So.2d 83 (1942); *Houston Oxygen Co.* v. *Davis,* 139 Tex. 1, 161 S.W.2d 474 (1942); and cases cited in McCormick § 273, p. 585, n. 4.

With respect to the *time element,* Exception [paragraph] (1) recognizes that in many, if not most, instances precise contemporaneity is not possible, and hence a slight lapse is allowable. Under Exception [paragraph] (2) the standard of measurement is the duration of the state of excitement. "How long can excitement prevail? Obviously there are no pat answers and the character of the transaction or event will largely determine the significance of the time factor." Slough, Spontaneous Statements and State of Mind, 46 Iowa L.Rev. 224, 243 (1961); McCormick § 272, p. 580.

*Participation* by the declarant is not required: a nonparticipant may be moved to describe what he perceives, and one may be startled by an event in which he is not an actor. Slough, *supra;* McCormick, *supra;* 6 Wigmore § 1755; Annot., 78 A.L.R.2d 300.

Whether *proof of the startling event* may be made by the statement itself is largely an academic question, since in most cases there is present at least circumstantial evidence that something of a startling nature must have occurred. For cases in which the evidence consists of the condition of the declarant (injuries, state of shock), see *Insurance Co.* v. *Mosely,* 75 U.S. (8 Wall.), 397, 19 L.Ed. 437 (1869); *Wheeler* v. *United States,* 93 U.S.A.App. D.C. 159, 211 F.2d 19 (1953); cert. denied 347 U.S. 1019, 74 S.Ct. 876, 98 L.Ed. 1140; *Wetherbee* v. *Safety Casualty Co.,* 219 F.2d 274 (5th Cir. 1955); *Lampe* v. *United States,* 97 U.S.App.D.C. 160, 229 F.2d 43 (1956). Nevertheless, on occasion the only evidence may be the content of the statement itself, and rulings that it may be sufficient are described as "increasing," Slough, *supra* at 246, and as the "prevailing practice," McCormick § 272, p. 579. Illustrative are *Armour & Co.* v. *Industrial Commission,* 78 Colo. 569, 243 P. 546 (1926); *Young* v. *Stewart,* 191 N.C. 297, 131 S.E. 735 (1926). Moreover, under Rule 104(a) the judge is not limited by the hearsay rule in passing upon preliminary questions of fact.

Proof of declarant's perception by his statement presents similar considerations when declarant is identified. *People* v. *Poland*, 22 Ill.2d 175, 174 N.E.2d 804 (1961). However, when declarant is an unidentified bystander, the cases indicate hesitancy in upholding the statement alone as sufficient, *Garrett* v. *Howden*, 73 N.M. 307, 387 P.2d 874 (1963); *Beck* v. *Dye*, 200 Wash. 1, 92 P.2d 1113 (1939), a result which would under appropriate circumstances be consistent with the rule.

Permissible *subject matter* of the statement is limited under Exception [paragraph] (1) to description or explanation of the event or condition, the assumption being that spontaneity, in the absence of a startling event, may extend no farther. In Exception [paragraph] (2), however, the statement need only "relate" to the startling event or condition, thus affording a broader scope of subject matter coverage. 6 Wigmore §§1750, 1754. See *Sanitary Grocery Co.* v. *Snead*, 67 App.D.C. 129, 90 F.2d 374 (1937), slip-and-fall case sustaining admissibility of clerk's statement, "That has been on the floor for a couple of hours," and *Murphy Auto Parts Co., Inc.* v. *Ball*, 101 U.S.App.D.C. 416, 249 F.2d 508 (1957), upholding admission, on issue of driver's agency, of his statement that he had to call on a customer and was in a hurry to get home. Quick, Hearsay, Excitement, Necessity and the Uniform Rules: A Reappraisal of Rule 63(4), 6 Wayne L.Rev. 204, 206–209 (1960).

Similar provisions are found in Uniform Rule 63(4)(a) and (b); California Evidence Code §1240 (as to Exception (2) only); Kansas Code of Civil Procedure §60-460(d)(1) and (2); New Jersey Evidence Rule 63(4).

Exception (3) is essentially a specialized application of Exception [paragraph] (1), presented separately to enhance its usefulness and accessibility. See McCormick §§265, 268.

The exclusion of "statements of memory or belief to prove the fact remembered or believed" is necessary to avoid the virtual destruction of the hearsay rule which would otherwise result from allowing state of mind, provable by a hearsay statement, to serve as the basis for an inference of the happening of the event which produced the state of mind). *Shepard* v. *United States*, 290 U.S. 96, 54 S.Ct. 22, 78 L.Ed. 196 (1933); Maguire, The Hillmon Case—Thirty-three Years After, 38 Harv.L.Rev. 709, 719-731 (1925); Hinton, States of Mind and the Hearsay Rule, 1 U.Chi.L.Rev. 394, 421–423 (1934). The rule of *Mutual Life Ins. Co.* v. *Hillman*, 145 U.S. 285, 12 S.Ct. 909, 36 L.Ed. 706 (1892), allowing evidence of intention as tending to prove the doing of the act intended, is of course, left undisturbed.

The carving out, from the exclusion mentioned in the preceding paragraph, of declarations relating to the execution, revocation, identification, or terms of declarant's will represents an *ad hoc* judgment which finds ample reinforcement in the decisions, resting on practical grounds of necessity and expediency rather than logic. McCormick §271, pp. 577-578; Annot., 34 A.L.R.2d 588, 62 A.L.R.2d 855. A similar recognition of the need for and practical value of this kind of evidence is found in California Evidence Code §1260.

Exception (4). Even those few jurisdictions which have shied away from generally admitting statements of present condition have allowed them if made to a physician for purposes of diagnosis and treatment in view of the patient's strong motivation to be truthful. McCormick §266, p. 563. The same guarantee of trustworthiness extends to statements of past conditions and medical history, made for purposes of diagnosis or treatment. It also extends to statements as to causation, reasonably pertinent to the same purposes, in accord with the current trend, *Shell Oil Co.* v. *Industrial Commission*, 2 Ill.2d 590, 119 N.E.2d 224 (1954); McCormick §266, p. 564; New Jersey Evidence Rule 63(12)(c). Statements as to fault would not ordinarily qualify under this latter language. Thus a patient's statement that he was struck by an automobile would qualify but not his statement that the car was driven through a red light. Under the exception the statement need not have been made to a physician. Statements to hospital attendants, ambulance drivers, or even members of the family might be included.

Conventional doctrine has excluded from the hearsay exception, as not within its guarantee of truthfulness, statements to a physician consulted only for the purpose of enabling him to testify. While these statements were not admissible as substantive evidence, the expert was allowed to state the basis of his opinion, including statements of this kind. The distinction thus called for was one most unlikely to be made by juries. The rule accordingly rejects the limitation. This position is consistent with the provision of Rule 703 that the facts on which expert testimony is based need not be admissible in evidence if of a kind ordinarily relied upon by experts in the field.

Exception (5). A hearsay exception for recorded recollection is generally recognized and has been described as having "long been favored by the federal and practically all the state courts that have had occasion to decide the question." *United States* v. *Kelly*, 349 F.2d 720, 770 (2d Cir. 1965), citing numerous cases and sustaining the exception against a claimed denial of the right of confrontation. Many additional cases are cited in Annot., 82 A.L.R.2d 473, 520. The guarantee of trustworthiness is found in the reliability inherent in a record made while events were still fresh in mind and accurately reflecting them. *Owens* v. *State*, 67 Md. 307, 316, 10 A. 210, 212 (1887).

The principal controversy attending the exception has centered, not upon the propriety of the exception itself, but upon the question whether a preliminary requirement of impaired memory on the part of the witness should be imposed. The authorities are divided. If regard be had only to the accuracy of the evidence, admittedly impairment of the memory of the witness adds nothing to it and should not be required. McCormick §277, p. 593; 3 Wigmore §738, p. 76; *Jordan* v. *People*, 151 Colo. 133, 376 P.2d 699 (1962), cert. denied 373 U.S. 944, 83 S.Ct. 1553, 10 L.Ed.2d 699; *Hall* v. *State*, 223 Md. 158, 162 A.2d 751 (1960); *State* v. *Bindhammer*, 44 N.J. 372, 209 A.2d 124 (1965). Nevertheless, the absence of the requirement, it is believed, would encourage the use of statements carefully prepared for purposes of litigation under the supervision of attorneys, investigators, or claim adjusters. Hence the example includes a requirement that the witness not have "sufficient recollection to enable him to testify fully and accurately." To the same effect are California Evidence Code §1237 and New Jersey Rule 63(1)(b), and this has been the position of the federal courts. *Vicksburg & Meridian R.R.* v. *O'Brien*, 119 U.S. 99, 7 S.Ct. 118, 30 L.Ed. 299 (1886); *Ahern* v. *Webb*, 268 F.2d 45 (10th Cir. 1959); and see *N.L.R.B.* v. *Hudson Pulp and Paper Corp.*, 273 F.2d 660, 665 (5th Cir. 1960); *N.L.R.B.* v. *Federal Dairy Co.*, 297 F.2d 487 (1st Cir. 1962). But cf. *United States* v. *Adams*, 385 F.2d 548 (2d Cir. 1967).

No attempt is made in the exception to spell out the method of establishing the initial knowledge or the contemporaneity and accuracy of the record, leaving them to be dealt with as the circumstances of the particular case might indicate. Multiple person involvement in the process of observing and recording, as in *Rathbun* v. *Brancatella*, 93 N.J.L. 222, 107 A. 279 (1919), is entirely consistent with the exception.

Locating the exception at this place in the scheme of the rules is a matter of choice. There were two other possibilities. The first was to regard the statement as one of the group of prior statements of a testifying witness which are excluded entirely from the category of hearsay by Rule 801(d)(1). That category, however, requires that declarant be "subject to cross-examination," as to which the impaired memory aspect of the exception raises doubts. The other possibility was to include the exception among those covered by Rule 804. Since unavailability is required by that rule and lack of memory is listed as a species of unavailability by the definition of the term in Rule 804(a)(3), that treatment at first impression would seem appropriate.

The fact is, however, that the unavailability requirement of the exception is of a limited and peculiar nature. Accordingly, the exception is located at this point rather than in the context of a rule where unavailability is conceived of more broadly.

Exception (6) represents an area which has received much attention from those seeking to improve the law of evidence. The Commonwealth Fund Act was the result of a study completed in 1927 by a distinguished committee under the chairmanship of Professor Morgan. Morgan et al., The Law of Evidence: Some Proposals for its Reform 63 (1927). With changes too minor to mention, it was adopted by Congress in 1936 as the rule for federal courts. 28 U.S.C. § 1732. A number of states took similar action. The Commissioners on Uniform State Laws in 1936 promulgated the Uniform Business Records as Evidence Act, 9A U.L.A. 506, which has acquired a substantial following in the states. Model Code Rule 514 and Uniform Rule 63(13) also deal with the subject. Difference of varying degrees of importance exist among these various treatments.

These reform efforts were largely within the context of business and commercial records, as the kind usually encountered, and concentrated considerable attention upon relaxing the requirement of producing as witnesses, or accounting for the nonproduction of, all participants in the process of gathering, transmitting, and recording information which the common law had evolved as a burdensome and crippling aspect of using records of this type. In their areas of primary emphasis on witnesses to be called and the general admissibility of ordinary business and commercial records, the Commonwealth Fund Act and the Uniform Act appear to have worked well. The exception seeks to preserve their advantages.

On the subject of what witnesses must be called, the Commonwealth Fund Act eliminated the common law requirement of calling or accounting for all participants by failing to mention it. *United States* v. *Mortimer*, 118 F.2d 266 (2d Cir. 1941); *La Porte* v. *United States*, 300 F.2d 878 (9th Cir. 1962); McCormick § 290, p. 608. Model Code Rule 514 and Uniform Rule 63(13) did likewise. The Uniform Act, however, abolished the common law requirement in express terms, providing that the requisite foundation testimony might be furnished by "the custodian or other qualified witness." Uniform Business Records as Evidence Act, § 2; 9A U.L.A. 506. The exception follows the Uniform Act in this respect.

The element of unusual reliability of business records is said variously to be supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation. McCormick §§ 281, 286, 287; Laughlin, Business Entries and the Like, 46 Iowa L.Rev. 276 (1961). The model statutes and rules have sought to capture these factors and to extend their impact by employing the phrase "regular course of business," in conjunction with a definition of "business" far broader than its ordinarily accepted meaning. The result is a tendency unduly to emphasize a requirement of routineness and repetitiveness and an insistence that other types of records be squeezed into the fact patterns which give rise to traditional business records. The rule therefore adopts the phrase "the course of a regularly conducted activity" as capturing the essential basis of the hearsay exception as it has evolved and the essential element which can be abstracted from the various specifications of what is a "business."

Amplification of the kinds of activities producing admissible records has given rise to problems which conventional business records by their nature avoid. They are problems of the source of the recorded information, of entries in opinion form, of motivation, and of involvement as participant in the matters recorded.

Sources of information presented no substantial problem with ordinary business records. All participants, including the observer or participant furnishing the information to be recorded, were acting routinely, under a duty of accuracy, with employer reliance on the result, or in short "in the regular course of business." If, however, the supplier of the information does not act in the regular course, an essential link is broken; the assurance of accuracy does not extend to the information itself, and the fact that it may be recorded with scrupulous accuracy is of no avail. An illustration is the police report incorporating information obtained from a bystander: the officer qualifies as acting in the regular course but the informant does not. The leading case, *Johnson* v. *Lutz*, 253 N.Y. 124, 170 N.E. 517 (1930), held that a report thus prepared was inadmissible. Most of the authorities have agreed with the decision. *Gencarella* v. *Fyfe*, 171 F.2d 419 (1st Cir. 1948); *Gordon* v. *Robinson*, 210 F.2d 192 (3d Cir. 1954); *Standard Oil Co. of California* v. *Moore*, 251 F.2d 188, 214 (9th Cir. 1957), cert. denied 356 U.S. 975, 78 S.Ct. 1139, 2 L.Ed.2d 1148; *Yates* v. *Bair Transport, Inc.*, 249 F.Supp. 681 (S.D.N.Y. 1965); Annot., 69 A.L.R.2d 1148. Cf. *Hawkins* v. *Gorea Motor Express, Inc.*, 360 F.2d 933 (2d Cir 1966). *Contra*, 5 Wigmore § 1530a, n. 1, pp. 391–392. The point is not dealt with specifically in the Commonwealth Fund Act, the Uniform Act, or Uniform Rule 63(13). However, Model Code Rule 514 contains the requirement "that it was the regular course of that business for one with personal knowledge * * * to make such a memorandum or record or to transmit information thereof to be included in such a memorandum or record * * *." The rule follows this lead in requiring an informant with knowledge acting in the course of the regularly conducted activity.

Entries in the form of opinions were not encountered in traditional business records in view of the purely factual nature of the items recorded, but they are now commonly encountered with respect to medical diagnoses, prognoses, and test results, as well as occasionally in other areas. The Commonwealth Fund Act provided only for records of an "act, transaction, occurrence, or event," while the Uniform Act, Model Code Rule 514, and Uniform Rule 63(13) merely added the ambiguous term "condition." The limited phrasing of the Commonwealth Fund Act, 28 U.S.C. § 1732, may account for the reluctance of some federal decisions to admit diagnostic entries. *New York Life Ins. Co.* v. *Taylor*, 79 U.S.App.D.C. 66, 147 F.2d 297 (1945); *Lyles* v. *United States*, 103 U.S.App.D.C. 22, 254 F.2d 725 (1957), cert. denied 356 U.S. 961, 78 S.Ct. 997, 2 L.Ed.2d 1067; *England* v. *United States*, 174 F.2d 466 (5th Cir. 1949); *Skogen* v. *Dow Chemical Co.*, 375 F.2d 692 (8th Cir. 1967). Other federal decisions, however, experienced no difficulty in freely admitting diagnostic entries. *Reed* v. *Order of United Commercial Travelers*, 123 F.2d 252 (2d Cir. 1941); *Buckminster's Estate* v. *Commissioner of Internal Revenue*, 147 F.2d 331 (2d Cir. 1944); *Medina* v. *Erickson*, 226 F.2d 475 (9th Cir. 1955); *Thomas* v. *Hogan*, 308 F.2d 355 (4th Cir. 1962); *Glawe* v. *Rulon*, 284 F.2d 495 (8th Cir. 1960). In the state courts, the trend favors admissibility. *Borucki* v. *MacKenzie Bros. Co.*, 125 Conn. 92, 3 A.2d 224 (1938); *Allen* v. *St. Louis Public Service Co.*, 365 Mo. 677, 285 S.W.2d 663, 55 A.L.R.2d 1022 (1956); *People* v. *Kohlmeyer*, 284 N.Y. 366, 31 N.E.2d 490 (1940); *Weis* v. *Weis*, 147 Ohio St. 416, 72 N.E.2d 245 (1947). In order to make clear its adherence to the latter position, the rule specifically includes both diagnoses and opinions, in addition to acts, events, and conditions, as proper subjects of admissible entries.

Problems of the motivation of the informant have been a source of difficulty and disagreement. In *Palmer* v. *Hoffman*, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943), exclusion of an accident report made by the since deceased engineer, offered by defendant railroad trustees in a grade crossing collision case, was upheld. The report was not "in the regular course of business," not a record of the systematic conduct of the business as a business, said the Court. The report was prepared for use in litigating, not railroading. While the opinion mentions the motivation of the engineer only obliquely, the emphasis on records of routine operations is significant only by virtue of impact on motivation to be accurate. Absence of routineness raises lack of motivation to be accurate. The opinion of the Court of Appeals had gone beyond mere lack of motive to be accurate: the engineer's statement was "dripping with motivations to misrepresent." *Hoffman* v. *Palmer*, 129 F.2d 976, 991 (2d Cir. 1942). The direct introduction of motivation is a disturbing factor, since absence of motivation to misrepresent has not traditionally been a requirement of the rule; that records might be self-serving has not been a ground for exclusion. Laughlin, Business Records and the Like, 46 Iowa L.Rev. 276, 285 (1961). As Judge Clark said in his dissent, "I submit that there is hardly a grocer's account book which could not be excluded on that basis." 129 F.2d at 1002. A physician's evaluation report of a personal injury litigant would appear to be in the routine of his business. If the report is offered by the party at whose instance it was made, however, it has been held inadmissible, *Yates* v. *Bair Transport, Inc.*, 249 F.Supp. 681 (S.D.N.Y. 1965), otherwise if offered by the opposite party, *Korte* v. *New York, N.H. & H.R. Co.*, 191 F.2d 86 (2d Cir. 1951), cert. denied 342 U.S. 868, 72 S.Ct. 108, 96 L.Ed. 652.

The decisions hinge on motivation and which party is entitled to be concerned about it. Professor McCormick believed that the doctor's report or the accident report were sufficiently routine to justify admissibility. McCormick § 287, p. 604. Yet hesitation must be experienced in admitting everything which is observed and recorded in the course of a regularly conducted activity. Efforts to set a limit are illustrated by *Hartzog* v. *United States*, 217 F.2d 706 (4th Cir. 1954), error to admit worksheets made by since deceased deputy collector in preparation for the instant income tax evasion prosecution, and *United States* v. *Ware*, 247 F.2d 698 (7th Cir. 1957), error to admit narcotics agents' records of purchases. See also Exception [paragraph] (8), *infra*, as to the public record aspects of records of this nature. Some decisions have been satisfied as to motivation of an accident report if made pursuant to statutory duty, *United States* v. *New York Foreign Trade Zone Operators*, 304 F.2d 792 (2d Cir. 1962); *Taylor* v. *Baltimore & O. R. Co.*, 344 F.2d 281 (2d Cir. 1965), since the report was oriented in a direction other than the litigation which ensued. Cf. *Matthews* v. *United States*, 217 F.2d 409 (5th Cir. 1954). The formulation of specific terms which would assure satisfactory results in all cases is not possible. Consequently the rule proceeds from the base that records made in the course of a regularly conducted activity will be taken as admissible but subject to authority to exclude if "the sources of information or other circumstances indicate lack of trustworthiness."

Occasional decisions have reached for enhanced accuracy by requiring involvement as a participant in matters reported. *Clainos* v. *United States*, 82 U.S.App.D.C. 278, 163 F.2d 593 (1947), error to admit police records of convictions; *Standard Oil Co. of California* v. *Moore*, 251 F.2d 188 (9th Cir. 1957), cert. denied 356 U.S. 975, 78 S.Ct. 1139, 2 L.Ed.2d 1148, error to admit employees' records of observed business practices of others. The rule includes no requirement of this nature. Wholly acceptable records may involve matters merely observed, e.g. the weather.

The form which the "record" may assume under the rule is described broadly as a "memorandum, report, record, or data compilation, in any form." The expression "data compilation" is used as broadly descriptive of any means of storing information other than the conventional words and figures in written or documentary form. It includes, but is by no means limited to, electronic computer storage. The term is borrowed from revised Rule 34(a) of the Rules of Civil Procedure.

Exception (7). Failure of a record to mention a matter which would ordinarily be mentioned is satisfactory evidence of its nonexistence. Uniform Rule 63(14), Comment. While probably not hearsay as defined in Rule 801, *supra*, decisions may be found which class the evidence not only as hearsay but also as not within any exception. In order to set the question at rest in favor of admissibility, it is specifically treated here. McCormick § 289, p. 609; Morgan, Basic Problems of Evidence 314 (1962); 5 Wigmore § 1531; Uniform Rule 63(14); California Evidence Code § 1272; Kansas Code of Civil Procedure § 60-460(n); New Jersey Evidence Rule 63(14).

Exception (8). Public records are a recognized hearsay exception at common law and have been the subject of statutes without number. McCormick § 291. See, for example, 28 U.S.C. § 1733, the relative narrowness of which is illustrated by its nonapplicability to nonfederal public agencies, thus necessitating report to the less appropriate business record exception to the hearsay rule. *Kay* v. *United States*, 255 F.2d 476 (4th Cir. 1958). The rule makes no distinction between federal and nonfederal offices and agencies.

Justification for the exception is the assumption that a public official will perform his duty properly and the unlikelihood that he will remember details independently of the record. *Wong Wing Foo* v. *McGrath*, 196 F.2d 120 (9th Cir. 1952), and see *Chesapeake & Delaware Canal Co.* v. *United States*, 250 U.S. 123, 39 S.Ct. 407, 63 L.Ed. 889 (1919). As to items (a) and (b), further support is found in the reliability factors underlying records of regularly conducted activities generally. See Exception [paragraph] (6), supra.

(a) Cases illustrating the admissibility of records of the office's or agency's own activities are numerous. *Chesapeake & Delaware Canal Co.* v. *United States*, 250 U.S. 123, 39 S.Ct. 407, 63 L.Ed. 889 (1919), Treasury records of miscellaneous receipts and disbursements; *Howard* v. *Perrin*, 200 U.S. 71, 26 S.Ct. 195, 50 L.Ed. 374 (1906), General Land Office records; *Ballew* v. *United States*, 160 U.S. 187, 16 S.Ct. 263, 40 L.Ed. 388 (1895), Pension Office records.

(b) Cases sustaining admissibility of records of matters observed are also numerous. *United States* v. *Van Hook*, 284 F.2d 489 (7th Cir. 1960), remanded for resentencing 365 U.S. 609, 81 S.Ct. 823, 5 L.Ed.2d 821, letter from induction officer to District Attorney, pursuant to army regulations, stating fact and circumstances of refusal to be inducted; *T'Kach* v. *United States*, 242 F.2d 937 (5th Cir. 1957), affidavit of White House personnel officer that search of records showed no employment of accused, charged with fraudulently representing himself as an envoy of the President; *Minnehaha County* v. *Kelley*, 150 F.2d 356 (8th Cir. 1945); Weather Bureau records of rainfall; *United States* v. *Meyer*, 113 F.2d 387 (7th Cir. 1940), cert. denied 311 U.S. 706, 61 S.Ct. 174, 85 L.Ed. 459, map prepared by government engineer from information furnished by men working under his supervision.

(c) The more controversial area of public records is that of the so-called "evaluative" report. The disagreement among the decisions has been due in part, no doubt, to the variety of situations encountered, as well as to differences in principle. Sustaining admissibility are such cases as *United States* v. *Dumas*, 149 U.S. 278, 13 S.Ct. 872, 37 L.Ed. 734 (1893), statement of account certified by Postmaster General in action against postmaster; *McCarty* v. *United States*, 185 F.2d 520 (5th Cir. 1950), reh. denied 187 F.2d 234, Certificate of Settlement of General Accounting Office showing indebtedness and letter from Army official stating Government had performed, in action on contract to purchase and remove waste food from Army camp; *Moran* v. *Pittsburgh-Des Moines Steel Co.*, 183 F.2d 467 (3d Cir. 1950), report of Bureau of Mines as to cause of gas tank explosion; Petition of W—, 164 F.Supp. 659 (E.D.Pa.1958), report by Immigration and Naturalization Service investigator that petitioner was known in community as wife of man to whom she was not married. To the opposite effect and denying admissibility are *Franklin* v. *Skelly Oil Co.*, 141 F.2d 568 (10th Cir. 1944), State Fire Marshal's report of cause of gas explosion; *Lomax Transp. Co.* v. *United States*, 183 F.2d 331 (9th Cir. 1950), Certificate of Settlement from General Accounting Office in action for naval supplies lost in warehouse fire; *Yung Jin Teung* v. *Dulles*, 229 F.2d 244 (2d Cir. 1956), "Status Reports" offered to justify delay in processing passport applications. Police reports have generally been excluded except to the extent to which they incorporate firsthand observations of the officer. Annot., 69 A.L.R.2d 1148. Various kinds of evaluative reports are admissible under federal statutes: 7 U.S.C. § 78, findings of Secretary of Agriculture prima facie evidence of true grade of grain; 7 U.S.C. § 210(f), findings of Secretary of Agriculture prima facie evidence in action for damages against stockyard owner; 7 U.S.C. § 292, order by Secretary of Agriculture prima facie evidence in judicial enforcement proceedings against producers association monopoly; 7 U.S.C. § 1622(h), Department of Agriculture inspection certificates of products shipped in interstate commerce prima facie evidence; 8 U.S.C. § 1440(c), separation of alien from military service on conditions other than honorable provable by certificate from department in proceedings to revoke citizenship; 18 U.S.C. § 4245, certificate of Director of Prisons that convicted person has been examined and found probably incompetent at time of trial prima facie evidence in court hearing on competency; 42 U.S.C. § 269(b), bill of health by appropriate official prima facie evidence of vessel's sanitary history and condition and compliance with regulations; 46 U.S.C. § 679, certificate of consul presumptive evidence of refusal of master to transport destitute seamen to United States. While these statutory exceptions to the hearsay rule are left undisturbed, Rule 802, the willingness of Congress to recognize a substantial measure of admissibility for evaluative reports is a helpful guide.

Factors which may be of assistance in passing upon the admissibility of evaluative reports include; (1) the timeliness of the investigation, McCormack, Can the Courts Make Wider Use of Reports of Official Investigations? 42 Iowa L.Rev. 363 (1957); (2) the special skill or experience of the official, *id.*, (3) whether a hearing was held and the level at which conducted, *Franklin* v. *Skelly Oil Co.*, 141 F.2d 568 (10th Cir. 1944); (4) possible motivation problems suggested by *Palmer* v. *Hoffman*, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943). Others no doubt could be added.

The formulation of an approach which would give appropriate weight to all possible factors in every situation is an obvious impossibility. Hence the rule, as in Exception [paragraph] (6), assumes admissibility in the first instance but with ample provision for escape if sufficient negative factors are present. In one respect, however, the rule with respect to evaluate reports under item (c) is very specific; they are admissible only in civil cases and against the government in criminal cases in view of the almost certain collision with confrontation rights which would result from their use against the accused in a criminal case.

Exception (9). Records of vital statistics are commonly the subject of particular statutes making them admissible in evidence. Uniform Vital Statistics Act, 9C U.L.A. 350 (1957). The rule is in principle narrower than Uniform Rule 63(16) which includes reports required of persons performing functions authorized by statute, yet in practical effect the two are substantially the same. Comment Uniform Rule 63(16). The exception as drafted is in the pattern of California Evidence Code § 1281.

Exception (10). The principle of proving nonoccurrence of an event by evidence of the absence of a record which would regularly be made of its occurrence, developed in Exception [paragraph] (7) with respect to regularly conducted activities, is here extended to public records of the kind mentioned in Exceptions [paragraphs] (8) and (9). 5 Wigmore § 1633(6), p. 519. Some harmless duplication no doubt exists with Exception [paragraph] (7). For instances of federal statutes recognizing this method of proof, see 8 U.S.C. § 1284(b), proof of absence of alien crewman's name from outgoing manifest prima facie evidence of failure to detain or deport, and 42 U.S.C. § 405(c)(3), (4)(B), (4)(C), absence of HEW [Department of Health, Education, and Welfare] record prima facie evidence of no wages or self-employment income.

The rule includes situations in which absence of a record may itself be the ultimate focal point of inquiry, e.g. *People* v. *Love*, 310 Ill. 558, 142 N.E. 204 (1923), certificate of Secretary of State admitted to show failure to file documents required by Securities Law, as well as cases where the absence of a record is offered as proof of the nonoccurrence of an event ordinarily recorded.

The refusal of the common law to allow proof by certificate of the lack of a record or entry has no apparent justification, 5 Wigmore § 1678(7), p. 752. The rule takes the opposite position, as do Uniform Rule 63(17); California Evidence Code § 1284; Kansas Code of Civil Procedure § 60–460(c); New Jersey Evidence Rule 63(17). Congress has recognized certification as evidence of the lack of a record. 8 U.S.C. § 1360(d), certificate of Attorney General or other designated officer that no record of Immigration and Naturalization Service of specified nature or entry therein is found, admissible in alien cases.

Exception (11). Records of activities of religious organizations are currently recognized as admissible at least to the extent of the business records exception to the hearsay rule, 5 Wigmore § 1523, p. 371, and Exception [paragraph] (6) would be applicable. However, both the business record doctrine and Exception [paragraph] (6) require that the person furnishing the information be one in the business or activity. The result is such decisions as *Daily* v. *Grand Lodge*, 311 Ill. 184, 142 N.E. 478 (1924), holding a church record admissible to prove fact, date, and place of baptism, but not age of child except that he had at least been born at the time. In view of the unlikelihood that false information would be furnished on occasions of this kind, the rule contains no requirement that the informant be in the course of the activity. See California Evidence Code § 1315 and Comment.

Exception (12). The principle of proof by certification is recognized as to public officials in Exceptions [paragraphs] (8) and (10), and with respect to authentication in Rule 902. The present exception is a duplication to the extent that it deals with a certificate by a public official, as in the case of a judge who performs a marriage ceremony. The area covered by the rule is, however, substantially larger and extends the certification procedure to clergymen and the like who perform marriages and other ceremonies or administer sacraments. Thus certificates of such matters as baptism or confirmation, as well as marriage, are included. In principle they are as acceptable evidence as certificates of public officers. See 5 Wigmore § 1645, as to marriage certificates. When the person executing the certificate is not a public official, the self-authenticating character of documents purporting to emanate from public officials, see Rule 902, is lacking and proof is required that the person was authorized and did make the certificate. The time element, however, may safely be taken as supplied by the certificate, once authority and authenticity are established, particularly in view of the presumption that a document was executed on the date it bears.

For similar rules, some limited to certificates of marriage, with variations in foundation requirements, see Uniform Rule 63(18); California Evidence Code § 1316; Kansas Code of Civil Procedure § 60–460(p); New Jersey Evidence Rule 63(18).

Exception (13). Records of family history kept in family Bibles have by long tradition been received in evidence. 5 Wigmore §§ 1495, 1496, citing numerous statutes and decisions. See also Regulations, Social Security Administration, 20 C.F.R. § 404.703(c), recognizing family Bible entries as proof of age in the absence of public or church records. Opinions in the area also include inscriptions on tombstones, publicly displayed pedigrees, and engravings on rings. Wigmore, *supra*. The rule is substantially identical in coverage with California Evidence Code § 1312.

Exception (14). The recording of title documents is a purely statutory development. Under any theory of the admissibility of public records, the records would be receivable as evidence of the contents of the recorded document, else the recording process would be reduced to a nullity. When, however, the record is offered for the further purpose of proving execution and delivery, a problem of lack of first-hand knowledge by the recorder, not present as to contents, is presented. This problem is solved, seemingly in all jurisdictions, by qualifying for recording only those documents shown by a specified procedure, either acknowledgement or a form of probate, to have been executed and delivered. 5 Wigmore §§ 1647-1651. Thus what may appear in the rule, at first glance, as endowing the record with an effect independently of local law and inviting difficulties of an *Erie* nature under *Cities Service Oil Co.* v. *Dunlap*, 308 U.S. 208, 60 S.Ct. 201, 84 L.Ed. 196 (1939), is not present, since the local law in fact governs under the example.

Exception (15). Dispositive documents often contain recitals of fact. Thus a deed purporting to have been executed by an attorney in fact may recite the existence of the power of attorney, or a deed may recite that the grantors are all the heirs of the last record owner. Under the rule, these recitals are exempted from the hearsay rule. The circumstances under which dispositive documents are executed and the requirement that the recital be germane to the purpose of the document are believed to be adequate guarantees of trustworthiness, particularly in view of the nonapplicability of the rule if dealings with the property have been inconsistent with the document. The age of the document is of no significance, though in practical application the document will most often be an ancient one. See Uniform Rule 63(29), Comment.

Similar provisions are contained in Uniform Rule 63(29); California Evidence Code § 1330; Kansas Code of Civil Procedure § 60-460(aa); New Jersey Evidence Rule 63(29).

Exception (16). Authenticating a document as ancient, essentially in the pattern of the common law, as provided in Rule 901(b)(8), leaves open as a separate question the admissibility of assertive statements contained therein as against a hearsay objection. 7 Wigmore § 2145a. Wigmore further states that the ancient document technique of authentication is university conceded to apply to all sorts of documents, including letters, records, contracts, maps, and certificates, in addition to title documents, citing numerous decisions. *Id.* § 2145. Since most of these items are significant evidentially only insofar as they are assertive, their admission in evidence must be as a hearsay exception. But see 5 *id.* § 1573, p. 429, referring to recitals in ancient deeds as a "limited" hearsay exception. The former position is believed to be the correct one in reason and authority. As pointed out in McCormick § 298, danger of mistake is minimized by authentication requirements, and age affords assurance that the writing antedates the present controversy. See *Dallas County* v. *Commercial Union Assurance Co.*, 286 F.2d 388 (5th Cir. 1961), upholding admissibility of 58-year-old newspaper story. Cf. Morgan, Basic Problems of Evidence 364 (1962), but see *id.* 254.

For a similar provision, but with the added requirement that "the statement has since generally been acted upon as true by persons having an interest in the matter," see California Evidence Code § 1331.

Exception (17). Ample authority at common law supported the admission in evidence of items falling in this category. While Wigmore's text is narrowly oriented to lists, etc., prepared for the use of a trade or profession, 6 Wigmore § 1702, authorities are cited which include other kinds of publications, for example, newspaper market reports, telephone directories, and city directories. *Id.* §§ 1702-1706. The basis of trustworthiness is general reliance by the public or by a particular segment of it, and the motivation of the compiler to foster reliance by being accurate.

For similar provisions, see Uniform Rule 63(30); California Evidence Code § 1340; Kansas Code of Civil Procedure § 60-460(bb); New Jersey Evidence Rule 63(30). Uniform Commercial Code § 2-724 provides for admissibility in evidence of "reports in official publications or trade journals or in newspapers or periodicals of general circulation published as the reports of such [established commodity] market."

Exception (18). The writers have generally favored the admissibility of learned treatises, McCormick § 296, p. 621; Morgan, Basic Problems of Evidence 366 (1962); 6 Wigmore § 1692, with the support of occasional decisions and rules, *City of Dothan* v. *Hardy*, 237 Ala. 603, 188 So. 264 (1939); *Lewandowski* v. *Preferred Risk Mut. Ins. Co.*, 33 Wis.2d 69, 146 N.W.2d 505 (1966), 66 Mich.L.Rev. 183 (1967); Uniform Rule 63(31); Kansas Code of Civil Procedure § 60-460(ce), but the great weight of authority has been that learned treatises are not admissible as substantive evidence though usable in the cross-examination of experts. The foundation of the minority view is that the hearsay objection must be regarded as unimpressive when directed against treatises since a high standard of accuracy is engendered by various factors: the treatise is written primarily and impartially for professionals, subject to scrutiny and exposure for inaccuracy, with the reputation of the writer at stake. 6 Wigmore § 1692. Sound as this position may be with respect to trustworthiness, there is, nevertheless, an additional difficulty in the likelihood that the treatise will be misunderstood and misapplied without expert assistance and supervision. This difficulty is recognized in the cases demonstrating unwillingness to sustain findings relative to disability on the basis of judicially noticed medical texts. *Ross* v. *Gardner*, 365 F.2d 554 (6th Cir. 1966); *Sayers* v. *Gardner*, 380 F.2d 940 (6th Cir. 1967); *Colwell* v. *Gardner*, 386 F.2d 56 (6th Cir. 1967); *Glendenning* v. *Ribicoff*, 213 F.Supp. 301 (W.D.Mo. 1962); *Cook* v. *Celebrezze*, 217 F.Supp. 366 (W.D.Mo. 1963); *Sosna* v. *Celebrezze*, 234 F.Supp. 289 (E.D.Pa. 1964); and see *McDaniel* v. *Celebrezze*, 331 F.2d 426 (4th Cir. 1964). The rule avoids the danger of misunderstanding and misapplication by limiting the use of treatises as substantive evidence to situations in which an expert is on the stand and available to explain and assist in the application of the treatise if declared. The limitation upon receiving the publication itself physically in evidence, contained in the last sentence, is designed to further this policy.

The relevance of the use of treatises on cross-examination is evident. This use of treatises has been the subject of varied views. The most restrictive position is that the witness must have stated expressly on direct his reliance upon the treatise. A slightly more liberal approach still insists upon reliance but allows it to be developed on cross-examination. Further relaxation dispenses with reliance but requires recognition as an authority by the witness, developable on cross-examination. The greatest liberality is found in decisions allowing use of the treatise on cross-examination when its status as an authority is established by any means. Annot., 60 A.L.R.2d 77. The exception is hinged upon this last position, which is that of the Supreme Court, *Reilly* v. *Pinkus*, 338 U.S. 269, 70 S.Ct. 110, 94 L.Ed. 63 (1949), and of recent well considered state court decisions, *City of St. Petersburg* v. *Ferguson*, 193 So.2d 648 (Fla.App. 1967), cert. denied Fla., 201 So.2d 556; *Darling* v. *Charleston Memorial Community Hospital*, 33 Ill.2d 326, 211 N.E.2d 253 (1965); *Dabroe* v. *Rhodes Co.*, 64 Wash.2d 431, 392 P.2d 317 (1964).

In *Reilly* v. *Pinkus*, *supra*, the Court pointed out that testing of professional knowledge was incomplete without exploration of the witness' knowledge of and attitude toward established treatises in the field. The process works equally well in reverse and furnishes the basis of the rule.

The rule does not require that the witness rely upon or recognize the treatise as authoritative, thus avoiding the possibility that the expert may at the outset block cross-examination by refusing to concede reliance or authoritativeness. *Dabroe* v. *Rhodes Co.*, *supra*. Moreover, the rule avoids the unreality of admitting evidence for the purpose of impeachment only, with an instruction to the jury not to consider it otherwise. The parallel to the treatment of prior inconsistent statements will be apparent. See Rules 6130(b) and 801(d)(1).

Exceptions (19), (20), and (21). Trustworthiness in reputation evidence is found "when the topic is such that the facts are likely to have been inquired about and that persons having personal knowledge have disclosed facts which have thus been discussed in the community; and thus the community's conclusion, if any has been formed, is likely to be a trustworthy one." 5 Wigmore § 1580, p. 444, and see also § 1583. On this common foundation, reputation as to land boundaries, customs, general history, character, and marriage have come to be regarded as admissible. The breadth of the underlying principle suggests the formulation of an equally broad exception, but tradition has in fact been much narrower and more particularized, and this is the pattern of these exceptions in the rule.

Exception [paragraph] (19) is concerned with matters of personal and family history. Marriage is universally conceded to be a proper subject of proof by evidence of reputation in the community. 5 Wigmore § 1602. As to such items as legitimacy, relationship, adoption, birth, and death, the decisions are divided. *Id.* § 1605. All seem to be susceptible to being the subject of well founded repute. The "world" in which the reputation may exist may be family, associates, or community. This world has proved capable of expanding with changing times from the single uncomplicated neighborhood, in which all activities take place, to the multiple and unrelated worlds of work, religious affiliation, and social activity, in each of which a reputation may be generated. *People* v. *Reeves*, 360 Ill. 55, 195 N.E. 443 (1935); *State* v. *Axilrod*, 248 Minn. 204, 79 N.W.2d 677 (1956); Mass.Stat. 1947, c. 410, M.G.L.A. c. 233 § 21A; 5 Wigmore § 1616. The family has often served as the point of beginning for allowing community reputation. 5 Wigmore § 1488. For comparable provisions see Uniform Rule 63(26), (27)(c); California Evidence Code §§ 1313, 1314; Kansas Code of Civil Procedure § 60-460(x), (y)(3); New Jersey Evidence Rule 63(26), (27)(c).

The first portion of Exception [paragraph] (20) is based upon the general admissibility of evidence of reputation as to land boundaries and land customs, expanded in this country to include private as well as public boundaries. McCormick § 299, p. 625. The reputation is required to antedate the controversy, though not to be ancient. The second portion is likewise supported by authority, *id.*, and is designed to facilitate proof of events when judicial notice is not available The historical character of the subject matter dispenses with any need that the reputation antedate the controversy with respect to which it is offered. For similar provisions see Uniform Rule 63(27)(a), (b); California Evidence Code §§ 1320-1322; Kansas Code of Civil Procedure § 60-460(y), (1), (2); New Jersey Evidence Rule 63(27)(a), (b).

Exception [paragraph] (21) recognizes the traditional acceptance of reputation evidence as a means of proving human character. McCormick §§ 44, 158. The exception deals only with the hearsay aspect of this kind of evidence. Limitations upon admissibility based on other grounds will be found in Rules 404, relevancy of character evidence generally, and 608, character of witness. The exception is in effect a reiteration, in the context of hearsay, of Rule 405(a). Similar provisions are contained in Uniform Rule 63(28); California Evidence Code § 1324; Kansas Code of Civil Procedure § 60-460(z); New Jersey Evidence Rule 63(28).

Exception (22). When the status of a former judgment is under consideration in subsequent litigation, three possibilities must be noted: (1) the former judgment is conclusive under the doctrine of res judicata, either as a bar or a collateral estoppel; or (2) it is admissible in evidence for what it is worth; or (3) it may be of no effect at all. The first situation does not involve any problem of evidence except in the way that principles of substantive law generally bear upon the relevancy and materiality of evidence. The rule does not deal with the substantive effect of the judgment as a bar or collateral estoppel. When, however, the doctrine of res judicata does not apply to make the judgment either a bar or a collateral estoppel, a choice is presented between the second and third alternatives. The rule adopts the second for judgments of criminal conviction of felony grade. This is the direction of the decisions, Annot., 18 A.L.R.2d 1287, 1299, which manifest an increasing reluctance to reject *in toto* the validity of the law's factfinding processes outside the confines of res judicata and collateral estoppel. While this may leave a jury with the evidence of conviction but without means to evaluate it, as suggested by Judge Hinton, Note 27 Ill.L.Rev. 195 (1932), it seems safe to assume that the jury will give it substantial effect unless defendant offers a satisfactory explanation, a possibility not foreclosed by the provision. But see *North River Ins. Co.* v. *Militello*, 104 Colo. 28, 88 P.2d 567 (1939), in which the jury found for plaintiff on a fire policy despite the introduction of his conviction for arson. For supporting federal decisions see Clark, J., in *New York & Cuba Mail S.S. Co.* v. *Continental Cas. Co.*, 117 F.2d 404, 411 (2d Cir. 1941); *Connecticut Fire Ins. Co.* v. *Farrara*, 277 F.2d 388 (8th Cir. 1960).

Practical considerations require exclusion of convictions of minor offenses, not became the administration of justice in its lower echelons must be inferior, but because motivation to defend at this level is often minimal or nonexistent. *Cope* v. *Goble*, 39 Cal.App.2d 448, 103 P.2d 598 (1940); *Jones* v. *Talbot*, 87 Idaho 498, 394 P.2d 316 (1964); *Warren* v. *Marsh*, 215 Minn. 615, 11 N.W.2d 528 (1943); Annot., 18 A.L.R.2d 1287, 1295-1297; 16 Brooklyn L.Rev. 286 (1950); 50 Colum.L.Rev. 529 (1950); 35 Cornell L.Q. 872 (1950). Hence the rule includes only convictions of felony grade, measured by federal standards.

Judgments of conviction based upon pleas of *nolo contendere* are not included. This position is consistent with the treatment of *nolo* pleas in Rule 410 and the authorities cited in the Advisory Committee's Note in support thereof.

While these rules do not in general purport to resolve constitutional issues, they have in general been drafted with a view to avoiding collision with constitutional principles. Consequently the exception does not include evidence of the conviction of a third person, offered against the accused in a criminal prosecution to prove any fact essential to sustain the judgment of conviction. A contrary position would seem clearly to violate the right of confrontation. *Kirby* v. *United States*, 174 U.S. 47, 19 S.Ct. 574, 43 L.Ed. 890 (1899), error to convict of possessing stolen postage stamps with the only evidence of theft being the record of conviction of the thieves The situation is to be distinguished from cases in which conviction of another person is an element of the crime, e.g. 15 U.S.C. § 902(d), interstate shipment of firearms to a known convicted felon, and, as specifically provided, from impeachment.

For comparable provisions see Uniform Rule 63(20); California Evidence Code § 1300; Kansas Code of Civil Procedure § 60-460(r); New Jersey Evidence Rule 63(20).

Exception (23). A hearsay exception in this area was originally justified on the ground that verdicts were evidence of reputation. As trial by jury graduated from the category of neighborhood inquests, this theory lost its validity. It was never valid as to chancery decrees. Nevertheless the rule persisted, though the judges and writers shifted ground and began saying that the judgment or decree was as good evidence as reputation. See *City of London* v. *Clerke*, Carth. 181, 90 Eng.Rep. 710 (K.B. 1691); *Neill* v. *Duke of Devonshire*, 8 App.Cas. 135 (1882). The shift appears to be correct, since the process of inquiry, sifting, and scrutiny which is relied upon to render reputation reliable is present in perhaps greater measure in the process of litigation. While this might suggest a broader area of application, the affinity to reputation is strong, and paragraph [paragraph] (23) goes no further, not even including character.

The leading case in the *United States*, *Patterson* v. *Gaines*, 47 U.S. (6 How.) 550, 599, 12 L.Ed. 553 (1847), follows in the pattern of the English decisions, mentioning as illustrative matters thus provable: manorial rights, public rights of way, immemorial custom, disputed boundary, and pedigree. More recent recognition of the principle is found in *Grant Bros. Construction Co.* v. *United States*, 232 U.S. 647, 34 S.Ct. 452, 58 L.Ed. 776 (1914), in action for penalties under Alien Contract Labor Law, decision of board of inquiry of Immigration Service admissible to prove alienage of laborers, as a matter of pedigree; *United States* v. *Mid-Continent Petroleum Corp.*, 67 F.2d 37 (10th Cir. 1933), records of commission enrolling Indians admissible on pedigree; *Jung Yen Loy* v. *Cahill*, 81 F.2d 809 (9th Cir. 1936), board decisions as to citizenship of plaintiff's father admissible in proceeding for declaration of citizenship. *Contra*, In re Estate of Cunha, 49 Haw. 273, 414 P.2d 925 (1966).

### NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 93-650

Rule 803(3) was approved in the form submitted by the Court to Congress. However, the Committee intends that the Rule be construed to limit the doctrine of *Mutual Life Insurance Co. v. Hillmon*, 145 U.S. 285, 295–300 (1892), so as to render statements of intent by a declarant admissible only to prove his future conduct, not the future conduct of another person.

After giving particular attention to the question of physical examination made solely to enable a physician to testify, the Committee approved Rule 803(4) as submitted to Congress, with the understanding that it is not intended in any way to adversely affect present privilege rules or those subsequently adopted.

Rule 803(5) as submitted by the Court permitted the reading into evidence of a memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify accurately and fully, "shown to have been made when the matter was fresh in his memory and to reflect that knowledge correctly." The Committee amended this Rule to add the words "or adopted by the witness" after the phrase "shown to have been made", a treatment consistent with the definition of "statement" in the Jencks Act, 18 U.S.C. 3500. Moreover, it is the Committee's understanding that a memorandum or report, although barred under this Rule, would nonetheless be admissible if it came within another hearsay exception. This last stated principle is deemed applicable to all the hearsay rules.

Rule 803(6) as submitted by the Court permitted a record made "in the course of a regularly conducted activity" to be admissible in certain circumstances. The Committee believed there were insufficient guarantees of reliability in records made in the course of activities falling outside the scope of "business" activities as that term is broadly defined in 28 U.S.C. 1732. Moreover, the Committee concluded that the additional requirement of Section 1732 that it must have been the regular practice of a business to make the record is a necessary further assurance of its trustworthiness. The Committee accordingly amended the Rule to incorporate these limitations.

Rule 803(7) as submitted by the Court concerned the *absence* of entry in the records of a "regularly conducted activity." The Committee amended this Rule to conform with its action with respect to Rule 803(6).

The Committee approved Rule 803(8) without substantive change from the form in which it was submitted by the Court. The Committee intends that the phrase "factual findings" be strictly construed and that evaluations or opinions contained in public reports shall not be admissible under this Rule.

The Committee approved this Rule in the form submitted by the Court, intending that the phrase "Statements of fact concerning personal or family history" be read to include the specific types of such statements enumerated in Rule 803(11).

### NOTES OF COMMITTEE ON THE JUDICIARY, SENATE REPORT NO. 93-1277

The House approved this rule as it was submitted by the Supreme Court "with the understanding that it is not intended in any way to adversely affect present privilege rules." We also approve this rule, and we would point out with respect to the question of its relation to privileges, it must be read in conjunction with rule 35 of the Federal Rules of Civil Procedure which provides that whenever the physical or mental condition of a party (plaintiff or defendant) is in controversy, the court may require him to submit to an examination by a physician. It is these examinations which will normally be admitted under this exception.

Rule 803(5) as submitted by the Court permitted the reading into evidence of a memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify accurately and fully, "shown to have been made when the matter was fresh in his memory and to reflect that knowledge correctly." The House amended the rule to add the words "or adopted by the witness" after the phrase "shown to have been made," language parallel to the Jencks Act [18 U.S.C. § 3500].

The committee accepts the House amendment with the understanding and belief that it was not intended to narrow the scope of applicability of the rule. In fact, we understand it to clarify the rule's applicability to a memorandum adopted by the witness as well as one made by him. While the rule as submitted by the Court was silent on the question of who made the memorandum, we view the House amendment as a helpful clarification, noting, however, that the Advisory Committee's note to this rule suggests that the important thing is the accuracy of the memorandum rather than who made it.

The committee does not view the House amendment as precluding admissibility in situations in which multiple participants were involved.

When the verifying witness has not prepared the report, but merely examined it and found it accurate, he has adopted the report, and it is therefore admissible. The rule should also be interpreted to cover other situations involving multiple participants, e.g., employer dictating to secretary, secretary making memorandum at direction of employer, or information being passed along a chain of persons, as in *Curtis* v. *Bradley* [65 Conn. 99, 31 Atl. 591 (1894); see, also *Rathbun* v. *Brancatella*, 93 N.J.L. 222, 107 Atl. 279 (1919); see, also McCormick on Evidence, § 303 (2d ed. 1972)].

The committee also accepts the understanding of the House that a memorandum or report, although barred under rule, would nonetheless be admissible if it came within another hearsay exception. We consider this principle to be applicable to all the hearsay rules.

Rule 803(6) as submitted by the Supreme Court permitted a record made in the course of a regularly conducted activity to be admissible in certain circumstances. This rule constituted a broadening of the traditional business records hearsay exception which has been long advocated by scholars and judges active in the law of evidence

The House felt there were insufficient guarantees of reliability of records not within a broadly defined business records exception. We disagree. Even under the House definition of "business" including profession, occupation, and "calling of every kind," the records of many regularly conducted activities will, or may be, excluded from evidence. Under the principle of ejusdem generis, the intent of "calling of every kind" would seem to be related to work-related endeavors—e.g., butcher, baker, artist, etc.

Thus, it appears that the records of many institutions or groups might not be admissible under the House amendments. For example, schools, churches, and hospitals will not normally be considered businesses within the definition. Yet, these are groups which keep financial and other records on a regular basis in a manner similar to business enterprises. We believe these records are of equivalent trustworthiness and should be admitted into evidence.

Three states, which have recently codified their evidence rules, have adopted the Supreme Court version of rule 803(6), providing for admission of memoranda of a "regularly conducted activity." None adopted the words "business activity" used in the House amendment. [See Nev. Rev. Stats. § 15.135; N. Mex. Stats. (1973 Supp.) § 20-4-803(6); West's Wis. Stats. Anno. (1973 Supp.) § 908.03(6).]

Therefore, the committee deleted the word "business" as it appears before the word "activity". The last sentence then is unnecessary and was also deleted.

It is the understanding of the committee that the use of the phrase "person with knowledge" is not intended to imply that the party seeking to introduce the memorandum, report, record, or data compilation must be able to produce, or even identify, the specific individual upon whose first-hand knowledge the memorandum, report, record or data compilation was based. A sufficient foundation for the introduction of such evidence will be laid if the party seeking to introduce the evidence is able to show that it was the regular practice of the activity to base such memorandums, reports, records, or data compilations upon a transmission from a person with knowledge, e.g., in the case of the content of a shipment of goods, upon a report from the company's receiving agent or in the case of a computer printout, upon a report from the company's computer programer or one who has knowledge of the particular record system. In short, the scope of the phrase "person with knowledge" is meant to be coterminous with the custodian of the evidence or other qualified witness. The committee believes this represents the desired rule in light of the complex nature of modern business organizations.

The House approved rule 803(8), as submitted by the Supreme Court, with one substantive change. It excluded from the hearsay exception reports containing matters observed by police officers and other law enforcement personnel in criminal cases. Ostensibly, the reason for this exclusion is that observations by police officers at the scene of the crime or the apprehension of the defendant are not as reliable as observations by public officials in other cases because of the adversarial nature of the confrontation between the police and the defendant in criminal cases.

The committee accepts the House's decision to exclude such recorded observations where the police officer is available to testify in court about his observation. However, where he is unavailable as unavailability is defined in rule 804(a)(4) and (a)(5), the report should be admitted as the best available evidence. Accordingly, the committee has amended rule 803(8) to refer to the provision of [proposed] rule 804(b)(5) [deleted], which allows the admission of such reports, records or other statements where the police officer or other law enforcement officer is unavailable because of death, then existing physical or mental illness or infirmity, or not being successfully subject to legal process.

The House Judiciary Committee report contained a statement of intent that "the phrase 'factual findings' in subdivision (c) be strictly construed and that evaluations or opinions contained in public reports shall not be admissible under this rule." The committee takes strong exception to this limiting understanding of the application of the rule. We do not think it reflects an understanding of the intended operation of the rule as explained in the Advisory Committee notes to this subsection. The Advisory Committee notes on subsection (c) of this subdivision point out that various kinds of evaluative reports are now admissible under Federal statutes. 7 U.S.C. § 78, findings of Secretary of Agriculture prima facie evidence of true grade of grain; 42 U.S.C. § 269(b), bill of health by appropriate official prima facie evidence of vessel's sanitary history and condition and compliance with regulations. These statutory exceptions to the hearsay rule are preserved. Rule 802. The willingness of Congress to recognize these and other such evaluative reports provides a helpful guide in determining the kind of reports which are intended to be admissible under this rule. We think the restrictive interpretation of the House overlooks the fact that while the Advisory Committee assumes admissibility in the first instance of evaluative reports, they are not admissible if, as the rule states, "the sources of information or other circumstances indicate lack of trustworthiness."

The Advisory Committee explains the factors to be considered:

* * * * *

> Factors which may be assistance in passing upon the admissibility of evaluative reports include: (1) the timeliness of the investigation, McCormick, Can the Courts Make Wider Use of Reports of Official Investigations? 42 Iowa L.Rev. 363 (1957); (2) the special skill or experience of the official, id.; (3) whether a hearing was held and the level at which conducted, *Franklin* v. *Skelly Oil Co.*, 141 F.2d 568 (19th Cir. 1944); (4) possible motivation problems suggested by *Palmer* v. *Hoffman*, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943). Others no doubt could be added.

* * * * *

The committee concludes that the language of the rule together with the explanation provided by the Advisory Committee furnish sufficient guidance on the admissibility of evaluative reports.

The proposed Rules of Evidence submitted to Congress contained identical provisions in rules 803 and 804 (which set forth the various hearsay exceptions), admitting any hearsay statement not specifically covered by any of the stated exceptions, if the hearsay statement was found to have "comparable circumstantial guarantees of trustworthiness." The House deleted these provisions (proposed rules 803(24) and 804(b)(6)[(5)]) as injecting "too much uncertainty" into the law of evidence and impairing the ability of practitioners to prepare for trial. The House felt that rule 102, which directs the courts to construe the Rules of Evidence so as to promote growth and development, would permit sufficient flexibility to admit hearsay evidence in appropriate cases under various factual situations that might arise.

We disagree with the total rejection of a residual hearsay exception. While we view rule 102 as being intended to provide for a broader construction and interpretation of these rules, we feel that, without a separate residual provision, the specifically enumerated exceptions could become tortured beyond any reasonable circumstances which they were intended to include (even if broadly construed). Moreover, these exceptions, while they reflect the most typical and well recognized exceptions to the hearsay rule, may not encompass every situation in which the reliability and appropriateness of a particular piece of hearsay evidence make clear that it should be heard and considered by the trier of fact.

The committee believes that there are certain exceptional circumstances where evidence which is found by a court to have guarantees of trust worthiness equivalent to or exceeding the guarantees reflected by the presently listed exceptions, and to have a high degree of prolativeness and necessity could properly be admissible.

The case of *Dallas County* v. *Commercial Union Assoc. Co., Ltd.*, 286 F.2d 388 (5th Cir. 1961) illustrates the point. The issue in that case was whether the tower of the county courthouse collapsed becuase it was struck by lightning (covered by insurance) or because of structural weakness and deterioration of the structure (not covered). Investigation of the structure revealed the presence of charcoal and charred timbers. In order to show that lightning may not have been the cause of the charring, the insurer offered a copy of a local newspaper published over 50 years earlier containing an unsigned article describing a fire in the courthouse while it was under construction. The Court found that the newspaper did not qualify for admission as a business record or an ancient document and did not fit within any other recognized hearsay exception. The court concluded, however, that the article was trustworthy because it was inconceivable that a newspaper reporter in a small town would report a fire in the courthouse if none had occurred. *See also United States* v. *Barbati*, 284 F. Supp. 409 (E.D.N.Y. 1968).

Because exceptional cases like the *Dallas County* case may arise in the future, the committee has decided to reinstate a residual exception for rules 803 and 804(b).

The committee, however, also agrees with those supporters of the House version who felt that an overly broad residual hearsay exception could emasculate the hearsay rule and the recognized exceptions or vitiate the rationale behind codification of the rules.

Therefore, the committee has adopted a residual exception for rules 803 and 804(b) of much narrower scope and applicability than the Supreme Court version. In order to qualify for admission, a hearsay statement not falling within one of the recognized exceptions would have to satisfy at least four conditions. First, it must have "equivalent circumstantial guarantees of trustworthiness." Second, it must be offered as evidence of a material fact. Third, the court must determine that the statement "is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts." This requirement is intended to insure that only statements which have high probative value and necessity may qualify for admission under the residual exceptions. Fourth, the court must determine that "the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence."

It is intended that the residual hearsay exceptions will be used very rarely, an only in exceptional circumstances. The committee does not intend to establish a broad license for trial judges to admit hearsay statements that do not fall within one of the other exceptions contained in rules 803 and 804(b). The residual exceptions are not meant to authorize major judicial revisions of the hearsay rule, including its present exceptions. Such major revisions are best accomplished by legislative action. It is intended that in any case in which evidence is sought to be admitted under these subsections, the trial judge will exercise no less care, reflection and caution than the courts did under the common law in establishing the now-recognized exceptions to the hearsay rule.

In order to establish a well-defined jurisprudence, the special facts and circumstances which, in the court's judgment, indicates that the statement has a sufficiently high degree of trustworthiness and necessity to justify its admission should be stated on the record. It is expected that the court will give the opposing party a full and adequate opportunity to contest the admission of any statement sought to be introduced under these subsections.

### NOTES OF CONFERENCE COMMITTEE, HOUSE REPORT NO. 93-1597

Rule 803 defines when hearsay statements are admissible in evidence even though the declarant is available as a witness. The Senate amendments make three changes in this rule.

The House bill provides in subsection (6) that records of a regularly conducted "business" activity qualify for admission into evidence as an exception to the hearsay rule. "Business" is defined as including "business, profession, occupation and calling of every kind." The Senate amendment drops the requirement that the records be those of a "business" activity and eliminates the definition of "business." The Senate amendment provides that records are admissible if they are records of a regularly conducted "activity."

The Conference adopts the House provision that the records must be those of a regularly conducted "business" activity. The Conferees changed the definition of "business" contained in the House provision in order to make it clear that the records of institutions and associations like schools, churches and hospitals are admissible under this provision. The records of public schools and hospitals are also covered by Rule 803(8), which deals with public records and reports.

The Senate amendment adds language, not contained in the House bill, that refers to another rule that was added by the Senate in another amendment ([proposed] Rule 804(b)(5)—Criminal law enforcement records and reports [deleted]).

In view of its action on [proposed] Rule 804(b)(5) (Criminal law enforcement records and reports) [deleted], the Conference does not adopt the Senate amendment and restores the bill to the House version.

The Senate amendment adds a new subsection, (24), which makes admissible a hearsay statement not specifically covered by any of the previous twenty-three subsections, if the statement has equivalent circumstantial guarantees of trustworthiness and if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

The House bill eliminated a similar, but broader, provision because of the conviction that such a provision injected too much uncertainty into the law of evidence regarding hearsay and impaired the ability of a litigant to prepare adequately for trial.

The Conference adopts the Seante amendment with an amendment that provides that a party intending to request the court to use a statement under this provision must notify any adverse party of this intention as well as of the particulars of the statement, including the name and address of the declarant. This notice must be given sufficiently in advance of the trial or hearing to provide any adverse party with a fair opportunity to prepare to contest the use of the statement.

### AMENDMENTS

1975—Exception (23). Pub. L. 94-149 inserted a comma immediately after "family" in catchline.

## Rule 804. Hearsay Exceptions; Declarant Unavailable

(*a*) *Definition of unavailability.* "Unavailability as a witness" includes situations in which the declarant—

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or

(2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of his statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

(*b*) *Hearsay exceptions.* The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(*1*) *Former testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(*2*) *Statement under belief of impending death.* In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death.

(*3*) *Statement against interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the staement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(*4*) *Statement of personal or family history.* (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(*5*) *Other exceptions.* A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

(Pub. L. 93–595, § 1, Jan. 2, 1975, 88 Stat. 1942; Pub. L. 94–149, § 1(12), (13), Dec. 12, 1975, 89 Stat. 806.)

### NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

As to firsthand knowledge on the part of hearsay declarants, see the introductory portion of the Advisory Committee's Note to Rule 803.

*Subdivison* (*a*). The definition of unavailability implements the divison of hearsay exceptions into two categories by Rules 803 and 804(b).

At common law the unavailability requirement was evolved in connection with particular hearsay exceptions rather than along general lines. For example, see the separate explications of unavailability in relation to former testimony, declarations against interest, and statements of pedigree, separately developed in McCormick §§ 234, 257, and 297. However, no reason is apparent for making distinctions as to what satisfies unavailability for the different exceptions. The treatment in the rule is therefore uniform although differences in the range of process for witnesses between civil and criminal cases will lead to a less exacting requirement under item (5). See Rule 45(e) of the Federal Rules of Civil Procedure and Rule 17(e) of the Federal Rules of Criminal Procedure.

Five instances of unavailability are specified:

(1) Substantial authority supports the position that exercise of a claim of privilege by the declarant satisfies the requirement of unavailability (usually in connection with former testimony). *Wyatt* v. *State*, 35 Ala.App. 147, 46 So.2d 837 (1950); *State* v. *Stewart*, 85 Kan. 404, 116 P. 489 (1911); Annot., 45 A.L.R.2d 1354; Uniform Rule 62(7)(a); California Evidence Code § 240(a)(1); Kansas Code of Civil Procedure § 60–459(g)(1). A ruling by the judge is required, which clearly implies that an actual claim of privilege must be made.

(2) A witness is rendered unavailable if he simply refuses to testify concerning the subject matter of his statement despite judicial pressures to do so, a position supported by similar considerations of practicality. *Johnson* v. *People*, 152 Colo. 586, 384 P.2d 454 (1963); *People* v. *Pickett*, 339 Mich. 294, 63 N.W.2d 681, 45 A.L.R.2d 1341 (1954). *Contra*, *Pleau* v. *State*, 255 Wis. 362, 38 N.W.2d 496 (1949).

(3) The position that a claimed lack of memory by the witness of the subject matter of his statement constitutes unavailability likewise finds support in the cases, though not without dissent. McCormick § 234, p. 494. If the claim is successful, the practical effect is to put the testimony beyond reach, as in the other instances. In this instance, however, it will be noted that the lack of memory must be established by the testimony of the witness himself, which clearly contemplates his production and subjection to cross-examination.

(4) Death and infirmity find general recognition as ground. McCormick §§ 234, 257, 297; Uniform Rule 62(7)(c); California Evidence Code § 240(a)(3); Kansas Code of Civil Procedure § 60–459(g)(3); New Jersey Evidence Rule 62(6)(c). See also the provisions on use of depositions in Rule 32(a)(3) of the Federal Rules of Civil Procedure and Rule 15(e) of the Federal Rules of Criminal Procedure.

(5) Absence from the hearing coupled with inability to compel attendance by process or other reasonable means also satisfies the requirement. McCormick § 234; Uniform Rule 62(7)(d) and (e); California Evidence Code § 240(a)(4) and (5); Kansas Code of Civil Procedure § 60–459(g)(4) and (5); New Jersey Rule 62(6)(b) and (d). See the discussion of procuring attendance of witnesses who are nonresidents or in custody in *Barber* v. *Page*, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968).

If the conditions otherwise constituting unavailability result from the procurement or wrongdoing of the proponent of the statement, the requirement is not satisfied. The rule contains no requirement that an attempt be made to take the deposition of a declarant.

*Subdivision* (*b*). Rule 803 *supra*, is based upon the assumption that a hearsay statement falling within one of its exceptions possesses qualities which justify the conclusion that whether the declarant is available or unavailable is not a relevant factor in determining admissibility. The instant rule proceeds upon a different theory: hearsay which admittedly is not equal in quality to testimony of the declarant on the stand may nevertheless be admitted if the declarant is unavailable and if his statement meets a specified standard. The rule expresses preferences: testimony given on the stand in person is preferred over hearsay, and hearsay, if of the specified quality, is preferred over complete loss of the evidence of the declarant. The exceptions evolved at common law with respect to declarations of unavailable declarants furnish the basis for the exceptions enumerated in the proposal. The term "unavailable" is defined in subdivision (a).

*Exception (1).* Former testimony does not rely upon some set of circumstances to substitute for oath and cross-examination, since both oath and opportunity to cross-examine were present in fact. The only missing one of the ideal conditions for the giving of testimony is the presence of trier and opponent ("demeanor evidence"). This is lacking with all hearsay exceptions. Hence it may be argued that former testimony is the strongest hearsay and should be included under Rule 803, *supra.* However, opportunity to observe demeanor is what in a large measure confers depth and meaning upon oath and cross-examination. Thus in cases under Rule 803 demeanor lacks the significance which it possesses with respect to testimony. In any event, the tradition, founded in experience, uniformly favors production of the witness if he is available. The exception indicates continuation of the policy. This preference for the presence of the witness is apparent also in rules and statutes on the use of depositions, which deal with substantially the same problem.

Under the exception, the testimony may be offered (1) against the party *against* whom it was previously offered or (2) against the party *by* whom it was previously offered. In each instance the question resolves itself into whether fairness allows imposing, upon the party against whom now offered, the handling of the witness on the earlier occasion. (1) If the party against whom now offered is the one against whom the testimony was offered previously, no unfairness is apparent in requiring him to accept his own prior conduct of cross-examination or decision not to cross-examine. Only demeanor has been lost, and that is inherent in the situation. (2) If the party against whom now offered is the one *by* whom the testimony was offered previously, a satisfactory answer becomes somewhat more difficult. One possibility is to proceed somewhat along the line of an adoptive admission, i.e. by offering the testimony proponent in effect adopts it. However, this theory savors of discarded concepts of witnesses' belonging to a party, of litigants' ability to pick and choose witnesses, and of vouching for one's own witnesses. Cf. McCormick § 246, pp. 526–527; 4 Wigmore § 1075. A more direct and acceptable approach is simply to recognize direct and redirect examination of one's own witness as the equivalent of cross-examining an opponent's witness. Falknor, Former Testimony and the Uniform Rules: A Comment, 38 N.Y.U.L.Rev. 651, n. 1 (1963); McCormick § 231, p. 483. See also 5 Wigmore § 1389. Allowable techniques for dealing with hostile, doublecrossing, forgetful, and mentally deficient witnesses leave no substance to a claim that one could not adequately develop his own witness at the former hearing. An even less appealing argument is presented when failure to develop fully was the result of a deliberate choice.

The common law did not limit the admissibility of former testimony to that given in an earlier trial of the same case, although it did require identity of issues as a means of insuring that the former handling of the witness was the equivalent of what would now be done if the opportunity were presented. Modern decisions reduce the requirement to "substantial" identity. McCormick § 233. Since identity of issues is significant only in that it bears on motive and interest in developing fully the testimony of the witness, expressing the matter in the latter terms is preferable. *Id.* Testimony given at a preliminary hearing was held in *California* v. *Green,* 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970), to satisfy confrontation requirements in this respect.

As a further assurance of fairness in thrusting upon a party the prior handling of the witness, the common law also insisted upon identity of parties, deviating only to the extent of allowing substitution of successors in a narrowly construed privity. Mutuality as an aspect of identity is now generally discredited, and the requirement of identity of the offering party disappears except as it might affect motive to develop the testimony. Falknor, *supra,* at 652; McCormick § 232, pp. 487–488. The question remains whether strict identity, or privity, should continue as a requirement with respect to the party against whom offered. The rule departs to the extent of allowing substitution of one with the right and opportunity to develop the testimony with similar motive and interest. This position is supported by modern decisions. McCormick § 232, pp. 489–490; 5 Wigmore § 1388.

Provisions of the same tenor will be found in Uniform Rule 63(3)(b); California Evidence Code §§ 1290–1292; Kansas Code of Civil Procedure § 60–460(c)(2); New Jersey Evidence Rule 63(3). Unlike the rule, the latter three provide either that former testimony is not admissible if the right of confrontation is denied or that it is not admissible if the accused was not a party to the prior hearing. The genesis of these limitations is a caveat in Uniform Rule 63(3) Comment that use of former testimony against an accused may violate his right of confrontation. *Mattox* v. *United States,* 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895), held that the right was not violated by the Government's use, on a retrial of the same case, of testimony given at the first trial by two witnesses since deceased. The decision leaves open the questions (1) whether direct and redirect are equivalent to cross-examination for purposes of confrontation, (2) whether testimony given in a different proceeding is acceptable, and (3) whether the accused must himself have been a party to the earlier proceeding or whether a similarly situated person will serve the purpose. Professor Falknor concluded that, if a dying declaration untested by cross-examination is constitutionally admissible, former testimony tested by the cross-examination of one similarly situated does not offend against confrontation. Falknor, *supra,* at 659–660. The constitutional acceptability of dying declarations has often been conceded. *Mattox* v. *United States,* 156 U.S. 237, 243, 15 S.Ct. 337, 39 L.Ed. 409 (1895); *Kirby* v. *United States,* 174 U.S. 47, 61, 19 S.Ct. 574, 43 L.Ed. 890 (1899); *Pointer* v. *Texas,* 380 U.S. 400, 407, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

*Exception (2).* The exception is the familiar dying declaration of the common law, expanded somewhat beyond its traditionally narrow limits. While the original religious justification for the exception may have lost its conviction for some persons over the years, it can scarcely be doubted that powerful psychological pressures are present. See 5 Wigmore § 1443 and the classic statement of Chief Baron Eyre in *Rex* v. *Woodcock,* 1 Leach 500, 502, 168 Eng.Rep. 352, 353 (K.B. 1789).

The common law required that the statement be that of the victim, offered in a prosecution for criminal homicide. Thus declarations by victims in prosecutions for other crimes, e.g. a declaration by a rape victim who dies in childbirth, and all declarations in civil cases were outside the scope of the exception. An occasional statute has removed these restrictions, as in Colo.R.S. § 52-1-20, or has expanded the area of offenses to include abortions, 5 Wigmore § 1432, p. 224, n. 4. Kansas by decision extended the exception to civil cases. *Thurston* v. *Fritz,* 91 Kan. 468, 138 P. 625 (1914). While the common law exception no doubt originated as a result of the exceptional need for the evidence in homicide cases, the theory of admissibility applies equally in civil cases and in prosecutions for crimes other than homicide. The same considerations suggest abandonment of the limitation to circumstances attending the event in question, yet when the statement deals with matters other than the supposed death, its influence is believed to be sufficiently attenuated to justify the limitation. Unavailability is not limited to death. See subdivision (a) of this rule. Any problem as to declarations phrased in terms of opinion is laid at rest by Rule 701, and continuation of a requirement of first-hand knowledge is assured by Rule 602.

Comparable provisions are found in Uniform Rule 63 (5); California Evidence Code § 1242; Kansas Code of Civil Procedure § 60–460(e); New Jersey Evidence Rule 63(5).

*Exception (3).* The circumstantial guaranty of reliability for declarations against interest is the assumption that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true. *Hileman* v. *Northwest Engineering Co.*, 346 F.2d 668 (6th Cir. 1965). If the statement is that of a party, offered by his opponent, it comes in as an admission, Rule 803(d)(2), and there is no occasion to inquire whether it is against interest, this not being a condition precedent to admissibility of admissions by opponents.

The common law required that the interest declared against be pecuniary or proprietary but within this limitation demonstrated striking ingenuity in discovering an against-interest aspect. *Higham* v. *Ridgeway*, 10 East 109, 103 Eng.Rep. 717 (K.B. 1808); *Reg.* v. *Overseers of Birmingham*, 1 B. & S. 763, 121 Eng.Rep. 897 (Q.B. 1861); McCormick, § 256, p. 551, nn. 2 and 3.

The exception discards the common law limitation and expands to the full logical limit. One result is to remove doubt as to the admissibility of declarations tending to establish a tort liability against the declarant or to extinguish one which might be asserted by him, in accordance with the trend of the decisions in this country. McCormick § 254, pp. 548–549. Another is to allow statements tending to expose declarant to hatred, ridicule, or disgrace, the motivation here being considered to be as strong as when financial interests are at stake. McCormick § 255, p. 551. And finally, exposure to criminal liability satisfies the against-interest requirement. The refusal of the common law to concede the adequacy of a penal interest was no doubt indefensible in logic, see the dissent of Mr. Justice Holmes in *Donnelly* v. *United States*, 228 U.S. 243, 33 S.Ct. 449, 57 L.Ed. 820 (1913), but one senses in the decisions a distrust of evidence of confessions by third persons offered to exculpate the accused arising from suspicions of fabrication either of the fact of the making of the confession or in its contents, enhanced in either instance by the required unavailability of the declarant. Nevertheless, an increasing amount of decisional law recognizes exposure to punishment for crime as a sufficient stake. *People* v. *Spriggs*, 60 Cal.2d 868, 36 Cal.Rptr. 841, 389 P.2d 377 (1964); *Sutter* v. *Easterly*, 354 Mo. 282, 189 S.W.2d 284 (1945); *Band's Refuse Removal, Inc.* v. *Fairlawn Borough*, 62 N.J.Super. 552, 163 A.2d 465 (1960); *Newberry* v. *Commonwealth*, 191 Va. 445, 61 S.E.2d 318 (1950); Annot., 162 A.L.R. 446. The requirement of corroboration is included in the rule in order to effect an accommodation between these competing considerations. When the statement is offered by the accused by way of exculpation, the resulting situation is not adapted to control by rulings as to the weight of the evidence and, hence the provision is cast in terms of a requirement preliminary to admissibility. Cf. Rule 406(a). The requirement of corroboration should be construed in such a manner as to effectuate its purpose of circumventing fabrication.

Ordinarily the third-party confession is thought of in terms of exculpating the accused, but this is by no means always or necessarily the case: it may include statements implicating him, and under the general theory of declarations against interest they would be admissible as related statements. *Douglas* v. *Alabama*, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965), and *Bruton* v. *United States*, 389 U.S. 818, 88 S.Ct. 126, 19 L.Ed.2d 70 (1968), both involved confessions by codefendants which implicated the accused. While the confession was not actually offered in evidence in *Douglas*, the procedure followed effectively put it before the jury, which the Court ruled to be error. Whether the confession might have been admissible as a declaration against penal interest was not considered or discussed. *Bruton* assumed the inadmissibility, as against the accused, of the implicating confession of his codefendant, and centered upon the question of the effectiveness of a limiting instruction. These decisions, however, by no means require that all statements implicating another person be excluded from the category of declarations against interest. Whether a statement is in fact against interest must be determined from the circumstances of each case. Thus a statement admitting guilt and implicating another person, made while in custody, may well be motivated by a desire to curry favor with the authorities and hence fail to qualify as against interest. See the dissenting opinion of Mr. Justice White in *Bruton*. On the other hand, the same words spoken under different circumstances, *e.g.*, to an acquaintance, would have no difficulty in qualifying. The rule does not purport to deal with questions of the right of confrontation.

The balancing of self-serving against dissenting aspects of a declaration is discussed in McCormick § 256.

For comparable provisions, see Uniform Rule 63(10): California Evidence Code § 1230; Kansas Code of Civil Procedure § 60–460(j); New Jersey Evidence Rule 63(10).

*Exception (4).* The general common law requirement that a declaration in this area must have been made *ante litem motam* has been dropped, as bearing more appropriately on weight than admissibility. See 5 Wigmore § 1483. Item (i)[(A)] specifically disclaims any need of firsthand knowledge respecting declarant's own personal history. In some instances it is self-evident (marriage) and in others impossible and traditionally not required (date of birth). Item (ii)[(B)] deals with declarations concerning the history of another person. As at common law, declarant is qualified if related by blood or marriage. 5 Wigmore § 1489. In addition, and contrary to the common law, declarant qualifies by virtue of intimate association with the family. *Id.*, § 1487. The requirement sometimes encountered that when the subject of the statement is the relationship between two other persons the declarant must qualify as to both is omitted. Relationship is reciprocal. *Id.*, § 1491.

For comparable provisions, see Uniform Rule 63 (23), (24), (25); California Evidence Code §§ 1310, 1311; Kansas Code of Civil Procedure § 60–460(u), (v), (w); New Jersey Evidence Rules 63(23), 63(24), 63(25).

### Notes of Committee on the Judiciary, House Report No. 93–650

Rule 804(a)(3) was approved in the form submitted by the Court. However, the Committee intends no change in existing federal law under which the court may choose to disbelieve the declarant's testimony as to his lack of memory. See *United States* v. *Insana*, 423 F.2d 1165, 1169–1170 (2nd Cir.), cert. denied, 400 U.S. 841 (1970).

Rule 804(a)(5) as submitted to the Congress provided, as one type of situation in which a declarant would be deemed "unavailable", that he be "absent from the hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means." The Committee amended the Rule to insert after the word "attendance" the parenthetical expression "(or, in the case of a hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony)". The amendment is designed primarily to require that an attempt be made to depose a witness (as well as to seek his attendance) as a precondition to the witness being deemed unavailable. The Committee, however, recognized the propriety of an exception to this additional requirement when it is the declarant's former testimony that is sought to be admitted under subdivision (b)(1).

Rule 804(b)(1) as submitted by the Court allowed prior testimony of an unavailable witness to be admissible if the party against whom it is offered or a person "with motive and interest similar" to his had an opportunity to examine the witness. The Committee considered that it is generally unfair to impose upon the party against whom the hearsay evidence is being offered responsibility for the manner in which the witness was previously handled by another party. The sole exception to this, in the Committee's view, is when a party's predecessor in interest in a civil action or proceeding had an opportunity and similar motive to examine the witness. The Committee amended the Rule to reflect these policy determinations.

Rule 804(b)(3) as submitted by the Court (now Rule 804(b)(2) in the bill) proposed to expand the traditional scope of the dying declaration exception (i.e. a statement of the victim in a homicide case as to the cause or circumstances of his believed imminent death) to allow such statements in all criminal and civil cases. The Committee did not consider dying declarations as among the most reliable forms of hearsay. Consequently, it amended the provision to limit their admissibility in criminal cases to homicide prosecutions, where exceptional need for the evidence is present. This is existing law. At the same time, the Committee approved the expansion to civil actions and proceedings where the stakes do not involve possible imprisonment, although noting that this could lead to forum shopping in some instances.

Rule 804(b)(4) as submitted by the Court (now Rule 804(b)(3) in the bill) provided as follows:

> *Statement against interest.*—A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest or so far tended to subject him to civil or criminal liability or to render invalid a claim by him against another or to make him an object of hatred, ridicule, or disgrace, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to exculpate the accused is not admissible unless corroborated.

The Committee determined to retain the traditional hearsay exception for statements against pecuniary or proprietary interest. However, it deemed the Court's additional references to statements tending to subject a declarant to civil liability or to render invalid a claim by him against another to be redundant as included within the scope of the reference to statements against pecuniary or proprietary interest. See *Gichner* v. *Antonio Triano Tile and Marble Co.*, 410 F.2d 238 (D.C. Cir. 1968). Those additional references were accordingly deleted.

The Court's Rule also proposed to expand the hearsay limitation from its present federal limitation to include statements subjecting the declarant to criminal liability and statements tending to make him an object of hatred, ridicule, or disgrace. The Committee eliminated the latter category from the subdivision as lacking sufficient guarantees of reliability. See *United States* v. *Dovico*, 380 F.2d 325, 327nn.2,4 (2nd Cir.), cert. denied, 389 U.S. 944 (1967). As for statements against penal interest, the Committee shared the view of the Court that some such statements do possess adequate assurances of reliability and should be admissible. It believed, however, as did the Court, that statements of this type tending to exculpate the accused are more suspect and so should have their admissibility conditioned upon some further provision insuring trustworthiness. The proposal in the Court Rule to add a requirement of simple corroboration was, however, deemed ineffective to accomplish this purpose since the accused's own testimony might suffice while not necessarily increasing the reliability of the hearsay statement. The Committee settled upon the language "unless corroborating circumstances clearly indicate the trustworthiness of the statement" as affording a proper standard and degree of discretion. It was contemplated that the result in such cases as *Donnelly v. United States*, 228 U.S. 243 (1912), where the circumstances plainly indicated reliability, would be changed. The Committee also added to the Rule the final sentence from the 1971 Advisory Committee draft, designed to codify the doctrine of *Bruton* v. *United States*, 391 U.S. 123 (1968). The Committee does not intend to affect the existing exception to the *Bruton* principle where the codefendant takes the stand and is subject to cross-examination, but believed there was no need to make specific provision for this situation in the Rule, since in that even the declarant would not be "unavailable".

### NOTES OF COMMITTEE ON THE JUDICIARY, SENATE REPORT NO. 93-1277

*Subdivision (a)* of rule 804 as submitted by the Supreme Court defined the conditions under which a witness was considered to be unavailable. It was amended in the House.

The purpose of the amendment, according to the report of the House Committee on the Judiciary, is "primarily to require that an attempt be made to depose a witness (as well as to seek his attendance) as a precondition to the witness being unavailable."

Under the House amendment, before a witness is declared unavailable, a party must try to depose a witness (declarant) with respect to dying declarations, declarations against interest, and declarations of pedigree. None of these situations would seem to warrant this needless, impractical and highly restrictive complication. A good case can be made for eliminating the unavailability requirement entirely for declarations against interest cases. [Uniform rule 63(10); Kan. Stat. Anno. 60-460(j); 2A N.J. Stats. Anno. 84-63(10).]

In dying declaration cases, the declarant will usually, though not necessarily, be deceased at the time of trial. Pedigree statements which are admittedly and necessarily based largely on word of mouth are not greatly fortified by a deposition requirement.

Depositions are expensive and time-consuming. In any event, deposition procedures are available to those who wish to resort to them. Moreover, the deposition procedures of the Civil Rules and Criminal Rules are only imperfectly adapted to implementing the amendment. No purpose is served unless the deposition, if taken, may be used in evidence. Under Civil Rule (a)(3) and Criminal Rule 15(e), a deposition, though taken, may not be admissible, and under Criminal Rule 15(a) substnatial obstacles exist in the way of even taking a deposition.

For these reasons, the committee deleted the House amendment.

The committee understands that the rule as to unavailability, as explained by the Advisory Committee "contains no requirement that an attempt be made to take the deposition of a declarant." In reflecting the committee's judgment, the statement is accurate insofar as it goes. Where, however, the proponent of the statement, with knowledge of the existence of the statement, fails to confront the declarant with the statement at the taking of the deposition, then the proponent should not, in fairness, be permitted to treat the declarant as "unavailable" simply because the declarant was not amendable to process compelling his attendance at trial. The committee does not consider it necessary to amend the rule to this effect because such a situation abuses, not conforms to, the rule. Fairness would preclude a person from introducing a hearsay statement on a particular issue if the person taking the deposition was aware of the issue at the time of the deposition but failed to depose the unavailable witness on that issue.

Former testimony.—Rule 804(b)(1) as submitted by the Court allowed prior testimony of an unavailable witness to be admissible if the party against whom it is offered or a person "with motive and interest similar" to his had an opportunity to examine the witness.

The House amended the rule to apply only to a party's predecessor in interest. Although the committee recognizes considerable merit to the rule submitted by the Supreme Court, a position which has been advocated by many scholars and judges, we have concluded that the difference between the two versions is not great and we accept the House amendment.

The rule defines those statements which are considered to be against interest and thus of sufficient trustworthiness to be admissible even though hearsay. With regard to the type of interest declared against, the version submitted by the Supreme Court included inter alia, statements tending to subject a declarant to civil liability or to invalidate a claim by him against another. The House struck these provisions as redundant. In view of the conflicting case law construing pecuniary or proprietary interests narrowly so as to exclude, e.g., tort cases, this deletion could be misconstrued.

Three States which have recently codified their rules of evidence have followed the Supreme Court's version of this rule, i.e., that a statement is against interest if it tends to subject a declarant to civil liability. [Nev. Rev. Stats. § 51.345; N. Mex. Stats. (1973 supp.) § 20-4-804(4); West's Wis. Stats. Anno. (1973 supp.) § 908.045(4).]

The committee believes that the reference to statements tending to subject a person to civil liability constitutes a desirable clarification of the scope of the rule. Therefore, we have reinstated the Supreme Court language on this matter.

The Court rule also proposed to expand the hearsay limitation from its present federal limitation to include statements subjecting the declarant to statements tending to make him an object of hatred, ridicule, or disgrace. The House eliminated the latter category from the subdivision as lacking sufficient guarantees of reliability. Although there is considerable support for the admissibility of such statements (all three of the State rules referred to supra, would admit such statements), we accept the deletion by the House.

The House amended this exception to add a sentence making inadmissible a statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both himself and the accused. The sentence was added to codify the constitutional principle announced in *Bruton v. United States*, 391 U.S. 123 (1968). *Bruton* held that the admission of the extrajudicial hearsay statement of one codefendant inculpating a second codefendant violated the confrontation clause of the sixth amendment.

The committee decided to delete this provision because the basic approach of the rules is to avoid codifying, or attempting to codify, constitutional evidentiary principles, such as the fifth amendment's right against self-incrimination and, here, the sixth amendment's right of confrontation. Codification of a constitutional principle is unnecessary and, where the principle is under development, often unwise. Furthermore, the House provision does not appear to recognize the exceptions to the *Bruton* rule, e.g. where the codefendant takes the stand and is subject to cross examination; where the accused confessed, see *United States v. Mancusi*, 404 F.2d 296 (2d Cir. 1968), cert. denied 397 U.S. 942 (1907); where the accused was placed at the scene of the crime, see *United States v. Zelker*, 452 F.2d 1009 (2d Cir. 1971). For these reasons, the committee decided to delete this provision.

*Note to Subdivision (b)(5).* See Note to Paragraph (24), Notes of Committee on the Judiciary, Senate Report No. 93-1277, set out as a note under rule 803 of these rules.

### NOTES OF CONFERENCE COMMITTEE, HOUSE REPORT NO. 93-1597

Rule 804 defines what hearsay statements are admissible in evidence if the declarant is unavailable as a witness. The Senate amendments make four changes in the rule.

Subsection (a) defines the term "unavailability as a witness". The House bill provides in subsection (a)(5) that the party who desires to use the statement must be unable to procure the declarant's attendance by process or other reasonable means. In the case of dying declarations, statements against interest and statements of personal or family history, the House bill requires that the proponent must also be unable to procure the declarant's *testimony* (such as by deposition or interrogatories) by process or other reasonable means. The Senate amendment eliminates this latter provision.

The Conference adopts the provision contained in the House bill.

The Senate amendment to subsection (b)(3) provides that a statement is against interest and not excluded by the hearsay rule when the declarant is unavailable as a witness, if the statement tends to subject a person to civil or criminal liability or renders invalid a claim by him against another. The House bill did not refer specifically to civil liability and to rendering invalid a claim against another. The Senate amendment also deletes from the House bill the provision that subsection (b)(3) does not apply to a statement or confession, made by a codefendant or another, which implicates the accused and the person who made the statement, when that statement or confession is offered against the accused in a criminal case.

The Conference adopts the Senate amendment. The Conferees intend to include within the purview of this rule, statements subjecting a person to civil liability and statements rendering claims invalid. The Conferees agree to delete the provision regarding statements by a codefendant, thereby reflecting the general approach in the Rules of Evidence to avoid attempting to codify constitutional evidentiary principles.

The Senate amendment adds a new subsection, (b)(6) [now (b)(5)], which makes admissible a hearsay statement not specifically covered by any of the five previous subsections, if the statement has equivalent circumstantial guarantees of trustworthiness and if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

The House bill eliminated a similar, but broader, provision because of the conviction that such a provision injected too much uncertainty into the law of evidence regarding hearsay and impaired the ability of a litigant to prepare adequately for trial.

The Conference adopts the Senate amendment with an amendment that renumbers this subsection and provides that a party intending to request the court to use a statement under this provision must notify any adverse party of this intention as well as of the particulars of the statement, including the name and address of the declarant. This notice must be given sufficiently in advance of the trial or hearing to provide any adverse party with a fair opportunity to prepare the contest the use of the statement.

### AMENDMENTS

1975—Pub. L. 94-149, § 1(12), substituted a semicolon for the colon in catchline.

Subd. (b)(3). Pub. L. 94-149, § 1(13), substituted "admissible" for "admissable".

## Rule 805. Hearsay Within Hearsay

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

(Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1943.)

### NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

On principle it scarcely seems open to doubt that the hearsay rule should not call for exclusion of a hearsay statement which includes a further hearsay statement when both conform to the requirements of a hearsay exception. Thus a hospital record might contain an entry of the patient's age based on information furnished by his wife. The hospital record would qualify as a regular entry except that the person who furnished the information was not acting in the routine of the business. However, her statement independently qualifies as a statement of pedigree (if she is unavailable) or as a statement made for purposes of diagnosis or treatment, and hence each link in the chain falls under sufficient assurances. Or, further to illustrate, a dying declaration may incorporate a declaration against interest by another declarant. See McCormick § 290, p. 611.

### Rule 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in Rule 801(d)(2), (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with his hearsay statement, is not subject to any requirement that he may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination.

(Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1943.)

#### NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

The declarant of a hearsay statement which is admitted in evidence is in effect a witness. His credibility should in fairness be subject to impeachment and support as though he had in fact testified. See Rules 608 and 609. There are however, some special aspects of the impeaching of a hearsay declarant which require consideration. These special aspects center upon impeachment by inconsistent statement, arise from factual differences which exist between the use of hearsay and an actual witness and also between various kinds of hearsay, and involve the question of applying to declarants the general rule disallowing evidence of an inconsistent statement to impeach a witness unless he is afforded an opportunity to deny or explain. See Rule 613(b).

The principle difference between using hearsay and an actual witness is that the inconsistent statement will in the case of the witness almost inevitably of necessity in the nature of things be a *prior* statement, which it is entirely possible and feasible to call to his attention, while in the case of hearsay the inconsistent statement may well be a *subsequent* one, which practically precludes calling it to the attention of the declarant. The result of insisting upon observation of this impossible requirement in the hearsay situation is to deny the opponent, already barred from cross-examination, any benefit of this important technique of impeachment. The writers favor allowing the subsequent statement. McCormick § 37, p. 69; 3 Wigmore § 1033. The cases, however, are divided. Cases allowing the impeachment include *People* v. *Collup*, 27 Cal.2d 829, 167 P.2d 714 (1946); *People* v. *Rosoto*, 58 Cal.2d 304, 23 Cal.Rptr. 779, 373 P.2d 867 (1962); *Carver* v. *United States*, 164 U.S. 694, 17 S.Ct. 228, 41 L.Ed. 602 (1897). *Contra. Mattox* v. *United States*, 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895); *People* v. *Hines*, 284 N.Y. 93, 29 N.E.2d 483 (1940). The force of *Mattox*, where the hearsay was the former testimony of a deceased witness and the denial of use of a subsequent inconsistent statement was upheld, is much diminished by *Carver*, where the hearsay was a dying declaration and denial of use of a subsequent inconsistent statement resulted in reversal. The difference in the particular brand of hearsay seems unimportant when the inconsistent statement is a *subsequent* one. True, the opponent is not totally deprived of cross-examination when the hearsay is former testimony or a deposition but he is deprived of cross-examining on the statement or along lines suggested by it. Mr. Justice Shiras, with two justices joining him, dissented vigorously in *Mattox*.

When the impeaching statement was made *prior* to the hearsay statement, differences in the kinds of hearsay appear which arguably may justify differences in treatment. If the hearsay consisted of a simple statement by the witness, e.g. a dying declaration or a declaration against interest, the feasibility of affording him an opportunity to deny or explain encounters the same practical impossibility as where the statement is a subsequent one, just discussed, although here the impossibility arises from the total absence of anything resembling a hearing at which the matter could be put to him. The courts by a large majority have ruled in favor of allowing the statement to be used under these circumstances. McCormick § 37, p. 69; 3 Wigmore § 1033. If, however, the hearsay consists of former testimony or a deposition, the possibility of calling the prior statement to the attention of the witness or deponent is not ruled out, since the opportunity to cross-examine was available. It might thus be concluded that with former testimony or depositions the conventional foundation should be insisted upon. Most of the cases involve depositions, and Wigmore describes them as divided. 3 Wigmore § 1031. Deposition procedures at best are cumbersome and expensive, and to require the laying of the foundation may impose an undue burden. Under the federal practice, there is no way of knowing with certainty at the time of taking a deposition whether it is merely for discovery or will ultimately end up in evidence. With respect to both former testimony and depositions the possibility exists that knowledge of the statement might not be acquired until after the time of the cross-examination. Moreover, the expanded admissibility of former testimony and depositions under Rule 804(b)(1) calls for a correspondingly expanded approach to impeachment. The rule dispenses with the requirement in all hearsay situations, which is readily administered and best calculated to lead to fair results.

Notice should be taken that Rule 26(f) of the Federal Rules of Civil Procedure, as originally submitted by the Advisory Committee, ended with the following:

> "* * * and, without having first called them to the deponent's attention, may show statements contradictory thereto made at any time by the deponent."

This language did not appear in the rule as promulgated in December, 1937. See 4 Moore's Federal Practice ¶¶ 26.01[9], 26.35 (2d ed. 1967). In 1951, Nebraska adopted a provision strongly resembling the one stricken from the federal rule:

> "Any party may impeach any adverse deponent by self-contradiction without having laid foundation for such impeachment at the time such deposition was taken." R.S.Neb. § 25-1267.07.

For similar provisions, see Uniform Rule 65; California Evidence Code § 1202; Kansas Code of Civil Procedure § 60-462; New Jersey Evidence Rule 65.

The provision for cross-examination of a declarant upon his hearsay statement is a corollary of general principles of cross-examination. A similar provision is found in California Evidence Code § 1203.

#### NOTES OF COMMITTEE ON THE JUDICIARY, SENATE REPORT NO. 93-1277

Rule 906, as passed by the House and as proposed by the Supreme Court provides that whenever a hearsay statement is admitted, the credibility of the declarant of the statement may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if the declarant had testified as a witness. Rule 801 defines what is a hearsay statement. While statements by a person authorized by a party-opponent to make a statement concerning the subject, by the party-opponent's agent or by a coconspirator of a party—see rule 801(d)(2)(c), (d) and (e)—are traditionally defined as exceptions to the hearsay rule, rule 801 defines such admission by a party-opponent as statements which are not hearsay. Consequently, rule 806 by referring exclusively to the admission of hearsay statements, does not appear to allow the credibility of the declarant to be attacked when the declarant is a coconspirator, agent or authorized spokesman. The committee is of the view that such statements should open the declarant to attacks on his credibility. Indeed, the reason such statements are excluded from the operation of rule 806 is likely attributable to the drafting technique used to codify the hearsay rule, viz some statements, instead of being referred to as exceptions to the hearsay rule, are defined as statements which are not hearsay. The phrase "or a statement defined in rule 801(d)(2)(c), (d) and (e)" is added to the rule in order to subject the declarant of such statements, like the declarant of hearsay statements, to attacks on his credibility. [The committee considered it unnecessary to include statements contained in rule 801(d)(2)(A) and (B)—the statement by the party-opponent himself or the statement of which he has manifested his adoption—because the credibility of the party-opponent is always subject to an attack on his credibility].

### NOTES OF CONFERENCE COMMITTEE, HOUSE REPORT NO. 93-1597

The Senate amendment permits an attack upon the credibility of the declarant of a statement if the statement is one by a person authorized by a party-opponent to make a statement concerning the subject, one by an agent of a party-opponent, or one by a coconspirator of the party-opponent, as these statements are defined in Rules 801(d)(2)(C), (D) and (E). The House bill has no such provision.

The Conference adopts the Senate amendment. The Senate amendment conforms the rule to present practice.

## ARTICLE IX. AUTHENTICATION AND IDENTIFICATION

### Rule 901. Requirement of Authentication or Identification

(a) *General provision.* The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) *Illustrations.* By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) *Testimony of witness with knowledge.* Testimony that a matter is what it is claimed to be.

(2) *Nonexpert opinion on handwriting.* Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) *Comparison by trier or expert witness.* Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) *Distinctive characteristics and the like.* Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) *Voice identification.* Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) *Telephone conversations.* Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) *Public records or reports.* Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) *Ancient documents or data compilation.* Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

(9) *Process or system.* Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) *Methods provided by statute or rule.* Any method of authentication or identification provided by Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority.

(Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1943.)

### NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

*Subdivision (a).* Authentication and identification represent a special aspect of relevancy. Michael and Adler, Real Proof, 5 Vand.L.Rev. 344, 362 (1952); McCormick §§ 179, 185; Morgan, Basic Problems of Evidence 378. (1962). Thus a telephone conversation may be irrelevant because on an unrelated topic or because the speaker is not identified. The latter aspect is the one here involved. Wigmore describes the need for authentication as "an inherent logical necessity." 7 Wigmore § 2129, p. 564.

This requirement of showing authenticity or identity falls in the category of relevancy dependent upon fulfillment of a condition of fact and is governed by the procedure set forth in Rule 104(b).

The common law approach to authentication of documents has been criticized as an "attitude of agnosticism," McCormick, Cases on Evidence 388, n. 4 (3rd ed. 1956), as one which "departs sharply from men's customs in ordinary affairs," and as presenting only a slight obstacle to the introduction of forgeries in comparison to the time and expense devoted to proving genuine writings which correctly show their origin on their face, McCormick § 185, pp. 395, 396. Today, such available procedures as requests to admit and pretrial conference afford the means of eliminating much of the need for authentication or identification. Also, significant inroads upon the traditional insistence on authentication and identification have been made by accepting as at least prima facie genuine items of the kind treated in Rule 902, *infra.* However, the need for suitable methods of proof still remains, since criminal cases pose their own obstacles to the use of preliminary procedures, unforeseen contingencies may arise, and cases of genuine controversy will still occur.

*Subdivision (b).* The treatment of authentication and identification draws largely upon the experience embodied in the common law and in statutes to furnish illustrative applications of the general principle set forth in subdivision (a). The examples are not intended as an exclusive enumeration of allowable methods but are meant to guide and suggest, leaving room for growth and development in this area of the law.

The examples relate for the most part to documents, with some attention given to voice communications and computer print-outs. As Wigmore noted, no special rules have been developed for authenticating chattels. Wigmore, Code of Evidence § 2086 (3rd ed. 1942).

It should be observed that compliance with requirements of authentication or identification by no means assures admission of an item into evidence, as other bars, hearsay for example, may remain.

*Example (1).* Example (1) contemplates a broad spectrum ranging from testimony of a witness who was present at the signing of a document to testimony establishing narcotics as taken from an accused and accounting for custody through the period until trial, including laboratory analysis. See California Evidence Code § 1413, eyewitness to signing.

*Example (2).* Example (2) states conventional doctrine as to lay identification of handwriting, which recognizes that a sufficient familiarity with the handwriting of another person may be acquired by seeing him write, by exchanging correspondence, or by other means, to afford a basis for identifying it on subsequent occasions. McCormick § 189. See also California Evidence Code § 1416. Testimony based upon familiarity acquired for purposes of the litigation is reserved to the expert under the example which follows.

*Example (3).* The history of common law restrictions upon the technique of proving or disproving the genuineness of a disputed specimen of handwriting through comparison with a genuine specimen, by either the testimony of expert witnesses or direct viewing by the triers themselves, is detailed in 7 Wigmore §§ 1991–1994. In breaking away, the English Common Law Procedure Act of 1854, 17 and 18 Vict., c. 125, § 27, cautiously allowed expert or trier to use exemplars "proved to the satisfaction of the judge to be genuine" for purposes of comparison. The language found its way into numerous statutes in this country, e.g., California Evidence Code §§ 1417, 1418. While explainable as a measure of prudence in the process of breaking with precedent in the handwriting situation, the reservation to the judge of the question of the genuineness of exemplars and the imposition of an unusually high standard of persuasion are at variance with the general treatment of relevancy which depends upon fulfillment of a condition of fact. Rule 104(b). No similar attitude is found in other comparison situations, e.g., ballistics comparison by jury, as in *Evans* v. *Commonwealth*, 230 Ky. 411, 19 S.W.2d 1091 (1929), or by experts, Annot. 26 A.L.R.2d 892, and no reason appears for its continued existence in handwriting cases. Consequently Example (3) sets no higher standard for handwriting specimens and treats all comparison situations alike, to be governed by Rule 104(b). This approach is consistent with 28 U.S.C. § 1731: "The admitted or proved handwriting of any person shall be admissible, for purposes of comparison, to determine genuineness of other handwriting attributed to such person."

Precedent supports the acceptance of visual comparison as sufficiently satisfying preliminary authentication requirements for admission in evidence. *Brandon* v. *Collins*, 267 F.2d 731 (2d Cir. 1959); *Wausau Sulphate Fibre Co.* v. *Commissioner of Internal Revenue*, 61 F.2d 879 (7th Cir. 1932); *Desimone* v. *United States*, 227 F.2d 864 (9th Cir. 1955).

*Example (4).* The characteristics of the offered item itself, considered in the light of circumstances, afford authentication techniques in great variety. Thus a document or telephone conversation may be shown to have emanated from a particular person by virtue of its disclosing knowledge of facts known peculiarly to him; *Globe Automatic Sprinkler Co.* v. *Braniff*, 89 Okl. 105, 214 P. 127 (1923); California Evidence Code § 1421; similarly, a letter may be authenticated by content and circumstances indicating it was in reply to a duly authenticated one. McCormick § 192; California Evidence Code § 1420. Language patterns may indicate authenticity or its opposite. *Magnuson* v. *State*, 187 Wis. 122, 203 N.W. 749 (1925); Arens and Meadow, Psycholinguistics and the Confession Dilemma, 56 Colum.L.Rev. 19 (1956).

*Example (5).* Since aural voice identification is not a subject of expert testimony, the requisite familiarity may be acquired either before or after the particular speaking which is the subject of the identification, in this respect resembling visual identification of a person rather than identification of handwriting. Cf. Example (2), *supra*, *People* v. *Nichols*, 378 Ill. 487, 38 N.E.2d 766 (1942); *McGuire* v. *State*, 200 Md. 601, 92 A.2d 582 (1952); *State* v. *McGee*, 336 Mo. 1082, 83 S.W.2d 98 (1935).

*Example (6).* The cases are in agreement that a mere assertion of his identity by a person talking on the telephone is not sufficient evidence of the authenticity of the conversation and that additional evidence of his identity is required. The additional evidence need not fall in any set pattern. Thus the content of his statements or the reply technique, under Example (4), *supra*, or voice identification under Example (5), may furnish the necessary foundation. Outgoing calls made by the witness involve additional factors bearing upon authenticity. The calling of a number assigned by the telephone company reasonably supports the assumption that the listing is correct and that the number is the one reached. If the number is that of a place of business, the mass of authority allows an ensuing conversation if it relates to business reasonably transacted over the telephone, on the theory that the maintenance of the telephone connection is an invitation to do business without further identification. *Matton* v. *Hoover Co.*, 350 Mo. 506, 166 S.W.2d 557 (1942); *City of Pawhuska* v. *Crutchfield*, 147 Okl. 4. 293 P. 1095 (1930); *Zurich General Acc. & Liability Ins. Co.* v. *Baum*, 159 Va. 404, 165 S.E. 518 (1932). Otherwise, some additional circumstance of identification of the speaker is required. The authorities divide on the question whether the self-identifying statement of the person answering suffices. Example (6) answers in the affirmative on the assumption that usual conduct respecting telephone calls furnish adequate assurances of regularity, bearing in mind that the entire matter is open to exploration before the trier of fact. In general, see McCormick § 193; 7 Wigmore § 2155; Annot., 71 A.L.R. 5, 105 id. 326.

*Example (7).* Public records are regularly authenticated by proof of custody, without more. McCormick § 191; 7 Wigmore §§ 2158, 2159. The example extends the principle to include data stored in computers and similar methods, of which increasing use in the public records area may be expected. See California Evidence Code §§ 1532, 1600.

*Example (8).* The familiar ancient document rule of the common law is extended to include data stored electronically or by other similar means. Since the importance of appearance diminishes in this situation, the importance of custody or place where found increases correspondingly. This expansion is necessary in view of the widespread use of methods of storing data in forms other than conventional written records.

Any time period selected is bound to be arbitrary. The common law period of 30 years is here reduced to 20 years, with some shift of emphasis from the probable unavailability of witnesses to the unlikeliness of a still viable fraud after the lapse of time. The shorter period is specified in the English Evidence Act of 1938, 1 & 2 Geo. 6, c. 28, and in Oregon R.S. 1963, § 41.360(34). See also the numerous statutes prescribing periods of less than 30 years in the case of recorded documents. 7 Wigmore § 2143.

The application of Example (8) is not subject to any limitation to title documents or to any requirement that possession, in the case of a title document, has been consistent with the document. See McCormick § 190.

*Example (9).* Example (9) is designed for situations in which the accuracy of a result is dependent upon a process or system which produces it. X-rays afford a familiar instance. Among more recent developments is the computer, as to which see *Transport Indemnity Co.* v. *Seib*, 178 Neb. 253, 132 N.W.2d 871 (1965); *State* v. *Veres*, 7 Ariz.App. 117, 436 P.2d 629 (1968); *Merrick* v. *United States Rubber Co.*, 7 Ariz.App. 433, 440 P.2d 314 (1968); Freed, Computer Print-Outs as Evidence, 16 Am.Jur. Proof of Facts 273; Symposium, Law and

Computers in the Mid-Sixties, ALI-ABA (1966); 37 Albany L.Rev. 61 (1967). Example (9) does not, of course, foreclose taking judicial notice of the accuracy of the process or system.

*Example (10)*. The example makes clear that methods of authentication provided by Act of Congress and by the Rules of Civil and Criminal Procedure or by Bankruptcy Rules are not intended to be superseded. Illustrative are the provisions for authentication of official records in Civil Procedure Rule 44 and Criminal Procedure Rule 27, for authentication of records of proceedings by court reporters in 28 U.S.C. § 753(b) and Civil Procedure Rule 80(c), and for authentication of depositions in Civil Procedure Rule 30(f).

### Rule 902. Self-authentication

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(*1*) *Domestic public documents under seal.* A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(*2*) *Domestic public documents not under seal.* A document purporting to bear the signature in his official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(*3*) *Foreign public documents.* A document purporting to be executed or attested in his official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(*4*) *Certified copies of public records.* A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.

(*5*) *Official publications.* Books, pamphlets, or other publications purporting to be issued by public authority.

(*6*) *Newspapers and periodicals.* Printed materials purporting to be newspapers or periodicals.

(*7*) *Trade inscriptions and the like.* Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(*8*) *Acknowledged documents.* Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(*9*) *Commercial paper and related documents.* Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(*10*) *Presumptions under Acts of Congress.* Any signature, document or other matter declared by Act of Congress to be presumptively or prima facie genuine or authentic.

(Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1944).

#### NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

Case law and statutes have, over the years, developed a substantial body of instances in which authenticity is taken as sufficiently established for purposes of admissibility without extrinsic evidence to that effect, sometimes for reasons of policy but perhaps more often because practical considerations reduce the possibility of unauthenticity to a very small dimension. The present rule collects and incorporates these situations, in some instances expanding them to occupy a larger area which their underlying considerations justify. In no instance is the opposite party foreclosed from disputing authenticity.

*Paragraph* (*1*). The acceptance of documents bearing a public seal and signature, most often encountered in practice in the form of acknowledgments or certificates authenticating copies of public records, is actually of broad application. Whether theoretically based in whole or in part upon judicial notice, the practical underlying considerations are that forgery is a crime and detection is fairly easy and certain. 7 Wigmore § 2161, p. 638; California Evidence Code § 1452. More than 50 provisions for judicial notice of official seals are contained in the United States Code.

*Paragraph* (*2*). While statutes are found which raise a presumption of genuineness of purported official signatures in the absence of an official seal, 7 Wigmore § 2167; California Evidence Code § 1453, the greater ease of effecting a forgery under these circumstances is apparent. Hence this paragraph of the rule calls for authentication by an officer who has a seal. Notarial acts by members of the armed forces and other special situations are covered in paragraph (10).

*Paragraph* (*3*) provides a method for extending the presumption of authenticity to foreign official documents by a procedure of certification. It is derived from Rule 44(a)(2) of the Rules of Civil Procedure but is broader in applying to public documents rather than being limited to public records.

*Paragraph* (*4*). The common law and innumerable statutes have recognized the procedure of authenticating copies of public records by certificate. The certificate qualifies as a public document, receivable as authentic when in conformity with paragraph (1), (2), or (3). Rule 44(a) of the Rules of Civil Procedure and Rule 27 of the Rules of Criminal Procedure have provided authentication procedures of this nature for both domestic and foreign public records. It will be observed that the certification procedure here provided extends only to public records, reports, and recorded documents, all including data compilations, and does not apply to public documents generally. Hence documents provable when presented in original form under paragraphs (1), (2), or (3) may not be provable by certified copy under paragraph (4).

*Paragraph* (5). Dispensing with preliminary proof of the genuineness of purportedly official publications, most commonly encountered in connection with statutes, court reports, rules, and regulations, has been greatly enlarged by statutes and decisions. 5 Wigmore § 1684. Paragraph (5), it will be noted, does not confer admissibility upon all official publications; it merely provides a means whereby their authenticity may be taken as established for purposes of admissibility. Rule 44(a) of the Rules of Civil Procedure has been to the same effect.

*Paragraph* (6). The likelihood of forgery of newspapers or periodicals is slight indeed. Hence no danger is apparent in receiving them. Establishing the authenticity of the publication may, of course, leave still open questions of authority and responsibility for items therein contained. See 7 Wigmore § 2150. Cf. 39 U.S.C. § 4005(b), public advertisement prima facie evidence of agency of person named, in postal fraud order proceeding; Canadian Uniform Evidence Act, Draft of 1936, printed copy of newspaper prima facie evidence that notices or advertisements were authorized.

*Paragraph* (7). Several factors justify dispensing with preliminary proof of genuineness of commercial and mercantile labels and the like. The risk of forgery is minimal. Trademark infringement involves serious penalties. Great efforts are devoted to inducing the public to buy in reliance on brand names, and substantial protection is given them. Hence the fairness of this treatment finds recognition in the cases. *Curtiss Candy Co.* v. *Johnson*, 163 Miss. 426, 141 So. 762 (1932), Baby Ruth candy bar; *Doyle* v. *Continental Baking Co.*, 262 Mass. 516, 160 N.E. 325 (1928), loaf of bread; *Weiner* v. *Mager & Throne, Inc.*, 167 Misc. 338, 3 N.Y.S.2d 918 (1938), same. And see W.Va.Code 1966, § 47-3-5, trade-mark on bottle prima facie evidence of ownership. *Contra, Keegan* v. *Green Giant Co.*, 150 Me. 283, 110 A.2d 599 (1954); *Murphy* v. *Campbell Soup Co.*, 62 F.2d 564 (1st Cir. 1933). Cattle brands have received similar acceptance in the western states. Rev.Code Mont.1947, § 46-606; *State* v. *Wolfley*, 75 Kan. 406, 89 P. 1046 (1907); Annot., 11 L.R.A. (N.S.) 87. Inscriptions on trains and vehicles are held to be prima facie evidence of ownership or control. *Pittsburgh, Ft. W. & C. Ry.* v. *Callaghan*, 157 Ill. 406, 41 N.E. 909 (1895); 9 Wigmore § 2510a. See also the provision of 19 U.S.C. § 1615(2) that marks, labels, brands, or stamps indicating foreign origin are prima facie evidence of foreign origin of merchandise.

*Paragraph* (8). In virtually every state, acknowledged title documents are receivable in evidence without further proof. Statutes are collected in 5 Wigmore § 1676. If this authentication suffices for documents of the importance of those affecting titles, logic scarcely permits denying this method when other kinds of documents are involved. Instances of broadly inclusive statutes are California Evidence Code § 1451 and N.Y.CPLR 4538, McKinney's Consol. Laws 1963.

*Paragraph* (9). Issues of the authenticity of commercial paper in federal courts will usually arise in diversity cases, will involve an element of a cause of action or defense, and with respect to presumptions and burden of proof will be controlled by *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). Rule 302, *supra*. There may, however, be questions of authenticity involving lesser segments of a case or the case may be one governed by federal common law. *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838 (1943). Cf. *United States* v. *Yazell*, 382 U.S. 341, 86 S.Ct. 500, 15 L.Ed.2d 404 (1966). In these situations, resort to the useful authentication provisions of the Uniform Commercial Code is provided for. While the phrasing is in terms of "general commercial law," in order to avoid the potential complication inherent in borrowing local statutes, today one would have difficulty in determining the general commercial law without referring to the Code. See *Williams* v. *Walker-Thomas-Furniture Co.*, 121 U.S.App.D.C. 315, 350 F.2d 445 (1965). Pertinent Code provisions are sections 1-202, 3-307, and 3-510, dealing with third-party documents, signatures on negotiable instruments, protests, and statements of dishonor.

*Paragraph* (10). The paragraph continues in effect dispensations with preliminary proof of genuineness provided in various Acts of Congress. See, for example, 10 U.S.C. § 936, signature, without seal, together with title, prima facie evidence of authenticity of acts of certain military personnel who are given notarial power; 15 U.S.C. § 77f(a), signature on SEC registration presumed genuine; 26 U.S.C. § 6064, signature to tax return prima facie genuine.

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Rule 902(8) as submitted by the Court referred to certificates of acknowledgment "under the hand and seal of" a notary public or other officer authorized by law to take acknowledgments. The Committee amended the Rule to eliminate the requirement, believed to be inconsistent with the law in some States, that a notary public must affix a seal to a document acknowledged before him. As amended the Rule merely requires that the document be executed in the manner prescribed by State law.

The Committee approved Rule 902(9) as submitted by the Court. With respect to the meaning of the phrase "general commercial law", the Committee intends that the Uniform Commercial Code, which has been adopted in virtually every State, will be followed generally, but that federal commercial law will apply where federal commercial paper is involved. See *Clearfield Trust Co.* v. *United States*, 318 U.S. 363 (1943). Further, in those instances in which the issues are governed by *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), State law will apply irrespective of whether it is the Uniform Commercial Code.

## Rule 903. Subscribing Witness' Testimony Unnecessary

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

(Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1945.)

### NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

The common law required that attesting witnesses be produced or accounted for. Today the requirement has generally been abolished except with respect to documents which must be attested to be valid, e.g. wills in some states. McCormick § 188. Uniform Rule 71; California Evidence Code § 1411; Kansas Code of Civil Procedure § 60-468; New Jersey Evidence Rule 71; New York CPLR Rule 4537.

# ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

## Rule 1001. Definitions

For purposes of this article the following definitions are applicable:

(1) *Writings and recordings.* "Writings" and "recordings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(2) *Photographs.* "Photographs" include still photographs, X-ray films, video tapes, and motion pictures.

(3) *Original.* An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original".

(4) *Duplicate.* A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.

(Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1945.)

### NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

In an earlier day, when discovery and other related procedures were strictly limited, the misleading named "best evidence rule" afforded substantial guarantees against inaccuracies and fraud by its insistence upon production of original documents. The great enlargement of the scope of discovery and related procedures in recent times has measurably reduced the need for the rule. Nevertheless important areas of usefulness persist: discovery of documents outside the jurisdiction may require substantial outlay of time and money; the unanticipated document may not practically be discoverable; criminal cases have built-in limitations on discovery. Cleary and Strong, The Best Evidence Rule: An Evaluation in Context, 51 Iowa L.Rev. 825 (1966).

*Paragraph (1).* Traditionally the rule requiring the original centered upon accumulations of data and expressions affecting legal relations set forth in words and figures. This meant that the rule was one essentially related to writings. Present day techniques have expanded methods of storing data, yet the essential form which the information ultimately assumes for usable purposes is words and figures. Hence the considerations underlying the rule dictate its expansion to include computers, photographic systems, and other modern developments.

*Paragraph (3).* In most instances, what is an original will be self-evident and further refinement will be unnecessary. However, in some instances particularized definition is required. A carbn copy of a contract executed in duplicate becomes an original, as does a sales ticket carbon copy given to a customer. While strictly speaking the original of a photograph might be thought to be only the negative, practicality and common usage require that any print from the negative be regarded as an original. Similarly, practicality and usage confer the status of original upon any computer printout. *Transport Indemnity Co.* v. *Seib,* 178 Neb. 253, 132 N.W.2d 871 (1965).

*Paragraph (4).* The definition describes "copies" produced by methods possessing an accuracy which virtually eliminates the possibility of error. Copies thus produced are given the status of originals in large measure by Rule 1003, *infra.* Copies subsequently produced manually, whether handwritten or typed, are not within the definition. It should be noted that what is an original for some purposes may be a duplicate for others. Thus a bank's microfilm record of checks cleared is the original as a record. However, a print offered as a copy of a check whose contents are in controversy is a duplicate. This result is substantially consistent with 28 U.S.C. § 1732(b). Compare 26 U.S.C. § 7513(c), giving full status as originals to photographic reproductions of tax returns and other documents, made by authority of the Secretary of the Treasury, and 44 U.S.C. § 399(a), giving original status to photographic copies in the National Archives.

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The Committee amended this Rule expressly to include "video tapes" in the definition of "photographs."

## Rule 1002. Requirement of Original

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.

(Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1946.)

### NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

The rule is the familiar one requiring production of the original of a document to prove its contents, expanded to include writings, recordings, and photographs, as defined in Rule 1001(1) and (2), *supra.*

Application of the rule requires a resolution of the question whether contents are sought to be proved. Thus an event may be proved by nondocumentary evidence, even though a written record of it was made. If, however, the event is sought to be proved by the written record, the rule applies. For example, payment may be proved without producing the written receipt which was given. Earnings may be proved without producing books of account in which they are entered. McCormick § 198; 4 Wigmore § 1245. Nor does the rule apply to testimony that books or records have been examined and found not to contain any reference to a designated matter.

The assumption should not be made that the rule will come into operation on every occasion when use is made of a photograph in evidence. On the contrary, the rule will seldom apply to ordinary photographs. In most instances a party *wishes* to introduce the item and the question raised is the propriety of receiving it in evidence. Cases in which an offer is made of the testimony of a witness as to what he saw in a photograph or motion picture, without producing the same, are most unusual. The usual course is for a witness on the stand to identify the photograph or motion picture as a correct representation of events which he saw or of a scene with which he is familiar. In fact he adopts the picture as his testimony, or, in common parlance, uses the picture to illustrate his testimony. Under these circumstances, no effort is made to prove the contents of the picture, and the rule is inapplicable. Paradis, The Celluloid Witness, 37 U.Colo.L. Rev. 235, 249-251 (1965).

On occasion, however, situations arise in which contents are sought to be proved. Copyright, defamation, and invasion of privacy by photograph or motion picture falls in this category. Similarly as to situations in which the picture is offered as having independent probative value, e.g. automatic photograph of bank robber. See *People* v. *Doggett,* 83 Cal.App.2d 405, 188 P.2d 792 (1948) photograph of defendants engaged in indecent act; Mouser and Philbin, Photographic Evidence—Is There a Recognized Basis for Admissibility? 8 Hastings L.J. 310 (1957). The most commonly encountered of this latter group is of course, the X-ray, with substantial authority calling for production of the original. *Daniels* v. *Iowa City,* 191 Iowa 811, 183 N.W. 415 (1921); *Cellamare* v. *Third Acc. Transit Corp.,* 273 App.Div. 260, 77 N.Y.S.2d 91 (1948); *Patrick & Tilman* v. *Matkin,* 154 Okl. 232, 7 P.2d 414 (1932); *Mendoza* v. *Rivera,* 78 P.R.R. 569 (1955)

It should be noted, however, that Rule 703, supra, allows an expert to give an opinion based on matters not in evidence, and the present rule must be read as being limited accordingly in its application. Hospital records which may be admitted as business records under Rule 803(6) commonly contain reports interpreting X-rays by the staff radiologist, who qualifies as an expert, and these reports need not be excluded from the records by the instant rule.

The reference to Acts of Congress is made in view of such statutory provisions as 26 U.S.C. § 7513, photographic reproductions of tax returns and documents, made by authority of the Secretary of the Treasury, treated as originals, and 44 U.S.C. § 399(a), photographic copies in National Archives treated as originals.

### Rule 1003. Admissibility of Duplicates

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

(Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1946.)

#### NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

When the only concern is with getting the words or other contents before the court with accuracy and precision, then a counterpart serves equally as well as the original, if the counterpart is the product of a method which insures accuracy and genuineness. By definition in Rule 1001(4), *supra*, a "duplicate" possesses this character.

Therefore, if no genuine issue exists as to authenticity and no other reason exists for requiring the original, a duplicate is admissible under the rule. This position finds support in the decisions, *Myrick* v. *United States*, 332 F.2d 279 (5th Cir. 1964), no error in admitting photostatic copies of checks instead of original microfilm in absence of suggestion to trial judge that photostats were incorrect; *Johns* v. *United States*, 323 F.2d 421 (5th Cir. 1963), not error to admit concededly accurate tape recording made from original wire recording; *Sauget* v. *Johnston*, 315 F.2d 816 (9th Cir. 1963), not error to admit copy of agreement when opponent had original and did not on appeal claim any discrepancy. Other reasons for requiring the original may be present when only a part of the original is reproduced and the remainder is needed for cross-examination or may disclose matters qualifying the part offered or otherwise useful to the opposing party. *United States* v. *Alexander*, 326 F.2d 736 (4th Cir. 1964). And see *Toho Bussan Kaisha, Ltd.* v. *American President Lines, Ltd.*, 265 F.2d 418, 76 A.L.R.2d 1344 (2d Cir. 1959).

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The Committee approved this Rule in the form submitted by the Court, with the expectation that the courts would be liberal in deciding that a "genuine question is raised as to the authenticity of the original."

### Rule 1004. Admissibility of Other Evidence of Contents

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if—

(*1*) *Originals lost or destroyed.* All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(*2*) *Original not obtainable.* No original can be obtained by any available judicial process or procedure; or

(*3*) *Original in possession of opponent.* At a time when an original was under the control of the party against whom offered, he was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and he does not produce the original at the hearing; or

(*4*) *Collateral matters.* The writing, recording, or photograph is not closely related to a controlling issue.

(Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1946.)

#### NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

Basically the rule requiring the production of the original as proof of contents has developed as a rule of preference: if failure to produce the original is satisfactory explained, secondary evidence is admissible. The instant rule specifies the circumstances under which production of the original is excused.

The rule recognizes no "degrees" of secondary evidence. While strict logic might call for extending the principle of preference beyond simply preferring the original, the formulation of a hierarchy of preferences and a procedure for making it effective is believed to involve unwarranted complexities. Most, if not all, that would be accomplished by an extended scheme of preferences will, in any event, be achieved through the normal motivation of a party to present the most convincing evidence possible and the arguments and procedures available to his opponent if he does not. Compare McCormick § 207.

*Paragraph (1).* Loss or destruction of the original, unless due to bad faith of the proponent, is a satisfactory explanation of nonproduction. McCormick § 201.

*Paragraph (2).* When the original is in the possession of a third person, inability to procure it from him by resort to process or other judicial procedure is sufficient explanation of nonproduction. Judicial procedure includes subpoena duces tecum as an incident to the taking of a deposition in another jurisdiction. No further showing is required. See McCormick § 202.

*Paragraph (3).* A party who has an original in his control has no need for the protection of the rule if put on notice that proof of contents will be made. He can ward off secondary evidence by offering the original. The notice procedure here provided is not to be confused with orders to produce or other discovery procedures, as the purpose of the procedure under this rule is to afford the opposite party an opportunity to produce the original, not to compel him to do so. McCormick § 203.

*Paragraph (4).* While difficult to define with precision, situations arise in which no good purpose is served by production of the original. Examples are the newspaper in an action for the price of publishing defendant's advertisement, *Foster-Holcomb Investment Co.* v. *Little Rock Publishing Co.*, 151 Ark. 449, 236 S.W. 597 (1922), and the streetcar transfer of plaintiff claiming status as a passenger, *Chicago City Ry. Co.* v. *Carroll*, 206 Ill. 318, 68 N.E. 1087 (1903). Numerous cases are collected in McCormick § 200, p. 412, n. 1.

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The Committee approved Rule 1004(1) in the form submitted to Congress. However, the Committee intends that loss or destruction of an original by another person at the instigation of the proponent should be considered as tantamount to loss or destruction in bad faith by the proponent himself.

### Rule 1005. Public Records

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

(Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1946.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

Public records call for somewhat different treatment. Removing them from their usual place of keeping would be attended by serious inconvenience to the public and to the custodian. As a consequence judicial decisions and statutes commonly hold that no explanation need be given for failure to produce the original of a public record. McCormick § 204; 4 Wigmore §§ 1215–1228. This blanket dispensation from producing or accounting for the original would open the door to the introduction of every kind of secondary evidence of contents of public records were it not for the preference given certified or compared copies. Recognition of degrees of secondary evidence in this situation is an appropriate *quid pro quo* for not applying the requirement of producing the original.

The provisions of 28 U.S.C. § 1733(b) apply only to departments or agencies of the United States. The rule, however, applies to public records generally and is comparable in scope in this respect to Rule 44(a) of the Rules of Civil Procedure.

**Rule 1006. Summaries**

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

(Pub. L. 93–595, § 1, Jan. 2, 1975, 88 Stat. 1946.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

The admission of summaries of voluminous books, records, or documents offers the only practicable means of making their contents available to judge and jury. The rule recognizes this practice, with appropriate safeguards. 4 Wigmore § 1230.

**Rule 1007. Testimony or Written Admission of Party**

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by his written admission, without accounting for the nonproduction of the original.

(Pub. L. 93–595, § 1, Jan. 2, 1975, 88 Stat. 1947.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

While the parent case, *Slatterie* v. *Pooley*, 6 M. & W. 664, 151 Eng. Rep. 579 (Exch. 1840), allows proof of contents by evidence of an oral admission by the party against whom offered, without accounting for nonproduction of the original, the risk of inaccuracy is substantial and the decision is at odds with the purpose of the rule giving preference to the original. See 4 Wigmore § 1255. The instant rule follows Professor McCormick's suggestion of limiting this use of admissions to those made in the course of giving testimony or in writing. McCormick § 208, p. 424. The limitation, of course, does not call for excluding evidence of an oral admission when nonproduction of the original has been accounted for and secondary evidence generally has become admissible. Rule 1004, *supra*.

A similar provision is contained in New Jersey Evidence Rule 70(1)(h).

**Rule 1008. Functions of Court and Jury**

When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of rule 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

(Pub. L. 93–595, § 1, Jan. 2, 1975, 88 Stat. 1947.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

Most preliminary questions of fact in connection with applying the rule preferring the original as evidence of contents are for the judge, under the general principles announced in Rule 104, *supra*. Thus, the question whether the loss of the originals has been established, or of the fulfillment of other conditions specified in Rule 1004, *supra*, is for the judge. However, questions may arise which go beyond the mere administration of the rule preferring the original and into the merits of the controversy. For example, plaintiff offers secondary evidence of the contents of an alleged contract, after first introducing evidence of loss of the original, and defendant counters with evidence that no such contract was ever executed. If the judge decides that the contract was never executed and excludes the secondary evidence, the case is at an end without ever going to the jury on a central issue. Levin, Authentication and Content of Writings, 10 Rutgers L.Rev. 632, 644 (1956). The latter portion of the instant rule is designed to insure treatment of these situations as raising jury questions. The decision is not one for uncontrolled discretion of the jury but is subject to the control exercised generally by the judge over jury determinations. See Rule 104(b), *supra*.

For similar provisions, see Uniform Rule 70(2); Kansas Code of Civil Procedure § 60–467(b); New Jersey Evidence Rule 70(2), (3).

## ARTICLE XI. MISCELLANEOUS RULES

**Rule 1101. Applicability of Rules**

(*a*) *Courts and magistrates.* These rules apply to the United States district courts, the District Court of Guam, the District Court of the Virgin Islands, the District Court for the District of the Canal Zone, the United States courts of appeals, the Court of Claims, and to United States magistrates, in the actions, cases, and proceedings and to the extent hereinafter set forth. The terms "judge" and "court" in these rules include United States magistrates, referees in bankruptcy, and commissioners of the Court of Claims.

(*b*) *Proceedings generally.* These rules apply generally to civil actions and proceedings, including admiralty and maritime cases, to criminal cases and proceedings, to contempt proceedings except those in which the court may act summarily, and to proceedings and cases under the Bankruptcy Act.

(*c*) *Rule of privilege.* The rule with respect to privileges applies at all stages of all actions, cases, and proceedings.

(*d*) *Rules inapplicable.* The rules (other than with respect to privileges) do not apply in the following situations:

(*1*) *Preliminary questions of fact.* The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under rule 104.

(*2*) *Grand jury.* Proceedings before grand juries.

(*3*) *Miscellaneous proceedings.* Proceedings for extradition or rendition; preliminary examinations in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

(e) *Rules applicable in part.* In the following proceedings these rules apply to the extent that matters of evidence are not provided for in the statutes which govern procedure therein or in other rules prescribed by the Supreme Court pursuant to statutory authority: the trial of minor and petty offenses by United States magistrates; review of agency actions when the facts are subject to trial de novo under section 706(2)(F) of title 5, United States Code; review of orders of the Secretary of Agriculture under section 2 of the Act entitled "An Act to authorize association of producers of agricultural products" approved February 18, 1922 (7 U.S.C. 292), and under sections 6 and 7(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499f, 499g(c)); naturalization and revocation of naturalization under sections 310-318 of the Immigration and Nationality Act (8 U.S.C. 1421-1429); prize proceedings in admiralty under sections 7651-7681 of title 10, United States Code; review of orders of the Secretary of the Interior under section 2 of the Act entitled "An Act authorizing associations of producers of aquatic products" approved June 25, 1934 (15 U.S.C. 522); review of orders of petroleum control boards under section 5 of the Act entitled "An Act to regulate interstate and foreign commerce in petroleum and its products by prohibiting the shipment in such commerce of petroleum and its products produced in violation of State law, and for other purposes", approved February 22, 1935 (15 U.S.C. 715d); actions for fines, penalties, or forfeitures under part V of title IV of the Tariff Act of 1930 (19 U.S.C. 1581-1624), or under the Anti-Smuggling Act (19 U.S.C. 1701-1711); criminal libel for condemnation, exclusion of imports, or other proceedings under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301-392); disputes between seamen under sections 4079, 4080, and 4081 of the Revised Statutes (22 U.S.C. 256-258; habeas corpus under sections 2241-2254 of title 28, United States Code; motions to vacate, set aside or correct sentence under section 2255 of title 28, United States Code; actions for penalties for refusal to transport destitute seamen under section 4578 of the Revised Statutes (46 U.S.C. 679); actions against the United States under the Act entitled "An Act authorizing suits against the United States in admiralty for damage caused by and salvage service rendered to public vessels belonging to the United States, and for other purposes", approved March 3,1925 (46 U.S.C. 781-790), as implemented by section 7730 of title 10, United States Code.

(Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1947; Pub. L. 94-149, § 1(14), Dec. 12, 1975, 89 Stat. 806.)

### Notes of Advisory Committee on Proposed Rules

*Subdivision (a).* The various enabling acts contain differences in phraseology in their descriptions of the courts over which the Supreme Court's power to make rules of practice and procedure extends. The act concerning civil actions, as amended in 1966, refers to "the district courts * * * of the United States in civil actions, including admiralty and maritime cases. * * *" 28 U.S.C. § 2072, Pub. L. 89-773, § 1, 80 Stat. 1323. The bankruptcy authorization is for rules of practice and procedure "under the Bankruptcy Act." 28 U.S.C. § 2075, Pub. L. 88-623, § 1, 78 Stat. 1001. The Bankruptcy Act in turn creates bankruptcy courts of "the United States district courts and the district courts of the Territories and possessions to which this title is or may hereafter be applicable." 11 U.S.C. §§ 1(10), 11(a). The provision as to criminal rules up to and including verdicts applies to "criminal cases and proceedings to punish for criminal contempt of court in the United States district courts, in the district courts for the districts of the Canal Zone and Virgin Islands, in the Supreme Court of Puerto Rico, and in proceedings before United States magistrates." 18 U.S.C. § 3771.

These various provisions do not in terms describe the same courts. In congressional usage the phrase "district courts of the United States," without further qualification, traditionally has included the district courts established by Congress in the states under Article III of the Constitution, which are "constitutional" courts, and has not included the territorial courts created under Article IV, Section 3, Clause 2, which are "legislative" courts. *Hornbuckle* v. *Toombs*, 85 U.S. 648, 21 L.Ed. 966 (1873). However, any doubt as to the inclusion of the District Court for the District of Columbia in the phrase is laid at rest by the provisions of the Judicial Code constituting the judicial districts, 28 U.S.C. § 81 et seq. creating district courts therein, *Id.* § 132, and specifically providing that the term "district court of the United States" means the courts so constituted. *Id.* § 451. The District of Columbia is included. *Id.* § 88. Moreover, when these provisions were enacted, reference to the District of Columbia was deleted from the original civil rules enabling act. 28 U.S.C. § 2072. Likewise Puerto Rico is made a district, with a district court, and included in the term. *Id.* § 119. The question is simply one of the extent of the authority conferred by Congress. With respect to civil rules it seems clearly to include the district courts in the states, the District Court for the District of Columbia, and the District Court for the District of Puerto Rico.

The bankruptcy coverage is broader. The bankruptcy courts include "the United States district courts," which includes those enumerated above. Bankruptcy courts also include "the district courts of the Territories and possessions to which this title is or may hereafter be applicable." 11 U.S.C. §§ 1(10), 11(a). These courts include the district courts of Guam and the Virgin Islands. 48 U.S.C. §§ 1424(b), 1615. Professor Moore points out that whether the District Court for the District of the Canal Zone is a court of bankruptcy "is not free from doubt in view of the fact that no other statute expressly or inferentially provides for the applicability of the Bankruptcy Act in the Zone." He further observes that while there seems to be little doubt that the Zone is a territory or possession within the meaning of the Bankruptcy Act, 11 U.S.C. § 1(10), it must be noted that the appendix to the Canal Zone Code of 1934 did not list the Act among the laws of the United States applicable to the Zone. 1 Moore's Collier on Bankruptcy ¶1.10, pp. 67, 72, n. 25 (14th ed. 1967). The Code of 1962 confers on the district court jurisdiction of:

"(4) actions and proceedings involving laws of the United States applicable to the Canal Zone; and

"(5) other matters and proceedings wherein jurisdiction is conferred by this Code or any other law." Canal Zone Code, 1962, Title 3, § 141.

Admiralty jurisdiction is expressly conferred. *Id.* § 142. General powers are conferred on the district court, "if the course of proceeding is not specifically prescribed by this Code, by the statute, or by applicable rule of the Supreme Court of the United States * * *" *Id.* § 279. Neither these provisions nor § 1(10) of the Bankruptcy Act ("district courts of the Territories and possessions to which this title is or may hereafter be applicable") furnishes a satisfactory answer as to the status of the District Court for the District of the

Canal Zone as a court of bankruptcy. However, the fact is that this court exercises no bankruptcy jurisdiction in practice.

The criminal rules enabling act specifies United States district courts, district courts for the districts of the Canal Zone and the Virgin Islands, the Supreme Court of the Commonwealth of Puerto Rico, and proceedings before United States commissioners. Aside from the addition of commissioners, now magistrates, this scheme differs from the bankruptcy pattern in that it makes no mention of the District Court of Guam but by specific mention removes the Canal Zone from the doubtful list.

The further difference in including the Supreme Court of the Commonwealth of Puerto Rico seems not to be significant for present purposes, since the Supreme Court of the Commonwealth of Puerto Rico is an appellate court. The Rules of Criminal Procedure have not been made applicable to it, as being unneeded and inappropriate, Rule 54(a) of the Federal Rules of Criminal Procedure, and the same approach is indicated with respect to rules of evidence.

If one were to stop at this point and frame a rule governing the applicability of the proposed rules of evidence in terms of the authority conferred by the three enabling acts, an irregular pattern would emerge as follows:

*Civil actions*, including admiralty and maritime cases—district courts in the states, District of Columbia, and Puerto Rico.

*Bankruptcy*—same as civil actions, plus Guam and Virgin Islands.

*Criminal cases*—same as civil actions, plus Canal Zone and Virgin Islands (but not Guam).

This irregular pattern need not, however, be accepted. Originally the Advisory Committee on the Rules of Civil Procedure took the position that, although the phrase "district courts of the United States" did not include territorial courts, provisions in the organic laws of Puerto Rico and Hawaii would make the rules applicable to the district courts thereof, though this would not be so as to Alaska, the Virgin Islands, or the Canal Zone, whose organic acts contained no corresponding provisions. At the suggestion of the Court, however, the Advisory Committee struck from its notes a statement to the above effect. 2 Moore's Federal Practice ¶1.07 (2nd ed. 1967); 1 Barron and Holtzoff, Federal Practice and Procedure § 121 (Wright ed. 1960). Congress thereafter by various enactments provided that the rules and future amendments thereto should apply to the district courts of Hawaii, 53 Stat. 841 (1939), Puerto Rico, 54 Stat. 22 (1940), Alaska, 63 Stat. 445 (1949), Guam, 64 Stat. 384-390 (1950), and the Virgin Islands, 68 Stat. 497, 507 (1954). The original enabling act for rules of criminal procedure specifically mentioned the district courts of the Canal Zone and the Virgin Islands. The Commonwealth of Puerto Rico was blanketed in by creating its court a "district court of the United States" as previously described. Although Guam is not mentioned in either the enabling act or in the expanded definition of "district court of the United States," the Supreme Court in 1956 amended Rule 54(a) to state that the Rules of Criminal Procedure are applicable in Guam. The Court took this step following the enactment of legislation by Congress in 1950 that rules theretofore or thereafter promulgated by the Court in civil cases, admiralty, criminal cases and bankruptcy should apply to the District Court of Guam, 48 U.S.C. § 1424(b), and two Ninth Circuit decisions upholding the applicability of the Rules of Criminal Procedure to Guam. *Pugh* v. *United States*, 212 F.2d 761 (9th Cir. 1954); *Hatchett* v. *Guam*, 212 F.2d 767 (9th Cir. 1954); Orfield, The Scope of the Federal Rules of Criminal Procedure, 38 U. of Det.L.J. 173, 187 (1960).

From this history, the reasonable conclusion is that Congressional enactment of a provision that rules and future amendments shall apply in the courts of a territory or possession is the equivalent of mention in an enabling act and that a rule on scope and applicability may properly be drafted accordingly. Therefore the pattern set by Rule 54 of the Federal Rules of Criminal Procedure is here followed.

The substitution of magistrates in lieu of commissioners is made in pursuance of the Federal Magistrates Act, P.L. 90-578, approved October 17, 1968, 82 Stat. 1107.

*Subdivision* (*b*) is a combination of the language of the enabling acts, *supra*, with respect to the kinds of proceedings in which the making of rules is authorized. It is subject to the qualifications expressed in the subdivisions which follow.

*Subdivision* (*c*), singling out the rules of privilege for special treatment, is made necessary by the limited applicability of the remaining rules.

*Subdivision* (*d*). The rule is not intended as an expression as to when due process or other constitutional provisions may require an evidentiary hearing. Paragraph (1) restates, for convenience, the provisions of the second sentence of Rule 104(a), *supra*. See Advisory Committee's Note to that rule.

(2) While some states have statutory requirements that indictments be based on "legal evidence," and there is some case law to the effect that the rules of evidence apply to grand jury proceedings, 1 Wigmore § 4(5), the Supreme Court has not accepted this view. In *Costello* v. *United States*, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1965), the Court refused to allow an indictment to be attacked, for either constitutional or policy reasons, on the ground that only hearsay evidence was presented.

"It would run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules. Neither justice nor the concept of a fair trial requires such a change." *Id.* at 364. The rule as drafted does not deal with the evidence required to support an indictment.

(3) The rule exempts preliminary examinations in criminal cases. Authority as to the applicability of the rules of evidence to preliminary examinations has been meagre and conflicting. Goldstein, The State and the Accused: Balance of Advantage in Criminal Procedure, 69 Yale L.J. 1149, 1168, n. 53 (1960); Comment, Preliminary Hearings on Indictable Offenses in Philadelphia, 106 U. of Pa.L.Rev. 589, 592-593 (1958). Hearsay testimony is, however, customarily received in such examinations. Thus in a Dyer Act case, for example, an affidavit may properly be used in a preliminary examination to prove ownership of the stolen vehicle, thus saving the victim of the crime the hardship of having to travel twice to a distant district for the sole purpose of testifying as to ownership. It is believed that the extent of the applicability of the Rules of Evidence to preliminary examinations should be appropriately dealt with by the Federal Rules of Criminal Procedure which regulate those proceedings.

Extradition and rendition proceedings are governed in detail by statute. 18 U.S.C. §§ 3181-3195. They are essentially administrative in character. Traditionally the rules of evidence have not applied. 1 Wigmore § 4(6). Extradition proceedings are accepted from the operation of the Rules of Criminal Procedure. Rule 54(b)(5) of Federal Rules of Criminal Procedure.

The rules of evidence have not been regarded as applicable to sentencing or probation proceedings, where great reliance is placed upon the presentence investigation and report. Rule 32(c) of the Federal Rules of Criminal Procedure requires a presentence investigation and report in every case unless the court otherwise directs. In *Williams* v. *New York*, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949), in which the judge overruled a jury recommendation of life imprisonment and imposed a death sentence, the Court said that due process does not require confrontation or cross-examination in sentencing or passing on probation, and that the judge has broad discretion as to the sources and types of information relied upon. Compare the recommendation that the substance of all derogatory information be disclosed to the defendant, in A.B.A. Project on Minimum Standards for Criminal Justice, Sentencing Alternatives and Procedures § 4.4, Tentative Draft (1967, Sobeloff, Chm.). Williams was adhered to in *Specht* v. *Patterson*, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967), but not extended to a proceeding under the Colorado Sex Offenders Act, which was said to be a new charge leading in effect to punishment, more like the recidivist statutes where opportunity must be given to be heard on the habitual criminal issue.

Warrants for arrest, criminal summonses, and search warrants are issued upon complaint or affidavit showing probable cause. Rules 4(a) and 41(c) of the Federal Rules of Criminal Procedure. The nature of the proceedings makes application of the formal rules of evidence inappropriate and impracticable.

Criminal contempts are punishable summarily if the judge certifies that he saw or heard the contempt and that it was committed in the presence of the court. Rule 42(a) of the Federal Rules of Criminal Procedure. The circumstances which preclude application of the rules of evidence in this situation are not present, however, in other cases of criminal contempt.

Proceedings with respect to release on bail or otherwise do not call for application of the rules of evidence. The governing statute specifically provides:

"Information stated in, or offered in connection with, any order entered pursuant to this section need not conform to the rules pertaining to the admissibility of evidence in a court of law." 18 U.S.C.A. § 3146(f). This provision is consistent with the type of inquiry contemplated in A.B.A. Project on Minimum Standards for Criminal Justice, Standards Relating to Pretrial Release, § 4.5(b), (c), p. 16 (1968). The references to the weight of the evidence against the accused, in Rule 46(a)(1), (c) of the Federal Rules of Criminal Procedure and in 18 U.S.C.A. § 3146(b), as a factor to be considered, clearly do not have in view evidence introduced at a hearing under the rules of evidence.

The rule does not exempt habeas corpus proceedings. The Supreme Court held in *Walker* v. *Johnston*, 312 U.S. 275, 61 S.Ct. 574, 85 L.Ed. 830 (1941), that the practice of disposing of matters of fact on affidavit, which prevailed in some circuits, did not "satisfy the command of the statute that the judge shall proceed 'to determine the facts of the case, by hearing the testimony and arguments.'" This view accords with the emphasis in *Townsend* v. *Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963), upon trial-type proceedings, *Id.* 311, 83 S.Ct. 745, with demeanor evidence as a significant factor, *Id.* 322, 83 S.Ct. 745, in applications by state prisoners aggrieved by unconstitutional detentions. Hence subdivision (e) applies the rules to habeas corpus proceedings to the extent not inconsistent with the statute.

*Subdivison (e).* In a substantial number of special proceedings, *ad hoc* evaluation has resulted in the promulgation of particularized evidentiary provisions, by Act of Congress or by rule adopted by the Supreme Court. Well adapted to the particular proceedings, though not apt candidates for inclusion in a set of general rules, they are left undisturbed. Otherwise, however, the rules of evidence are applicable to the proceedings enumerated in the subdivision.

### NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 93-650

Subdivision (a) as submitted to the Congress, in stating the courts and judges to which the Rules of Evidence apply, omitted the Court of Claims and commissioners of that Court. At the request of the Court of Claims, the Committee amended the Rule to include the Court and its commissioners within the purview of the Rules.

Subdivision (b) was amended merely to substitute positive law citations for those which were not.

The Tariff Act of 1930, referred to in subsec. (e), is act June 17, 1930, ch. 497, 46 Stat. 590, which is classified principally to chapter 4 (§ 1202 et seq.) of Title 19, Customs Duties. Part V of title IV of the Tariff Act of 1930 enacted part V (§ 1581 et seq.) of subtitle III of chapter 4 of title 19. For complete classification of this Act to the Code, see section 1654 of Title 19 and Tables volume.

The Anti-Smuggling Act (19 U.S.C. 1701-1711), referred to in subsec. (e), is act Aug. 5, 1935, ch. 438, 49 Stat. 517, which enacted sections 1432a, 1601a, and 1701 to 1711 of Title 19, Customs Duties, and amended section 64 of former Title 14, Coast Guard, sections 70, 483, 1401, 1434, 1436, 1441, 1581, 1584 to 1587, 1591, 1592, 1615, 1619, and 1621 of title 19, and sections 60, 91, 106, 277, 288, 319, and 325 of Title 46, Shipping. For complete classification of this Act to the Code, see section 1711 of Title 19 and Tables volume.

The Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301-392), referred to in subsec. (e), is act June 25, 1938, ch. 675, 52 Stat. 1040, which is classified generally to chapter 9 (§ 301 et seq.) of Title 21, Food and Drugs. For complete classification of this Act to the Code, see section 301 of Title 21 and Tables volume.

"An Act authorizing suits against the United States in admirality [sic] for damage caused by and salvage service rendered to public vessels belonging to the United States, and for other purposes," approved Mar. 3, 1925 (46 U.S.C. 781-790), referred to in subsec. (e), is act Mar. 3, 1925, ch. 428, 43 Stat. 1112, which is classified generally to chapter 22 (§ 781 et seq.) of Title 46, Shipping. For complete classification of this Act to the Code, see Tables volume.

### AMENDMENTS

1975—Subd. (e). Pub. L. 94-149 substituted "admiralty" for "admirality".

## Rule 1102. Amendments

Amendments to the Federal Rules of Evidence may be made as provided in section 2076 of title 28 of the United States Code.

(Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1948.)

## Rule 1103. Title

These rules may be known and cited as the Federal Rules of Evidence.

(Pub. L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1948.)

# RULES OF THE COURT OF CLAIMS OF THE UNITED STATES

*As amended to January 1, 1977*

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### CROSS-REFERENCE TABLE

These rules are adapted in part from the Federal Rules of Civil Procedure and other sources, as indicated in the cross-reference table below.

| *1969 Edition (as amended)* | *Comparable Rules* [1] |
|---|---|
| 1 | 1, 86 |
| 5 | —— |
| 6(a) | 77(a) |
| (b) | —— |
| 7 | *cf.* FRAP [2] 35 |
| 8 | —— |
| 12 | —— |
| 13 | —— |
| 14 | —— |
| 21(a) | 3 |
| (b) and (c) | —— |
| 22 | 4(d)(4) |
| 23 | 5(a) and (b) |
| 24 | 5(d) and (e) |
| 25 | 6 (FRCP 6(c), on which Rule 25(e) is based was abrogated effective July 1, 1966) |
| 26 | —— |
| 31 | 7(a) and (c) |
| 32 | 8(e) and (f) |
| 33 | 9(a)–(c), (e), and (f) |
| 34 | 10 |
| 35 | 8(a) |
| 36 | *cf.* 27(a) |
| 37 | 8(b)–(d) |
| 38 | 12 |
| 39 | 15 |
| 40 | 13(a)–(c), (e), and (f) |
| 41 | *cf.* 14 |
| 42 | 11 |
| 51(a) and (b) | 7(b) |
| (c) and (d) | —— |
| 52 | —— |
| 53(a) and (b) | —— |
| (c) | *cf.* 28 U.S.C. 1292, FRAP 5 |
| 54 | —— |
| 55 | —— |
| 56 | —— |
| 57 | *cf.* S.Ct. [3] 34(5). |
| 61 | 17 |
| 62 | 19(a) and (c) |
| 63 | 20 |
| 64 | 21 |
| 65 | 24 |
| 66 | 25 |
| 71(a) and (b) | 26(a) and (b) |
| (c) | *cf.* 26(d) and 30(a) |
| (d) | 29 |
| (e) | —— |
| (f) | 26(c) |
| (g) | 26(e) |
| 72 | 36 |
| 73 | 33 |
| 74(a) and (b) | 34 |
| (c) | 34(a) and 26(b) |
| (d) and (e) | —— |
| 75 | —— |
| 76 | 37 |
| 81 | *cf.* 26 |
| 82 | 45(d)(1) |
| 83(a) | 30(c) |
| (b) | 26(b) |
| 84 | 30 |
| 85 | 31 |
| 86 | *cf.* 27(b) |
| 87 | 26(c) |
| 88 | 32 |
| 89(a)–(c) | 28(a)–(c) |
| (d) | —— |
| 90(a)–(c) | 30(c), (f) |
| (d) | —— |
| 91 | 32(d) |
| 92 | 37 |
| 101 | 56 |
| 102 | 41 |
| 111 | *cf.* 16 |
| 112(a) | 16 |
| (b) | —— |
| 113 | *cf.* 16 |
| 114 | *cf.* 37(b) |
| 121 | —— |
| 122 | *cf.* 28 U.S.C. 796 |
| 123 | 45 |
| 124 | 44 |
| 125 | 44.1 |
| 131 | 42 |
| 132 | —— |
| 133 | 43 |
| 134 | —— |
| 141 | —— |
| 142 | —— |
| 143(a)–(c) | —— |
| (d) | *cf.* 55 |
| 144 | *cf.* S.Ct. 40, FRAP 28 |
| 145 | *cf.* S.Ct. 42, FRAP 29 |
| 146 | —— |
| 147(a)–(b) | *cf.* 52(a) |
| (c) | —— |
| 148 | —— |
| 149 | —— |
| 150 | —— |
| 151 | 59 |
| 152 | 60 |
| 153 | 61 |
| 154 | *See* S.Ct. 21 |
| 161 | —— |
| 162 | —— |
| 163 | —— |
| 164 | —— |
| 165 | —— |
| 166 | —— |
| 171 | —— |

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See footnotes at end of table.

| *1969 Edition (as amended)* | *Comparable Rules*[1] |
|---|---|
| 172 | —— |
| 173 | —— |
| 174 | —— |
| 175 | —— |
| 179 | *See generally* FRAP |
| 181 | —— |
| 183 | —— |
| 191(a) | 58 |
| (b) | 77(d) |
| (c) | 79(b) |
| 192(a) | 79(a) |
| (b) | 79(c) |
| 193 | —— |
| 201 | *cf.* S.Ct. 5, 52(d), FRAP 46(a) |
| 202 | *cf.* S.Ct. 8, FRAP 46(b) |
| 203 | —— |
| 204 | *cf.* S.Ct. 7 |
| 211 | —— |
| 212 | —— |
| 213 | —— |
| 214 | —— |
| 221 | —— |
| 222 | —— |
| 223 | —— |
| 224 | —— |

[1] Federal Rules of Civil Procedure, unless otherwise indicated.
[2] Federal Rules of Appellate Procedure.
[3] Supreme Court Rules.

## I. RULES; COURT; TRIAL JUDGES

### DESIGNATION OF COMMISSIONERS AS TRIAL JUDGES

General Order No. 2 of 1973 of the United States Court of Claims, entered August 1, 1973, provided:

Except as the use of the statutory designation of "commissioner" may be required, the commissioners of this court shall, in the performance of their duties and the exercise of their functions, be known and referred to by the title of "Trial Judge." Such title shall be deemed to be substituted for that of "commissioner" in all appropriate places in the rules of this court. Amendments, changes, and revisions of the rules made hereafter in due course shall reflect such change in title.

BY THE COURT.

WILSON COWEN,
*Chief Judge.*

### Rule 1. Scope of rules; effective date; construction

These rules govern all proceedings in actions filed in the United States Court of Claims on or after September 1, 1969, and also all further proceedings in actions then pending, except to the extent that, in the opinion of the court (or the trial judge), their application in a particular action pending on September 1, 1969, would not be feasible or would work an injustice, in which event the former procedure applies. They shall be so construed as to promote the just, speedy, and inexpensive determination of every action.

### Rule 5. Name and seal of the court

(a) *Name.* The name of the court, as fixed by section 171 of title 28, United States Code, is "United States Court of Claims."

(b) *Seal.* The seal of the court shall be the American eagle, as represented in the arms of the United States, engraved on a circular piece of brass or steel of the size of a half dollar, with these words in the margin: "Court of Claims" on the upper part; and "Reipublicae Civibusque" in the other part of the margin.

### Rule 6. Court always open; term

(a) *Always Open.* The court shall be deemed always open for the purpose of filing proper papers, issuing and returning process, making motions, and issuing orders.

(b) *Annual Term.* The annual term of the court shall begin on the first Monday of October. The continued existence or expiration of a term in no way affects the power of the court to do any act or take any proceeding.

### Rule 7. Sittings by court and panels

(a) *Panels.* The judges of the court shall sit in panels of three, and in such order and at such times and places as the court shall direct, unless a hearing or rehearing en banc is ordered as provided for in this rule.

(b) *When Hearing or Rehearing En Banc Will Be Ordered.* A majority of the judges who are in regular active service, or the chief judge, may order that a case or controversy be heard initially en banc. A majority of the judges in regular active service may order that a rehearing en banc be granted. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance or difficulty.

(c) *Suggestion of a Party for Hearing En Banc.* On or before the completion of the briefing on the matter at issue, a party may suggest the appropriateness of and give his reasons for an initial hearing en banc, superseding any panel hearing, by letter to the clerk (original plus 7 copies). The clerk will transmit such suggestion to all judges of the court who are in regular active service. However, a vote will not be taken to determine whether the cause shall be heard en banc unless a judge in regular active service requests a vote on such suggestion by a party. A party so suggesting shall promptly mail or otherwise provide a copy thereof to the adverse party or parties. Such suggestion shall not obstruct or stay the routine assignment of the case to a panel unless the court, or the chief judge, so orders.

(d) *Suggestion of a Party for Rehearing En Banc.* If, after a judgment or order by a panel, a party affected thereby desires to suggest a rehearing en banc, the suggestion shall be included in a motion filed pursuant to Rule 151 or Rule 152 and within the time therein prescribed. However, a vote will not be taken to determine whether the cause shall be reheard en banc unless a judge in regular active service requests a vote on such a suggestion made by a party. The pendency of such suggestion shall not affect the finality of the judgment or stay the effectiveness of any order.

(e) *Panel Defined.* The term "panel" used herein means the same as the term "division" in 28 U.S.C. § 175, as amended.

### Rule 8. Appellate functions of the court

In order to effectuate the purposes of Rule 13 and related rules, the judges of the court, appointed by the President under Article III of the Constitution, shall function primarily in an appellate capacity: *Provided,* That there shall be no change in the title of any judge, nor shall this rule be construed to limit or affect his exercise of any judicial act, power, or duty that is provided by law or by these rules. Such judges are "the court" except to the extent certain powers are specifically delegated to the trial judges.

### Rule 12. The court and trial judges

(a) *Delegations of authority to trial judges.* Delegations of authority to "the trial judge" in these rules relate to actions which a trial judge is authorized to take with respect to a case while it is under reference to him in accordance with Rule 14. Such a delegation shall not be construed as preventing the court from exercising the same authority.

(b) *Proceedings before trial judges.* Cases commenced in the Court of Claims will be referred to trial judges for the conduct of proceedings pursuant to the provisions of Rule 13(b). A termination or a suspension of the reference terminates or suspends the authority of the trial judge with respect to the case.

(c) *When "court" includes trial judges.* When the context permits, the term "the court" includes the trial judges in matters under reference to them pursuant to Rule 14, to the extent of the authority vested in them by Rule 13.

(d) *Requests for review; actions.* (1) Requests for review of the trial judges' actions or orders, as provided by Rule 13(d) or Rule 53(c) may be acted upon by the chief judge or a judge in chambers. Such action shall be without prejudice and subject to review by the court in its discretion. Proceedings before the trial judge will not be stayed pending action upon a request for review pursuant to this provision unless the trial judge or the court or a judge thereof shall so order.

(2) Requests for review of trial judges' recommended decisions (Rules 54(b)(3), 143, and 166(e)) will be acted upon by the court.

### Rule 13. Authority of trial judges; trial division

(a) *General.* The trial judges shall constitute the trial division of the court and shall have the power, to the extent authorized by statute and these rules, to do and perform any acts which may be necessary or proper for the efficient performance of their duties and the regulation of proceedings before them.

(b) *Responsibility.* In all cases referred to him, the trial judge shall be responsible in the first instance (1) for all orders requisite to the joinder of issue on the pleadings; (2) for the disposition of procedural motions; (3) for the direction and conduct of pretrial proceedings (including discovery and depositions); (4) for the trial of issues of fact; (5) for making findings of fact; and (6) unless otherwise directed by the court, or otherwise provided by these rules, for submitting his recommended decision.

(c) *Discretion of trial judge.* In the event that a question of authority not covered by a rule arises in proceedings before a trial judge, the trial judge shall exercise his discretion thereon, subject to review by the court in its discretion.

(d) *Review by the court.* (1) Unless the rules provide otherwise, all rulings and orders by the trial judge shall be subject to review by the court on appeal or *sua sponte.* (Exercise of discretion by trial judge, paragraph (c) of this Rule 13; procedural motions, Rule 53; recommended decisions, Rules 54, 141-47, and 166.)

(2) With respect to any ruling or order by the trial judge (including any such ruling or order made pursuant to paragraph (c) of this rule) as to which no time is prescribed for filing a request for review by the court, the request shall be filed within 10 days after the service of such ruling or order, unless the court on motion and for good cause shown enlarges or shortens the time.

(e) *Misconduct before trial judge.* Any misconduct by attorneys, parties, witnesses, or other persons at any proceeding before a trial judge may be reported by him to the court for such disciplinary action, including contempt proceedings as the court may deem proper under the circumstances.

### Rule 14. Reference of cases to trial judges

(a) *Purpose of reference.* Unless otherwise ordered by the court, every case commenced in the Court of Claims shall be referred to a trial judge for action pursuant to the provisions of Rule 13(b).

(b) *Duration of reference.* (1) *Termination.* The filing by the trial judge of his recommended decision shall be deemed a return of the case to the court, terminating the reference as to all parties or matters covered by the recommended decision, subject to the normal right of the trial judge to correct minor and inadvertent errors within a reasonable time *sua sponte* or on motion of a party. (See Rules 54, 134 and 166.)

(2) *Suspension.* Except as provided in Rule 166, the filing of a dispositive motion in any case will suspend the reference for purposes of the particular motion: *Provided,* That the subsequent filing by the parties of a stipulation of settlement will terminate the suspension.

(c) *Substitution of trial judge.* When a trial judge to whom a case has been referred is unavailable, the chief of the trial division or another trial judge designated by him may (1) rule upon motions, (2) conduct pretrial proceedings, or (3) hear evidence: *Provided,* That when oral testimony has been heard by one trial judge after reference of the case to him, the case shall not thereafter, except for good cause, be referred to another trial judge.

(d) *Disqualification.* A trial judge may at any time withdraw from a case if he deems himself disqualified. Upon the filing in good faith by any party of a timely sufficient affidavit of personal bias or disqualification of a trial judge, the chief of the trial division shall determine the matter, subject to review by the court in its discretion.

## II. COMMENCEMENT OF SUIT; SERVICE OF PROCESS; COMPUTATION OF TIME

### Rule 21. Commencement of suit

(a) *Petition; filing and fee.* A suit in this court shall be commenced by filing a petition with the clerk of the court and by paying to him the fee required by Rule 221.

(b) *Petition; date of filing.* (1) The records of the clerk, including the date stamped on the petition, shall be final and conclusive evidence of the date on which a petition was filed, in the

**absence of the filing and allowance of a motion under subparagraph (2) of this paragraph (b).**

**(2)(i) A party plaintiff who contends that the effective filing date of his petition should properly be a date earlier than that shown by the clerk's records may seek a corrective order from the court by means of a motion under Rule 51.**

**(ii) Upon motion of a party plaintiff supported by a proper showing that the clerk's records are factually incorrect, the court will correct the records by order.**

**(iii) In a situation where a petition is stamped by the clerk after the last date allowed by a statute of limitations for the filing of the petition, if the petition was received by the clerk through the mail, it may, by order of the court, upon motion of the party plaintiff, be deemed to have been filed on the last date allowed if there is a proper showing (*a*) that the petition was sent by registered mail, properly addressed to the clerk of the court at 717 Madison Place, N.W., Washington, D.C. 20005, and with return receipt requested, (*b*) that it was deposited in the mail sufficiently in advance of the last date allowed for filing to provide for receipt by the clerk on or before such date in the ordinary course of the mail, and (*c*) that the party plaintiff as sender exercised no control over the mailing between the deposit of the petition in the mail and its delivery.**

**(c) *Petition; form; content; duplication; copies.* The petition shall conform to the following requirements: form, Rules 32 and 42; content, Rule 35; duplication and copies, Rule 214(a). (*Cf.* Rule 36, for petition pending discovery; Rule 41(g), for third-party petition; and Rule 162(a), for petition in Wunderlich Act review cases.)**

### Rule 22. Service of petition

**(a) *Service upon the United States.* Service of the petition upon the United States shall be made through the delivery by the clerk of the court to the Attorney General, or to an agent, designated by authority of the Attorney General, of copies of the petition in numbers prescribed by paragraph (b) of this rule.**

**(b) *Copies.* The clerk shall serve on the Attorney General or his designated agent 5 copies of the petition: *Provided,* That when only 5 copies of the petition are initially filed under Rule 214(a)(2), 3 copies shall be served without delay on the Attorney General or his designated agent, and 5 additional copies shall be served when the party files the 16 copies called for by Rule 214(a)(2). (*Cf.* Rule 38(a)(1).)**

### Rule 23. Service of other papers

**Except as provided in Rule 41, relating to third-party procedure, every paper required to be served shall be served by the clerk of the court upon the party or parties affected thereby, as follows:**

**(a) upon the plaintiff, by mailing a copy (or copies, where more than one copy is required by these rules) to plaintiff's attorney of record at his address registered with the clerk as required by Rule 42;**

**(b) where the plaintiff is not represented by an attorney, by mailing such copy or copies to the plaintiff at the address registered with the clerk as required by Rule 42; and**

**(c) upon the United States, by delivery of such copy or copies to the Attorney General, or to an agent designated by authority of the Attorney General.**

### Rule 24. Proof and date of service

**At the time of serving a pleading, motion, or other paper, as provided in Rules 22 and 23, the clerk shall enter the fact of service on the docket, and such entry shall be prima facie evidence of service. For the purposes of these rules (except Rule 41), the date of service shall be the date of filing with the clerk.**

### Rule 25. Time

**(a) *Computation.* (1) In computing any period of time prescribed or allowed by these rules or by order of the court or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday in the District of Columbia, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday.**

**(2) The following days are legal holidays in the District of Columbia:**

**New Year's Day, January 1.**
**Inauguration Day, every fourth year.**
**Washington's Birthday, February 22 [third Monday in February beginning in 1971].**
**Memorial Day, May 30 [last Monday in May beginning in 1971].**
**Independence Day, July 4.**
**Labor Day, first Monday in September.**
**Columbus Day, second Monday in October [beginning in 1971].**
**Veterans Day, November 11 [fourth Monday in October beginning in 1971].**
**Thanksgiving Day, fourth Thursday in November.**
**Christmas Day, December 25.**

**When a legal holiday falls on Sunday, the next day is a holiday. When a legal holiday falls on Saturday, the preceding day is a holiday.**

**(b) *Enlargement.* (1) When, by these rules or by a notice given thereunder or by order of the court, an act is required or allowed to be done at or within a specified time, the court may, upon motion under Rule 51 stating good cause for such action, order the period enlarged.**

**(2) Every motion for enlargement of time (i) must set forth therein the specific number of additional days requested, the date to which the enlargement is to run, the extent to which the time for the performance of the particular act has been previously enlarged, and the reason or reasons upon which the motion for enlargement is based; and (ii) must be filed within the period allowed for the performance of the act to which the motion relates (including any previous enlargement of the time): *Provided,* That the requirement stated in subdivision (ii) may be waived by the court upon a showing, in a separate motion for leave to file out of time, that the delay in filing was the result of excusable neglect.**

**(c) *Additional time after service by mail.* Whenever a party has the right or is required to do some act or take some proceeding within a prescribed period after the service of a paper, and the service is made by mail outside the Dis-**

trict of Columbia, 5 days shall be added to the prescribed period.

(d) *When time begins to run.* In computing any period of time prescribed or allowed by these rules, or by order of the court, or by any applicable statute, the period of time shall commence to run on the day after the date of service of a paper, unless otherwise particularly specified in these rules.

(e) *Unaffected by expiration of term.* The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a term of court.

### Rule 26. Bond to stay execution of order of renegotiation board

(a) *Filing.* Within 10 days after the filing of the petition in a renegotiation case, a plaintiff desiring to stay the execution of the order of the Renegotiation Board shall file the necessary bond, accompanied by a copy of the Board's order and a copy of the Board's notice thereof to the plaintiff, with the clerk of the court.

(b) *Amount.* The bond shall be in an amount equal to 100 percent of the excessive profits to be eliminated under the Board's order, reduced by the credit, if any, authorized by Section 1481 of the Internal Revenue Code of 1954, as shown by an accompanying statement from the District Director of Internal Revenue for the district in which the return for the taxable year was filed.

(c) *Sureties.* Acceptable sureties on bonds shall be those bonding companies holding certificates of authority from the Secretary of the Treasury. (See the latest U.S. Treasury Dept. Circ. 570.)

(d) *Collateral.* If collateral is to be deposited as security for a bond, in lieu of a surety, United States Government marketable public securities, fully negotiable by the bearer, owned by the plaintiff, in a sum equal at their par value to the amount of the bond to be furnished, will be acceptable when accompanied by the necessary power of attorney.

(e) *Increase or decrease in amount of bond.* Nothing contained in this rule shall preclude the entry at any time by the court (or the trial judge) of an order requiring that the amount of the bond be increased or decreased, upon a satisfactory showing that such increase or decrease is necessary.

(f) *Forms.* (1) The forms for the bond and the power of attorney referred to in this Rule 26 are prescribed in Appendix E to these rules.

(2) The plaintiff shall file an original and two copies of each instrument or document required by this Rule 26 to be filed with the clerk.

#### REFERENCES IN TEXT

Section 1481 of the Internal Revenue Code of 1954, referred to in subsec. (b), is section 1481 of Title 26, Internal Revenue Code.

## III. PLEADINGS

### Rule 31. Pleadings allowed

(a) *Pleadings.* There shall be a petition and an answer; and if the answer contains a counterclaim or offset or a plea of fraud, there shall be a reply thereto. There shall be such third-party pleadings as are permitted by Rule 41. No other pleading shall be allowed, except that the court (or the trial judge) may order a reply to an answer, or a responsive pleading to a third-party petition or answer.

(b) *Demurrers, pleas, etc., abolished.* Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used.

### Rule 32. General rules of pleading

(a) *Pleading to be concise and direct; consistency.* (1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them, if made independently, would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has, regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 42(c).

(b) *Construction of pleadings.* All pleadings shall be so construed as to do substantial justice.

### Rule 33. Pleading special matters

(a) *Capacity.* It is not necessary to aver the capacity of a party to sue or be sued, or the authority of a party to sue or be sued in a representative capacity, or the legal existence of an organized association of persons that is made a party, except to the extent required to show the jurisdiction of the court and to comply with the provisions of Rule 35. When a party desires to raise an issue as to the legal existence of any party, or the capacity of any party to sue or be sued, or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

(b) *Fraud; mistake; caprice; condition of mind.* In all averments (1) of fraud (including a plea by the United States that the plaintiff has practiced or attempted to practice fraud), (2) of mistake, or (3) of action alleged to be arbitrary, capricious, or so grossly erroneous as to imply bad faith, the circumstances constituting fraud, mistake, or arbitrary, capricious, or erroneous action shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

(c) *Conditions precedent.* In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

(d) *Judgment.* In pleading a judgment or decision of a domestic or foreign court, of a judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.

(e) *Time and place.* For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

### Rule 34. Form of pleadings

(a) *Caption; names of parties; designation; paging.* Every pleading (and every other paper to be filed with the clerk) shall contain a caption in large and distinct type setting forth the name of this court, The United States Court of Claims; the title of the action; the docket number (when available); and a designation to show the nature of the pleading (or other paper). In the petition, the title of the action shall include the names of all the parties (the United States being designated as the party defendant in every case), but in other pleadings (and papers) it is sufficient to state the name of the first party on each side with an appropriate indication of other parties. The paging of each pleading (or other paper) shall commence with page 1.

(b) *Paragraphs; separate statements.* All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense, other than denials, shall be stated in a separate count or defense, whenever a separation facilitates the clear presentation of the matters set forth.

(c) *Adoption by reference; exhibits.* Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes unless otherwise indicated, but the adverse party shall not be deemed to have admitted the truth of the allegations in such exhibit merely because he has failed to deny them explicitly.

### Rule 35. Content of petition

The petition shall set forth:

(a) *Statement of facts.* A clear and concise statement of the facts on which each claim is based, including the facts upon which the court's jurisdiction depends, the time when and place where the claim arose, and the items and amounts claimed: *Provided,* That in cases for general or specific accounting, the statement of the relief requested may omit the amounts claimed.

(b) *Action by other tribunal or body.* Any action on the claim taken by Congress or by a department or agency of the United States, or in any judicial proceeding, including any in the Tax Court of the United States.

(c) *Citation of statutes, regulations, orders.* A clear citation of the Act of Congress, regulation of an executive department or agency, or Executive order of the President, where the claim is founded upon such an act, regulation, or order.

(d) *Contracts or treaties.* If the claim is founded upon a contract or treaty with the United States, a description of the contract or treaty sufficient to identify it. In addition, the plaintiff shall plead the substance of those portions of the contract or treaty on which he relies or, at his election, annex to the petition a copy of the contract or treaty or the provisions thereof on which he relies.

(e) *Patent suits.* In any patent suit, the claim or claims of the patent or patents alleged to be infringed.

(f) *Ownership of claim; assignment.* Where the plaintiff is the owner by assignment or other transfer of the claim, in whole or in part, when and upon what consideration the assignment or transfer was made.

(g) *Demand for judgment.* A demand for the judgment to which the pleader deems himself entitled, including any relief provided for in Rule 147(c).

(h) *Addresses and signatures.* The addresses and signatures required for an initial pleading by Rule 42(a).

### Rule 36. Petition pending motion for discovery

When the plaintiff cannot state his case with the requisite particularity without an examination of documents or things or other information in the possession of the United States, and he has been unable upon application to obtain a sufficient examination of such documents or things or other information, he may file a petition in conformity with Rule 21(c), stating his claim as far as is in his power and specifying as definitely as he can the documents or things or other information he requires. Such a petition shall state specifically that it is filed under this Rule 36. Within 30 days after the filing of such petition, he shall file a motion pursuant to Rules 72, 74, or 81, or a motion for leave to submit interrogatories pursuant to Rule 73(a), or such combination thereof as may be needed to obtain from the proper department or agency of the United States such documents or things or other information as may be deemed necessary. If such motion is granted, plaintiff may file an amended petition within 30 days after such documents or things or other information are furnished or obtained. Defendant need not respond to an original petition filed under this rule, but shall answer or otherwise respond to the amended petition within the time required under these rules for answering an original petition. If no motion is granted or if an amended petition is not filed after the requested documents or things or other information are furnished or obtained, the defendant shall file such responsive pleading or motion within such time as the court (or the trial judge) may require.

### Rule 37. Defenses

(a) *Form of denials.* A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If the attorney for a party or a party not represented by an attorney is unable to obtain knowledge or information sufficient for him to form a belief as to the truth of an averment, the answer shall so state and such statement shall have the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials or designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but when he does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, he may do so by general denial subject to the obligations set forth in Rule 42(c).

(b) *Affirmative defenses.* In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, duress, estoppel, failure of consideration, fraud, illegality, laches, license, payment, release, res judicata, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counter claim or a counterclaim as a defense, the court (or the trial judge) may, if justice so requires, treat the pleading as if there had been a proper designation.

(c) *Effect of failure to deny.*—Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damages, shall be deemed admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

### Rule 38. Defenses and objections; when and how presented

(a) *Time for answer and reply.* (1) Except as otherwise provided in these rules, the United States shall file its answer within 60 days after the service of 5 copies of the petition in conformity with Rule 22(b). After service of an answer containing a counterclaim, offset, or plea of fraud, plaintiff shall have 40 days within which to file a reply to the counterclaim, offset, or plea of fraud. If a reply to an answer or a responsive pleading to a third-party petition or answer is ordered by the court, the reply or the responsive pleading shall be filed within 40 days after service of the order unless the order otherwise directs. The answer, reply, or other responsive pleading shall be duplicated in conformity with Rules 211-14; the number of copies to be filed shall be as provided in Rule 214; and service shall be made as provided in Rule 23.

(2) The service of a motion permitted under this rule or under Rule 101 alters the above period of time as follows, unless a different time is fixed by the court: (i) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be filed within 30 days after service of the court's order; or (ii) if the court grants a motion for a more definite statement, the responsive pleading shall be filed within 30 days after the service of the more definite statement.

(b) *Defenses; how presented.* Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, or a third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may, at the option of the pleader, be made by motion: (1) lack of jurisdiction of the subject matter or the person, and (2) failure to state a claim upon which relief can be granted. A motion making either of these defenses shall be filed before pleading further if a further pleading is permitted. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and are not excluded by the court, the motion shall be treated as one for summary judgment and shall be disposed of as provided in Rule 101, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 101.

(c) *Motion for judgment on the pleadings.* After the pleadings are closed, any party may move for judgment on the pleadings: *Provided,* That no such motion may be filed, except by leave of court, after the case has been set for trial. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and are not excluded by the court, the motion shall be treated as one for summary judgment and shall be disposed of as provided in Rule 101, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 101.

(d) *Preliminary hearings.* The defenses specifically enumerated (1) and (2) in paragraph (b) of this Rule 38, whether made in a pleading or by motion, and the motion for judgment mentioned in paragraph (c) of this rule shall, on motion of any party, be heard and determined before trial, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) *Motion for more definite statement.* If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonable be required to frame a responsive pleading, he may move within 30 days for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 30 days after service of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just. The more definite statement shall comply with Rule 214(a) and (b) as to duplication and number of copies.

(f) *Motion to strike.* Upon motion made by a party before responding to a pleading, or if no responsive pleading is permitted by these rules, upon motion made by a party within 30 days after the service of the pleading upon him, or upon the court's own initiative at any time, the court may order stricken from any pleading any redundant, immaterial, impertinent, or scandalous matter, or any insufficient defense.

(g) *Consolidation of defenses.* A party who makes a motion under this rule may join with it the other motions herein provided for and then available to him. If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except as provided in paragraph (h) of this rule.

(h) *Waiver of defenses.* A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, and the objection of failure to state a legal defense to a claim, may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings; and (2) that whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

### Rule 39. Amended and supplemental pleadings

(a) *Amendments.* A party may amend his pleading once as a matter of course at any time before the service on him of a responsive pleading, or of a motion to dismiss or for summary judgment, or if the pleading is one to which no responsive pleading is permitted, he may so amend it at any time within 30 days after it is served. Otherwise, a party may amend his pleading (1) by leave of court (which shall be freely given when justice so requires), or (2) by written consent of the adverse party. In any event, the amendment shall conform to the requirements of paragraph (e) of this rule. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 30 days after service of the amended pleading, whichever period may be the longer, unless the court orders otherwise.

(b) *Amendments to conform to the evidence.* When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendments of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may receive the evidence and may allow the pleadings to be amended, and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence will prejudice him in maintaining his action or defense upon the merits. The court shall afford the objecting party an opportunity to meet such evidence.

(c) *Relation back of amendments.* Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

(d) *Supplemental pleadings.* Upon motion of a party, the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemented pleading, it shall so order, specifying the time therefor.

(e) *Form and filing.* Every amendment to a pleading shall (1) include so much of the prior pleading as may be required to show clearly how the pleading is to stand amended; (2) comply with the requirements of Rules 34(a) and 42 as to caption, designation, and signature; (3) carry designation as the first, second, or subsequent amended pleading; and (4) comply with the requirements of Rules 211–14 that applied to the pleading to stand amended, except that upon a proper showing, by motion filed with the court or during pretrial conference or at trial, that the proposed amendments are minor in character or of such brevity as to warrant the use of pasters or interlineation, the court may waive the requirements of this clause (4) of this paragraph (e) and permit such amendments to be made by pasters or interlineation. When the requirements of clause (4) apply, the same number of copies of the amendments shall be filed as in the case of the pleading that it to stand amended.

### Rule 40. Counterclaims

(a) *Compulsory counterclaim.* The answer shall state as a counterclaim any claim which, at the time of serving the answer, the defendant has against any plaintiff, if it arises out of the transaction or occurrence that is the subject matter of the petition and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction: *Provided,* That such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action.

(b) *Permissive counterclaim.* The answer may state as a counterclaim any claim against a plaintiff not arising out of the transaction or occurrence that is the subject matter of the petition.

(c) *Extent of counterclaim.* A counterclaim may or may not diminish or defeat the recovery sought by a plaintiff. It may claim relief exceeding in amount or different in kind from that sought in the petition.

(d) *Counterclaim maturing or acquired after pleading.* A claim which either matured or was acquired by the defendant after serving its answer may, with the permission of the court, be presented as a counterclaim by supplemental pleading.

(e) *Omitted counterclaim.* When defendant fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, it may, by leave of court, set up the counterclaim by amendment.

(f) *Form and content.* A counterclaim shall conform to the requirements of Rule 21(c).

**Rule 41. Third-party practice**

(a) *When third parties may be brought in.* (1) The court, on its own motion or on the motion of a party, may notify any person with legal capacity to sue and be sued and who appears to have an interest in the subject matter of any pending suit to appear as a party and assert his interest therein.

(2) On motion of the United States, the court may summon any third person against whom the United States may be asserting a claim or contingent claim for the recovery of money paid by the United States in respect of the transaction or matter which constitutes the subject matter of the suit to appear as a party and defend his interest, if any, in such suit.

(3) A motion made by the plaintiff under subparagraph (1) of this paragraph (a) shall be filed at the time the petition is filed. A motion made by the United States under subparagraph (1) or (2) shall be filed on or before the date on which the answer is required to be filed. For good cause shown, the court may allow any such motion to be filed at a later time.

(b) *Content of motion for notice to third parties.* A party desiring to bring in a third party pursuant to subparagraph (1) of paragraph (a) of this rule shall file with the clerk a written motion, which shall comply with the requirements of Rule 51 and which shall in addition—

(1) state the name and address of such person, if known;

(2) if the address of such person is unknown, or if such person resides outside the jurisdiction of the United States, or there is good reason why personal service on such person cannot be had, be accompanied by an affidavit showing why personal service cannot be had on such person and stating the lastknown address of such person;

(3) set forth the interest which such person appears to have in the suit; and

(4) be accompanied by 1 copy of each pleading theretofore filed in the suit for each person to be notified.

(c) *Issuance and service of notice.* (1) If the court, on its own motion or on the motion of a party, orders any third person to be notified pursuant to subparagraph (1) of paragraph (a) of this rule, the clerk shall issue an original and 1 copy of the notice for each third person to be notified. The notice shall contain the names of the parties and a statement of the time within which such third person may appear, and shall state that in case the third party fails to appear and assert a claim in the subject matter of the suit, his claim or interest therein shall forever be barred. The notice shall indicate that it is accompanied by a copy or copies of the pleadings filed in said suit, naming such pleadings.

(2) Upon the issuance of such notice upon motion of a party, the notice with the accompanying pleadings shall be delivered by the clerk to the moving party, who shall at his expense cause the same to be served by the United States marshal for the judicial district wherein the person to be notified may be found, and the return of such service shall be made directly to the clerk of this court.

(3) When the court directs the issuance of a notice to a third person on its own motion, each of the existing parties shall, on request of the clerk, deliver to the clerk a sufficient number of copies of pleadings filed by such party to provide the third party to be notified with a copy of each of such pleadings, and the clerk shall forthwith issue such notice as specified in subparagraph (1) of paragraph (c) of this rule, and shall forward the same with accompanying copies of the pleadings to the Attorney General for service by the United States marshal in the judicial district where the person to be notified may be found.

(4) When service of the notice required by subparagraph (1) of this paragraph (c) is to be effected upon a third person in a foreign country, service of the notice may be made by the moving party or the court (as required by subparagraphs (2) and (3) of this paragraph (c)) and proof of such service may be made in the manner authorized by Rule 4(i) of the Federal Rules of Civil Procedure.

(d) *Service of notice by publication.* Where, upon motion of a party, the court under subparagraph (1) of paragraph (a) of this rule directs the issuance of a notice to a person upon whom personal service cannot be had, the moving party shall cause such notice to be published in a newspaper of general circulation in a place designated in the order, for a specified time, not less than once in each of 4 successive weeks. On or before the day of the first publication, the moving party shall send a copy of the notice by registered mail to such person at his last-known address and shall file with the clerk an affidavit showing such mailing. The moving party shall procure an affidavit of the publisher showing that publication of the notice has been had as required by the order and shall file such affidavit with the clerk, who shall make an entry on his docket that publication has been had. The affidavit of mailing and the publisher's affidavit, together with the clerk's entry, shall constitute proof of service by publication. Service shall be deemed complete on the date of the last publication. The costs of such service by publication shall be paid by the party at whose instance it was made.

(e) *Content of motion for summons to third parties.* When the United States is asserting a claim for damages or other demand against a third person for the recovery of money paid by the United States in respect of the transaction or matter which constitutes the subject matter of any pending suit and desires to have such third person brought in pursuant to subparagraph (2) of paragraph (a) of this Rule 41, it shall file a written motion, which shall comply with the requirements of paragraph (b) of this rule and which shall be accompanied by an appropriate pleading setting forth, in the form and manner specified in Rules 32-34 and 42, the claim or contingent claim which it is asserting against such third person.

(f) *Issuance and service of summons.* If the court, on motion of the United States, summons a third person pursuant to subparagraph (2) of paragraph (a) of this rule to answer a claim or contingent claim asserted by the United States, the clerk shall issue an original and 1 copy of such summons for each person to be summoned. The summons shall contain the names of the parties and a statement of the time within which the party summoned is required to appear and answer. The summons shall also state that the United States is asserting a claim against such person, as described in the accompanying pleading of the United States, and shall further state that if such third person fails to appear and answer the claim asserted by the United States, judgment *pro confesso* may be entered against such third person upon the claim of the United States to the same extent as if said third person had appeared and admitted the truth of all the allegations made on behalf of the United States. The summons shall indicate that it is accompanied by a copy or copies of all pleadings filed in said suit, naming such pleadings. Upon issuance of the summons, the clerk shall deliver the summons and accompanying pleadings to the Attorney General for service in the same manner as provided in subparagraph (2) of paragraph (c) of this Rule 41 for a notice.

(g) *Pleadings of third parties.* Within 40 days after service upon a third person of a notice or summons issued pursuant to this Rule 41, such person may file a petition setting forth his interest, if any, in the subject matter of the suit and the nature of his claim against the United States, or an answer, or both, which pleadings shall comply with the requirements of these rules with respect to the filing of original petitions and answers. (*Cf.* Rules 21(c) and 34.)

#### REFERENCES IN TEXT

Rule 4(i) of the Federal Rules of Civil Procedure, referred to in subsec. (c)(4), is set out in this appendix.

### Rule 42. Signing of papers

(a) *Parties other than the United States.* The original of every pleading or paper of a party (other than the United States) represented by an attorney shall be signed by the attorney of record, as defined in Rule 203, and the initial pleading shall set forth the post office address of the party and of the attorney. A party who is not represented by an attorney shall set forth his post office address in his initial pleading and shall sign his pleadings and papers. All notices and copies of pleadings and papers will be sent to the attorney of record where the party is represented by an attorney; otherwise to the party.

(b) *The United States.* The original of every pleading or paper of the United States shall be signed by the Attorney General, or by an attorney of the Department of Justice designated by him.

(c) *Effect of signature.* The signature of an attorney or a party constitutes a certificate by him that he has read the pleading or paper; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. The signature of an attorney also constitutes a representation by him that he is authorized to represent the party or parties in whose behalf the pleading or paper is filed. If a pleading or paper is not signed, or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false, and the action may proceed as though the pleading or paper had not been served. For a willful violation of this rule, an attorney may be subjected to appropriate disciplinary action by the court. Similar action may be taken if scandalous or indecent matter is inserted.

## IV. MOTIONS

### Rule 51. Motions and related papers

(a) *Content of motions.* Every application to the court or the trial judge for an order shall be by written motion filed with the clerk. The motion shall set forth the relief or order sought and shall state with particularity the grounds therefor.

(b) *Form; signing; duplication; copies.* The rules relating to the form of pleadings (Rule 34), signing (Rule 42), duplication (Rules 211–14), and number of copies (Rule 214) shall apply to all motions and related papers provided for by these rules, including objections and responses to motions, and including briefs and memoranda of law in support of motions, objections, and responses.

(c) *Briefs; memoranda; affidavits.* Any brief, memorandum of law, or affidavit submitted in support of any motion, or in support of any objections or response to a motion, shall be included in or attached to each copy of such motion, objections, or response. Every dispositive motion, as defined in Rule 52(a), shall be supported by the moving party's brief. As to any rule or regulation relied upon, see Rule 124(c).

(d) *Notice of action.* The clerk shall give the parties written notice of the disposition of all motions.

### Rule 52. Motions; dispositive and procedural; objections and responses

(a) *Dispositive motions defined.* Dispositive motions include (1) motions for judgment on the pleadings (Rule 38); (2) motions asserting defenses based upon lack of jurisdiction of the subject matter or the person, or upon failure to state a claim upon which relief can be granted (Rule 38); (3) motions to dismiss (Rule 102); (4) motions for summary judgment (Rules 101 and 163); and (5) motions for judgment on trial judge's recommendation or report (Rules 54(b)(3)(iii) and 141(b)).

(b) *Time for filing; papers combined.* (1) *Objections and responses to dispositive motions:* Objections or a response to a dispositive motion, including any cross-dispositive motion, shall be filed within 30 days after the service of such motion. Any cross-dispositive motion shall be contained in the same document with the objections or other responses.

(2) *Reply briefs:* The moving party shall have 15 days from the date of the service of the objections or response to such motion within which to file a reply brief: *Provided,* That when cross-dispositive motions are pending, the party who filed first shall have 30 days from the service on him of the crossmotion within which to file both his objections or response thereto and his reply to the objections or responses to the motion filed by him, and all such material shall be contained in the same document.

(c) *Procedural motions defined.* Except for dispositive motions and the motions referred to in Rules 151 and 152, all motions are regarded as procedural motions for the purposes of these rules.

(d) *Time for filing objections or responses to procedural motions.* Except as otherwise specifically provided (Rule 72 and paragraph 21 of Appendix C), objections or a response to a procedural motion shall be filed within 10 days after the service of such motion: *Provided*, That if a procedural motion states that opposing counsel has no objection, it may be acted upon as soon after filing as practicable, without awaiting the expiration of the 10-day period.

(e) *Time for filing reply.* Within 10 days after the service of objections or a response to a procedural motion, the moving party may file a reply: *Provided*, That no enlargement of time for this purpose will be allowed without a showing of exceptional cause.

### Rule 53. Reference of procedural motions

(a) *Reference to trial judge.* In every case under reference to a trial judge, all procedural motions will be referred to him as a matter of course.

(b) *Action by trial judge.* (1) *Order.* With respect to any procedural motion referred to him pursuant to paragraph (a) of this rule, the trial judge shall, by appropriate order, allow, deny, or otherwise dispose of it. The order shall be filed with the clerk, and the clerk shall promptly notify the parties of the trial judge's action.

(2) *Requirements for procedural motions.* With respect to form, content, number of copies, time and place for filing, service, and notice of the action taken, the provisions of Rule 51 shall be applicable to procedural motions referred to a trial judge: *Provided*, That when a trial judge is engaged in the trial of a case outside Washington, D.C., and determines that the filing with him of a procedural motion will expedite the disposition of the case then under trial, such a motion may be accepted for filing by him. In such instance, he may determine how the motion shall be served on the adverse party, specify when and where the response or objection to the motion shall be made, and give notice of his action on the motion by announcement made in open court and recorded in the transcript. As soon as practicable thereafter, the written motion, showing the date it was filed with the trial judge and the action taken by him, together with any written response or objection, shall be returned by him to the clerk.

(c) *Review by the court.* (1) *Deferred review.* Except as provided in subparagraph (2) of this paragraph (c), a party dissatisfied with a procedural order of the trial judge may request review of the order only by including such request in his initial brief (i) filed pursuant to Rule 143(b) following the filing of the trial judge's recommended decision, (ii) filed pursuant to Rule 54(b)(3) in connection with a request for review of the trial judge's recommended decision on a dispositive motion, or (iii) filed in connection with a dispositive motion pursuant to Rule 38 or 101. (See also Rule 52(b).)

(2) *Prompt review.* A party dissatisfied with a procedural order of the trial judge may request prompt review of the order in either of the following situations:

(i) When a trial judge is of the opinion that an order made by him pursuant to paragraph (b) of this rule involves an issue of controlling importance or an issue of deprivation of fundamental rights as to which there is substantial ground for difference of opinion and that the ultimate termination of the litigation may be materially advanced by permitting an immediate request for review of his action, he shall so state in such order, and any party dissatisfied with the order may, in accordance with subparagraph (3) of this paragraph (c), request the court to review it. On motion, and for good cause shown, an order may be amended by the trial judge to include such a statement at any time while the reference of the case to him remains in effect. (See Rule 14(b).)

(ii) When a trial judge's procedural order does not contain the statement referred to in subdivision (i), a party dissatisfied with the order may, in accordance with the following subparagraph of this paragraph (c), request the court to review the order upon a showing of extraordinary circumstances whereby further proceedings pursuant to the said order would irreparably injure the complaining party or occasion a manifest waste of the resources of the court or of the parties. In general, the policy of the court is that proceedings before trial judges will not be interrupted by appeals to the court for piecemeal determinations, and the court will deal with the entire case, or a properly severed aspect thereof, on a single occasion only. The mere fact that deferring correction of the trial judge's alleged error to the court's review of the trial judge's final decision may lead to a remand for a new trial, or for the taking of further evidence, or for reconsideration by the trial judge, or may cause delay in the ultimate disposition of the case, will not be deemed, by itself, to satisfy the standards of this subdivision (ii).

(3) *Request for prompt review.* (i) A request for review of a trial judge's procedural order under subparagraph (2) of this paragraph (c) shall be filed by the dissatisfied party with the clerk within 10 days from the date of (*a*) service of an order filed pursuant to subparagraph (1) of paragraph (b) of this rule, or (*b*) the announcement of an order in open court pursuant to subparagraph (2) of paragraph (b) of this rule, or (*c*) the service of an amendment made pursuant to the final sentence of subdivision (i) of subparagraph (2) of this paragraph (c), as may be appropriate.

(ii) The request for review shall contain (*a*) a statement of the facts necessary to an understanding of the controlling question determined by the order of the trial judge, or to an understanding of the extraordinary circumstances warranting prompt review by the court despite the absence from the order of a statement by the trial judge as indicated in subdivision (i) of subparagraph (2) of this paragraph (c); (*b*) a statement of the question or issue involved in the order; and (*c*) a statement of the reasons why, in the opinion of the party requesting review, the order was erroneous and should be reversed or modified.

(4) *Response to request for review.* Within 10 days after service of a request for review pursuant to subparagraph (3) of this paragraph (c), an adverse party may file an objection or response thereto. (See Rule 12(d); see also Rule 214(c)(2)(ii) as to number of copies.)

(5) *Denial without prejudice.* The court may in its discretion deny any request for review pursuant to subparagraphs (2) and (3) of this paragraph (c) without prejudice to the right of the dissatisfied party to raise the error complained of when the case comes before the court for final judgment.

### Rule 54. Reference of dispositive motions

(a) *Reference to trial judge.* In any case under reference to a trial judge, the court may by order refer a dispositive motion to him for his opinion and recommendation for the conclusion of law.

(b) *Action by trial judge.* (1) *Recommendation by trial judge.* With respect to any dispositive motion referred to him, the trial judge shall prepare and file with the clerk his opinion and recommendation for the conclusion of law.

(2) *Notice of trial judge's recommendation.* Upon the filing of the trial judge's recommendation, the clerk shall serve 5 copies thereof on each party, as provided by Rule 23.

(3) *Review by the court.* (i) If any party is dissatisfied with the recommendation of the trial judge, he shall file with the clerk, within 30 days after service of notice of the filing of the trial judge's recommendation, a request for review of such recommendation and a brief specifying with particularly the matters which he wishes the court to consider in the review and discussing the issues involved. Any adverse party may file an answering brief within 30 days; and within 15 days after the filing of the answering brief, a reply brief may be filed. Briefs shall conform to Rule 144. (See Rule 214(d) as to duplication and number of copies.)

(ii) If a timely request for review of the trial judge's recommendation is filed, the case shall be assigned to the calendar for argument before the court, unless otherwise disposed of by the court.

(iii) In the absence of a timely request for review, any party may by motion request that the trial judge's recommendation be adopted—either (a) in whole or (b) with modifications—by the court as the basis for its judgment. (See Rule 214(c) as to duplication and number of copies.)

### Rule 55. Consideration of motions by trial judge

In connection with any motion referred to him, the trial judge may (a) require the moving party to supply any additional information to explain the nature and purpose of the motion; (b) schedule the motion for conference or hear oral argument in Washington, D.C., or elsewhere; or (c) take such other action as in his judgment is requisite to a determination by him.

### Rule 56. Motions not referred to trial judges

(a) *Motions under rules 151 and 152.* Motions authorized by Rules 151 and 152 will not be referred to a trial judge.

(b) *Procedural motions in certain situations.* Procedural motions filed after the referral to the trial judge has been suspended by the filing of a dispositive motion (subject to the lifting of such suspension by order pursuant to Rule 54 (a)), or procedural motions filed after a case has been returned to the court by the trial judge, will not be routinely referred to the trial judge: *Provided,* That the court in its discretion may refer procedural motions at any time to the trial judge for his recommendation or for disposition.

### Rule 57. Secretary to the court or clerk authorized to act on certain motions

(a) *Motions enumerated.* Any motion for enlargement of time, for leave to file out of time, for waiver of printing or duplication requirements, for substitution of counsel, or for the permanent withdrawal of papers or exhibits theretofore filed by the parties, which requires action by the court as distinguished from a trial judge, may (except as indicated in paragraph (d) of this rule) be acted upon by the secretary to the court or, in his absence, by the clerk of the court if (1) the motion states that opposing counsel has no objection or (2) no opposition to the motion has been timely filed.

(b) *Maximum time allowable.* In acting on motions for enlargement of time under paragraph (a) of this rule, the total enlargement of time allowed by the secretary to the court or the clerk of the court with respect to any matter shall not exceed 30 days, and shall not exceed 20 days with respect to the filing of a reply brief by a party.

(c) *Denial of motions for enlargement.* The secretary to the court or, in his absence, the clerk of the court may (except as indicated in paragraph (d) of this rule) deny forthwith a motion requesting an enlargement of time if it requires action by the court, as distinguished from a trial judge, and fails to comply with the provisions of Rule 25(b)(2)(i): *Provided,* That the denial shall specifically state that it is without prejudice to the filing, within 10 days after service of such denial, of a renewed motion for enlargement complying with the provisions of Rule 25(b)(2)(i).

(d) *Authority restricted.* The authority delegated in paragraphs (a) and (c) of this rule does not extend to any motion for an enlargement of time (1) for the filing of supplemental memoranda, papers, or briefs after oral argument before the court, (2) for the filing of a motion for rehearing, reconsideration, or other relief under Rule 151 or Rule 152, or (3) for the filing of papers, motions, or briefs where the court has entered a special order fixing the time for such action.

(e) *Review by the court.* Any action taken under this rule may be suspended, altered, or rescinded by the court for cause shown or sua sponte.

## V. PARTIES

### Rule 61. Parties; capacity

(a) *Real party in interest.* Every action shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, receiver, trustee in bankruptcy, or other representative appointed by a judicial tribunal, or a party authorized by statute, may sue in his own name without joining with him the party for whose benefit the action is brought.

(b) *Capacity to sue or be sued.* The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. The capacity of a representative mentioned in paragraph (a) of this rule to sue or be sued shall be determined by the order of the judicial tribunal appointing or authorizing the representative and the law of the state or other authority under which the judicial tribunal exercises jurisdiction.

(c) *Infants or incompetent persons.* Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative, he may sue by his next friend or by a guardian *ad litem.*

### Rule 62. Necessary joinder of parties

(a) *Necessary joinder.* Subject to and in the manner provided by Rule 41, persons having a joint interest adverse to the United States shall be made parties and shall be joined on the same side as plaintiffs. When any person who should join as a plaintiff refuses to do so, he may be made an involuntary plaintiff.

(b) *Names of omitted persons and reasons for nonjoinder to be pleaded.* In any pleading in which relief is asked the pleader shall set forth the names, if known to him, of persons who ought to be parties if complete relief is to be accorded between those already parties, but who are not joined, and shall state why they are omitted.

### Rule 63. Permissive joinder of parties

(a) *Permissive joinder.* All persons may join in one action as plaintiffs if they assert in their petition any right to relief jointly, severally, or in the alternative, in respect of or arising out of the same transactions, occurrences, or series of transactions or occurrences, and if any question of law or fact common to all of them will arise in the action. A plaintiff need not be interested in obtaining all the relief demanded. Where, in such a petition, two or more plaintiffs demand separate judgments, the petition shall state the judgment demanded by each plaintiff, shall list the plaintiffs alphabetically (on the basis of surnames where individuals are involved), and shall assign to each plaintiff demanding a separate judgment a number to be used as a distinguishing subnumeral ((1), (2), etc.) to the docket number of the case. No such multiple-party petition may be amended by any such party by adding any new party plaintiff. Judgment may be given to one or more of the plaintiffs, according to their respective rights to relief. (See Rule 34(a) as to caption and names of parties.)

(b) *Separate trials.* In the event of a joinder in accordance with the provisions of paragraph (a) of this rule, the court (or the trial judge) may limit the trial to the claim of one or more of the plaintiffs, and the proceedings with respect to all other plaintiffs may be held in abeyance.

### Rule 64. Misjoinder of parties; dropping or adding parties; severance

Misjoinder of parties is not a ground for dismissal of an action. At any stage of the action and on such terms as are just, parties may be dropped or added by order of the court (1) on its own initiative, or (2) on motion of any party, except that no new party plaintiff shall be added to a petition filed by multiple plaintiffs upon motion of any of such multiple plaintiffs. Any claim against a party may be severed and proceeded with separately.

### Rule 65. Intervention

(a) *When permitted.* Upon timely application, any one may be permitted by the court (or the trial judge) to intervene in an action (1) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action, or (2) where the applicant has a pecuniary interest in the subject matter of the main action.

(b) *Procedure.* A person desiring to intervene shall file with the clerk a motion to intervene. The motion shall (1) comply with Rule 51; (2) state the grounds for intervention; (3) be accompanied by a pleading setting forth the claim or defense for which intervention is sought (which pleading shall comply with the requirements of these rules relating to petition or answer, as the case may be (*cf.* Rules 21 and 37)); and (4) be served by the clerk. Upon the granting of such motion, the pleading shall be duplicated in conformity with Rule 214(b).

### Rule 66. Substitution of parties

(a) *Death.* (1) If a party dies, the court, upon application made within 2 years after the death, may order substitution of the proper party or parties. If the application is made after 2 years, the court may order substitution but only upon the showing of a reasonable excuse for failure to apply within that period. If substitution is not so made, the action shall be dismissed as to the deceased party. An application for substitution may be made by the successors or representatives of the deceased party, or by any party, and shall be filed as provided in Rule 51 and served as provided in Rule 23.

(2) In the event of the death of one or more of the plaintiffs in an action in which the right sought to be enforced survives only to the surviving plaintiffs, the action does not abate. The death shall be suggested upon the record, and

the action shall proceed in favor of or against the surviving parties.

(b) *Incompetency.* If a party becomes incompetent, the court, upon motion filed and served as provided in paragraph (a) of this rule, may allow the action to be continued by or against his representative.

(c) *Transfer of interest.* In the case of any transfer of interest, the action may be continued by or against the original party, except that where the transfer is not prohibited by law the court may, upon motion, direct the person to whom the interest is transferred to be substituted in the action or joined with the original party.

## VI. DISCOVERY

### Rule 71. General provisions governing discovery

(a) *Discovery methods.* (1) In conformity with these rules, any party may obtain discovery by one or more of the following methods: (i) interrogatories to parties (Rule 73); (ii) depositions (*a*) upon oral examination (Rule 84) or (*b*) by written questions (Rule 85); (iii) subpoenas duces tecum used in conjunction with notice to take depositions (Rule 82); (iv) admissions (Rule 72); (v) the production of documents or things or permission to enter upon land or other property for inspection or other purposes (Rule 74); or (vi) calls (Rule 75).

(2) The discovery methods listed in subdivisions (ii)-(vi) of subparagraph (1) may be utilized by a party only by leave of court upon motion showing good cause.

(b) *Scope of discovery.* Unless otherwise ordered by the court, the scope of discovery is as follows:

(1) *In general.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) *Experts.* (i) By means of written interrogatories in conformity with Rule 73, a party may require any other party (*a*) to identify each person whom the other party expects to call as an expert witness and (*b*) to state the subject matter on which the expert is expected to testify.

(ii) In relation to the expert testimony to be adduced at the trial, the court, on its own motion or the motion of a party, may require the submission or exchange of (*a*) statements of the proposed direct testimony of expert witnesses, in narrative or question and answer form, or (*b*) summaries of experts' reports. Every such summary shall contain the substance of the report in terms of conclusions and the principal facts deemed to support the expert's conclusions.

(c) *Initiation of discovery.* Except as provided in Rule 36, no measure for discovery may be initiated prior to the filing of an answer or other pleading responsive to the petition; and after the scheduling of the trial, no measure for discovery may be initiated without leave of court for good cause shown. The fact that one party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery. Unless the court upon motion, for the convenience of parties and witnesses, orders otherwise, the methods of discovery hereinabove mentioned (1) may be used concurrently or in any sequence by any party, and (2) may be initiated and carried out voluntarily and without intervention by, or filing with, the court, if the parties so agree.

(d) *Stipulation regarding discovery procedure.* Unless the court orders otherwise, the parties, by written stipulation filed with the clerk, may so modify the procedures provided by these rules as to permit other methods of discovery, including provision that depositions may be taken before any person, at any time or place, upon any notice, and in any manner, and when so taken may be used like other depositions.

(e) *Leave or order.* (1) A party desiring discovery may move for leave or for an order of the court as provided in the rules cited in subdivisions (ii)-(vi) of subparagraph (1) of paragraph (a) of this rule (i) in lieu of seeking agreement for voluntary discovery by the party from whom discovery is sought, or (ii) when such agreement has been sought but not obtained, or (iii) in the event such an agreement, once made, proves ineffectual.

(2) Every motion for leave or for an order of the court shall comply with Rule 51 and shall set out the circumstances which the moving party regards as good cause for the granting of leave or the issuance of an order.

(f) *Protective orders.* (1) Upon motion by any party or by the person from whom discovery is sought, and for good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including (but not limited to) one or more of the following: (i) that the discovery not be had; (ii) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (iii) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (iv) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (v) that discovery be conducted with no one present except persons designated by the court; (vi) that a deposition, after being sealed, be opened only by order of the court; (vii) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; or (viii) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

(2) If a motion for a protective order is denied in whole or in part, the court may, on such

terms and conditions as are just, order that any party or person provide or permit discovery.

(g) *Supplementation of responses.* A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (i) the identity or location of persons having knowledge of discoverable matters, or (ii) the identity of each person expected to be called as an expert witness at trial or the subject matter on which he is expected to testify.

(2) A party who knows or later learns that his response was incorrect is under a duty seasonably to correct the response.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through requests for supplementation of prior responses.

### Rule 72. Admissions

(a) *Motion.* After an answer or other pleading responsive to the petition has been filed (except as provided in Rule 36), any party by motion (Rule 71(e)) may apply to the court for an order directing any other party to respond to a request for admissions, a copy of which shall be attached to the motion.

(b) *Objections to request.* (1) Within 30 days after the service of the motion (and request for admissions), the party served may file objections on the grounds that some or all of the requested admissions are privileged or plainly irrelevant, or that the request is otherwise improper in whole or in part, or that the requirement of a response would result in annoyance, embarrassment, oppression, or undue burden or expense.

(2) Within 10 days after service of objections, the moving party may file a reply thereto.

(3) Upon consideration of the motion, objections, and reply, the court may make any order pertaining thereto that justice requires.

(c) *Request for admissions; content.* A request for admissions may contain—

(1) a statement of the material matters of fact as to which it is believed that there is no substantial controversy between the parties (such statement being phrased clearly and coherently in the form of distinct propositions, with the various paragraphs and subparagraphs appropriately numbered or lettered), followed by a request that the party served admit the truth of such matters of fact; and

(2) a list accurately describing the documents that are to be offered in evidence, accompanied by (i) a written request for the admission of the genuineness of any relevant document described in and exhibited with the request, of (ii) a written request that the party served consent to the admission in evidence of the documents so listed and exhibited with the request.

(d) *Response to request for admissions.* (1) Within 30 days after the service of an order directing a party to respond to a request for admissions, or such other period as may be fixed by the court, the party to whom a request for admissions is directed shall (unless he is willing for the admissions to be inferred pursuant to subparagraph (3) of this paragraph (d)) file with the clerk his response to the request for admissions in form as follows:

(i) a statement admitting or denying the factual propositions, or asserting that such propositions cannot truthfully be admitted or denied, and indicating the reason why this is so; and

(ii) a statement (*a*) conceding the genuineness or (*b*) consenting to the admission in evidence of documents, or stating the reasons why the genuineness of the documents (or any of them) cannot be conceded or the objections to the admission in evidence of such documents (or any of them). Reasons for refusal to concede the genuineness of documents and objections to the admission of documents in evidence shall be stated in such terms as to enable the party making the request for admissions to understand the challenge and prepare to meet it if he can.

(2) A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party deny only part of a matter concerning which an admission is requested, he shall specify so much of it as is true and deny only the remainder.

(3) A factual proposition set out in a request for admissions shall be deemed admitted, and a document listed in such a request shall be deemed unobjectionable, if no response to the part of the request pertaining to such matter is filed.

(4) Any proposition of fact expressly admitted or deemed admitted under this paragraph (d) shall be conclusively established for purposes of the pending action. Any such admission is for the purposes of the pending action only; it does not constitute an admission by the particular party for any other purpose; and it cannot be used against him in any other civil or criminal action or in any other proceeding.

(5) The court on motion may permit withdrawal of an admission if the court finds that the party seeking withdrawal acted with due diligence or that the other party will not be prejudiced thereby.

### Rule 73. Interrogatories to parties

(a) *Availability.* After an answer to the petition or a dispositive motion has been filed, any party may submit to any other party written interrogatories to be answered by the party to whom submitted, or, if such other party is a public or private corporation, or a partnership or association, or the United States, by an officer or agent, who shall furnish such information as is available to the party. In the case of interrogatories submitted to the United States, they shall name the department or agency, or a bureau, division or section of such department or agency, which is to answer the interrogatories.

(b) *Response to interrogatories.* Within 30 days after receipt of the interrogatories, the party to whom the interrogatories have been directed shall respond by submitting answers, and objections, if any. Each interrogatory shall be answered separately and fully in writing under oath, unless objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers shall be signed by the person making them and the objections shall be signed by the party's attorney (or by the party if not represented by an attorney). In the case of interrogatories submitted to the United States, the person or persons responding shall be designated by the organization named in the interrogatories, as provided in paragraph (a) of this rule.

(c) *How submitted.* The submitting party shall submit interrogatories, and the party addressed shall submit answers and objections, if any, to all other parties and to the trial judge. Submissions to a party shall be accomplished by delivering or mailing a copy of the paper to the attorney for a party (or to a party if not represented by an attorney).

(d) *Failure to answer.* (1) The party submitting the interrogatories may, with respect to any objection to or other failure to answer an interrogatory, file a motion pursuant to Rules 51 and 52 requesting an order compelling an answer. The motion may include a request that the order impose sanctions, upon a showing that such failure to answer was without substantial justification.

(2) The order on such motion may include the imposition of sanctions set forth in Rule 76(b), where it is found that any objection or other failure to answer was without substantial justification.

(3) For the purposes of this rule, an evasive or incomplete answer may be considered a failure to answer.

(e) *Scope and use.* (1) Interrogatories may relate to any matters which can be inquired into under Rule 71(b), and the answers may be used to the extent permitted by the rules of evidence.

(2) An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to the fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pretrial conference or other later time. The provisions of Rule 71(f) are applicable for the protection of the party from whom answers to interrogatories are sought under this rule.

(f) *Option to produce business records.* Where the answer to an interrogatory may be derived or ascertained from the business records of the party to whom the interrogatory has been submitted, or from an examination, audit, or inspection of such business records, or from a compilation, abstract, or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party submitting the interrogatory as for the other party, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained, and to afford to the party submitting the interrogatory reasonable opportunity to examine, audit, or inspect such records and to make copies thereof or compilations, abstracts, or summaries therefrom.

### Rule 74. Production of documents and things and entry upon land for inspection and other purposes

(a) *Motion for order.* (1) After an answer or other pleading responsive to the petition has been filed (except as provided in Rule 36), any party may by motion (Rule 71(e)) apply to the court for an order as specified in paragraph (b) of this rule.

(2) Every such motion shall (i) show with reasonable particularity (*a*) the documents or things desired and (*b*) how or in what respect they are relevant to the issues of the case in terms of discovery or proof, and (ii) state that such documents (or copies thereof) or things are not in the possession of the moving party. Documents and things shall be deemed to be defined with reasonable particularity to the extent that each such document or thing is so identified that its extraction from the files, or other method of identification and procurement, may reasonably be made by the officer or employee responsible therefor.

(b) *Issuance of order.* Pursuant to such a motion, the court may—

(1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or other tangible things (hereafter "documents or things"), not privileged, which are in the party's possession, custody, or control and which constitute or contain evidence (including the existence, description, nature, custody, condition, and location of any documents or things and the identity and location of persons having knowledge of relevant facts) regarding any matter that is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party; or

(2) order any party to permit entry upon designated land or other property in his or its possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated object or operation thereon which is relevant.

(c) *Relation to admissible evidence.* It is not a ground for objection to the motion that the information will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(d) *Scope of order.* The order shall specify the time, place, and manner of making the inspection or of making the copies and photographs, and may prescribe such terms and conditions as are just. The court may make an order that the inspection, copying, measuring, surveying, or photographing shall be limited to certain matters, or that secret processes, developments, or research need not be disclosed; or the court may make any other order which justice requires to protect the party from annoyance, embarrassment, oppression, or undue burden or expense.

(e) *Designation of department or agency.* Every motion filed under paragraph (a) of this rule which seeks an order directed to the United States shall specify the department or agency of the United States which, according to the moving party's information and belief, has possession, custody, or control of the documents or things sought to be produced, or which has possession or control of the land or property sought to be entered. Any order issued pursuant to such a motion shall be directed to the United States and not to any specific department or agency thereof.

### Rule 75. Calls

(a) *Issuance.* (1) On its own motion or the motion of a party plaintiff showing good cause, the court may at any time call upon any department or agency of the United States for any information or papers it deems necessary, to be filed with the clerk within a specified time.

(2) In any case appropriate for a computation by a department or agency of the United States, the court, upon the motion of a party or on its own motion, may issue a call for the computation. Within 30 days after service of notice of the filing of the computation, each party shall signify in writing, filed with the clerk, its acceptance or rejection of the computation. A rejection shall be accompanied by a statement of the reasons therefor.

(b) *Refusal of compliance.* The head of any department or agency of the United States may refuse to comply with such a call when, in his opinion, compliance will be injurious to the public interest. Such refusal may be made known by letter signed by the head of the department or agency and addressed to the clerk.

### Rule 76. Failure to comply with order for discovery; sanctions

(a) *By deponent.* The consequences of willful failure by a deponent (including a party) to appear before the officer who is to take his deposition, or to be sworn, or to answer questions after having been directed by the court to do so, shall be as provided in Rule 92.

(b) *By a party in relation to requests for admissions, interrogatories, or the production of documents or things.* If a party (as defined in Rule 92(b)(2)) willfully fails to comply with an order to respond to a request for admissions, to answer interrogatories, or to produce documents or things, or to permit the entry upon land or other property, the court, on its own motion or on the motion of a party, may make such orders in regard to the failure as are just, including (but not limited to) the following:

(1) an order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(2) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence; or

(3) an order striking pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

(c) *Evasive or incomplete answers or responses.* For the purposes of this rule, an evasive or incomplete answer or response may be considered a willful failure to respond.

## VII. DEPOSITIONS

### Rule 81. Depositions; leave

(a) *Leave required.* Depositions may be taken only by leave of court as provided in this rule, subject to the exception for the voluntary taking of depositions provided in Rule 71.

(b) *Motion for leave.* A party may file a motion requesting leave to take the testimony of any person, including another party, by deposition upon oral examintion or upon written questions. Every motion for leave shall comply with Rule 51 and shall set out the circumstances which the moving party regards as good cause for the granting of leave.

(c) *Objections or responses.* An opposing party shall be afforded an opportunity to file under Rule 52(d) objections or a response to a motion for leave to take a deposition before the court acts on such motion.

(d) *Action on motion for leave.* (1) Leave for the taking of a deposition will be granted only if the motion requesting such leave shows good cause therefor.

(2)(i) A motion for leave to take a deposition may be denied with or without prejudice (*a*) if the motion is made before an answer has been filed; or (*b*) if the motion is made while there is pending before the court another motion that may be dispositive of the action; or (*c*) if it appears that the taking of the deposition would be impracticable or would cause undue burden or expense to the deponent or to an opposing party.

(ii) When leave is granted for the taking of a depositon, or at any time thereafter, such conditions or limitations may be imposed, in conformity with or in addition to the provisions of Rule 87, as may seem necessary or appropriate for the accomplishment of the intended purpose of the deposition or for the protection of the deponent or of any party.

### Rule 82. Attendance of witnesses

(a) *Subpoenas.* The attendance of deposition witnesses shall be compelled by the use of subpoenas, as provided in Rule 123, in the absence of a waiver of this requirement.

(b) *Subpoenas duces tecum.* A subpoena issued in connection with the taking of a deposition may not require the production of books, papers, documents, or other tangible things unless permission for the inclusion of such a requirement is requested in the motion for leave under Rule 81 and granted upon a satisfactory showing by the moving party of the specific items to be produced and the need for and the feasibility of the requirement: *Provided,* That a person whose deposition is to be taken may be agreement waive the requirement of this paragraph, respond voluntarily to a request for production, and, if occasion arises, invoke the protection afforded by Rule 87.

### Rule 83. Scope and effect of depositions

(a) *Examination and cross-examination.* The examination and cross-examination of a deponent may proceed as permitted at the trial under the provisions of the Federal Rules of Evidence.

(b) *Scope of examination.* Unless otherwise ordered, the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party. This may include inquiries relative to the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things, and the identity and location of persons having knowledge of relevant facts. If the testimony is sought for the purpose of discovery and appears reasonably calculated to lead to the discovery of admissible evidence, it shall not be a ground for objection that the testimony will be inadmissible at the trial.

### Rule 84. Depositions upon oral examination

(a) *Notice of examination.* (1) *Filing and service.* Leave first having been obtained under Rule 81, a party desiring to take the deposition of any person upon oral examination shall file with the clerk, at least 10 days before the deposition is to be taken, a written notice of intention to take such deposition. An original notice and 3 copies thereof, plus 1 copy for each additional adverse party (as defined in Rule 211(b)), shall be filed with the clerk, who shall serve a copy upon each adverse party as provided in Rule 23.

(2) *Waiver of notice.* The filing and service of notice for the taking of a deposition may be waived by agreement of the parties proceeding voluntarily pursuant to Rule 71.

(3) *Content of notice.* (i) The notice (if required) shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, or, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs.

(ii) A party may in his notice name as the deponent a public or private corporation, or a partnership or association, or a department or agency of the United States, or a bureau, division, or section of any such department or agency, and designate with reasonable particularity the matters on which examination is requested. The organization so named shall designate one or more officers, directors, managing agents, or employees, or other persons duly authorized and consenting to testify on its behalf. The persons so designated shall testify as to matters known or available to the organization.

(b) *Submission to witness; changes; signing.* When the testimony is fully transcribed (see Rule 90(a)), the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer before whom taken, with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing, or unless the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness, the officer before whom taken shall sign it and state on the record the fact of the waiver, or of the illness or absence of the witness, or of his refusal to sign, together with the reasons, if any, given therefor; and the deposition may then be used as fully as though signed, unless the court (or the trial judge), on a motion to suppress under Rule 91(e), holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

### Rule 85. Depositions upon written questions

(a) *Written questions; notice of; filing; service.* A party desiring to take the deposition of any person upon written questions shall attach the questions to his motion for leave and file the papers with the clerk, together with a notice stating the name and address of the person who is to answer the questions (or otherwise identifying the deponent as provided in Rule 84(a)(3)(ii)), and the name or descriptive title and address of the officer before whom the deposition is to be taken. Within 15 days after notice that leave has been granted, an adverse party may file cross-questions. Within 10 days thereafter, redirect questions may be filed. Within 10 days thereafter, recross-questions may be filed. The party filing the notice or any set of written questions referred to in this paragraph (a) shall furnish the clerk the original and 3 copies thereof, plus 1 copy for each additional adverse party (as defined in Rule 211(b)). Service of copies shall be made upon the parties as provided in Rule 23.

(b) *Officer to take responses and prepare record.* Ten days after completion of service upon the parties, unless some other action is taken under Rule 87, the deposition may be taken. The notice and written questions shall be forwarded by the clerk to the officer designated in the notice, with directions to proceed promptly to take the testimony of the witness in response to the written questions and to prepare, certify, and file or return the deposition, all as provided in Rules 84(b) and 90, attaching thereto the notice and the written questions received by him.

(c) *Notice of filing.* When the deposition is filed with the clerk, he shall give notice thereof to the parties.

### Rule 86. Depositions pending certiorari

(a) *When allowed.* In any case (1) which is pending in the Supreme Court of the United States, or (2) in which a petition for a writ of certiorari has been filed but not acted upon, or (3) in which the time for filing such a petition has not expired, this court may allow the taking of depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in this court.

(b) *Motion.* A party who desires to perpetuate testimony under this rule may make a motion for leave to take the depositions, upon the same notice and service thereof as if the action were pending in this court. The motion shall comply with Rule 51 and shall show (1) the names and addresses of the persons to be examined; (2) the substance of the testimony which the moving party expects to elicit from each person; and (3) the reasons for perpetuating the testimony.

(c) *Action on motion.* If the court finds that the perpetuation of the testimony sought under this rule is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken. Thereupon, the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in actions pending in this court.

### Rule 87. Orders for the protection of parties and deponents

At any time after the service of notice of the taking of a deposition, whether upon oral examination or upon written questions, and although leave for the taking may have been granted, the court, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, may make an order for the protection of a party or a deponent in conformity with Rule 71(f). Any such order made by the court shall be in writing, and a signed copy thereof shall be filed in the clerk's office. The clerk shall serve a copy of the order on each of the parties as provided in Rule 23.

### Rule 88. Use of depositions as evidence

(a) *General.* (1) No testimony taken by deposition shall be considered as part of the evidence in the case until such testimony is offered and received in evidence at the trial or upon the hearing of a motion or an interlocutory proceeding.

(2) Subject to the provisions of Rule 91(c) and (e), objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof upon the ground that it does not qualify for admission as former testimony under the provisions of the Federal Rules of Evidence, or upon any other ground which would require the exclusion of the evidence if the witness were then present and testifying.

(3) If only part of a deposition is offered by a party and admitted in evidence, an adverse party may require him to introduce any other portion of the deposition that is relevant to the part introduced and which is admissible under the rules of evidence, and any party may introduce any other parts of the deposition that are admissible under the rules of evidence.

### Rule 89. Persons before whom depositions may be taken

(a) *Within the United States.* Within the United States or within a territory or insular possession subject to the dominion of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held, or before a person appointed by the court. A person so appointed has power to administer oaths and to take such testimony.

(b) *In foreign countries.* In a foreign country, depositions may be taken (1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, or (2) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of his commission to administer any necessary oath and take testimony, or (3) pursuant to a letter rogatory. A commission or a letter rogatory shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in [here name the country]." Evidence obtained in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript, or that the testimony was not taken under oath, or for any similar departure from the requirements for depositions taken within the United States under these rules.

(c) *Disqualification for interest.* Except as provided in paragraph (b) of this rule, no deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or who is a relative or employee of such attorney or counsel, or who is financially interested in the action.

(d) *Fees of officer taking deposition.* The party at whose instance the deposition is taken shall be responsible for the payment of the officer's fees for taking, transcribing, and returning the deposition.

### Rule 90. Record of examination; exhibits; filing; return

(a) *Record of testimony.* (1) *Oath; transcription:* The officer before whom any deposition is taken shall put the witness on oath (or affirmation) and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness. The testimony shall be recorded stenographically or electronically, and shall be transcribed unless the parties agree otherwise.

(2) *Objections.* All objections made at the time of the examination (i) to the qualifications of the officer taking the deposition, or (ii) to the manner of taking it, or (iii) to the evidence presented, or (iv) to the conduct of any party, or (v) any other objections to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections.

(3) *Use of written questions.* In lieu of participating in an oral examination, parties served with notice of the taking of a deposition may transmit written questions to the officer, who shall propound them to the witness and record the answers verbatim.

(b) *Exhibits.* All exhibits shall be numbered and carefully marked with the title and number of the case, and by which side offered, so as to be capable of immediate identification. The exhibits shall not be affixed to the deposition but shall accompany it, except that the parties may agree that each party retain the exhibits he identified or offered at the time of the taking of the deposition.

(c) *Certification by officer.* The officer shall certify on the deposition that the witness was duly sworn (or affirmed) by him and that the deposition is a true record of the testimony given by the witness.

(d) *Return of depositions.* The officer before whom a deposition is taken shall make his return to the parties in accordance with arrangements made by him with the parties or in conformity with the instructions of the party taking the deposition. Unless otherwise ordered by the court, depositions shall not be filed with the clerk.

### Rule 91. Effect of errors and irregularities in depositions

(a) *As to notice.* All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly filed with the clerk after service of the notice.

(b) *As to disqualification of officer.* Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(c) *As to taking of deposition.* (1) Objections to the competency of a witness, or to the competency, relevancy, or materiality of testimony, are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(2) At the taking of a deposition upon oral examination, errors and irregularities occurring in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(3) Objections to the form of written questions submitted under Rule 85 are waived unless filed with clerk within the time allowed for filing the succeeding questions, or, with regard to the last questions authorized, within 10 days after they are served.

(d) *Service of objections.* At the time of filing the objections referred to in paragraphs (a) and (c)(3) of this rule, the party filing the same shall furnish the clerk the original and 3 copies thereof, plus 1 copy for each additional adverse party (as defined in Rule 211(b)). Service of such copies shall be made as provided in Rule 23.

(e) *As to completion and return of deposition.* Errors and irregularities in the manner in which the testimony is transcribed, or the deposition is prepared, signed, certified, sealed, endorsed, transmitted, or otherwise dealt with by the officer under Rule 90, are waived unless a motion to suppress the deposition of some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

### Rule 92. Refusal of deponent to testify; consequences

(a) *Refusal to answer.* If a deponent (including a party) refuses to answer any question propounded upon oral examination conducted pursuant to Rule 84, the examination shall be completed on other matters or adjourned, as the proponent of the question may prefer. Thereafter, on reasonable notice to all persons affected thereby, he may apply to the court for an order compelling an answer.

(b) *Failure to give deposition or to comply with order.* (1) *Contempt.* If any person (including a party), after being served with a subpoena or having waived this requirement, willfully fails to appear before the officer who is to take his deposition or refuses to be sworn, or if any person (including a party) willfully fails to obey an order made under paragraph (a) of this rule requiring him to answer designated questions, or willfully fails to answer a written question submitted pursuant to Rule 85, such failure may be considered contempt of court.

(2) *Other consequences.* If any party (which, in respect to a plaintiff or a third party, shall include any officer, director, managing agent, or employee of a public or private corporation or of a partnership or association, as well as an individual; and which, in respect to the defendant, shall include any officer or employee of the United States or of any corporation wholly owned by the United States) refuses to obey an order made under paragraph (a) of this rule requiring him to answer designated questions, or willfully fails to give his deposition, the court may make such orders in regard to the refusal or failure as are just. These may include, among others, the following orders:

(i) an order that the matters regarding which the questions were asked, or any other designated facts, shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order; or

(ii) an order pursuant to paragraph (b) or (c) of Rule 76.

(c) *Failure to respond to letters rogatory.* If any citizen or resident of the United States fails to respond to a letter rogatory, a subpoena may be issued as provided in 28 U.S.C. § 1783, under the circumstances and conditions stated in subsections (a)(1) and (b) of that section.

## VIII. SUMMARY JUDGMENT; DISMISSALS

### Rule 101. Summary judgment

(a) *For claimant.* Subject to the provisions of paragraph (c) of this rule, a party seeking to recover upon a claim or counter-claim may, at any time after a responsive pleading or a dispositive motion has been filed by the adverse party, move with or without supporting affidavits for summary judgment in his favor upon all or any part thereof.

(b) *For defending party.* Subject to the provisions of paragraph (c) of this rule, a party against whom a claim or counterclaim is asserted may at any time move with or without supporting affidavits for summary judgment in his favor as to all or any part thereof.

(c) *When leave is required.* A motion for summary judgment may not be filed by any party except by leave of court (or the trial judge) (1) after the case has been set for trial, or (2) after the filing of a pretrial memorandum or order in accordance with Rule 113, or (3) after the filing of his response to a dispositive motion by an adverse party, or (4) after the filing of a stipulation of facts by the parties. (With respect to a stipulation agreed by the parties to contain all the pertinent facts, see Rule 134(b).)

(d) *Motion and proceedings thereon.* After a motion for summary judgment has been filed, and after the expiration of the time allowed for a response thereto or for a reply to the response, if any (Rule 52(b)), such motion may (subject to the provisions of Rules 54(b), 146(b)(2), and 166(b)) be assigned to the calendar. (See Rules 14(b)(2).) The judgment sought shall be rendered if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(e) *Case not fully adjudicated on motion.* If, on motion under this rule, judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court may ascertain (if it is practicable to do so upon the basis of examining the pleadings and the evidence before it and interrogating counsel) what material facts exist without substantial controversy and what material facts are in good faith controverted. It shall thereupon make an order specifying the facts that appear to be without substantial controversy (including the extent to which the amount of damages or other relief is not in controversy), and directing such further proceedings in the action as are just. Upon the trial of the action, the facts so specified shall be deemed to be established, and the trial shall be conducted accordingly.

(f) *Form of affidavits; further testimony.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, will be entered against him.

(g) *When affidavits are unavailable.* Should it appear from the affidavit of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may deny the motion for summary judgment, or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had, or may make such other order as is just.

(h) *Affidavits made in bad faith.* Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the offending party or attorney may be adjudged guilty of contempt.

### Rule 102. Dismissal of actions

(a) *Voluntary dismissal; effect thereof.* (1) *By plaintiff; by stipulation.* Subject to the provisions of any statute of the United States, an action may be dismissed by the plaintiff without order of the court (i) by filing a notice of dismissal at any time before service of the answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by the adverse parties, or (iii) by filing a motion to dismiss endorsed "no objection" by the adverse parties. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States an action based on or including the same claim.

(2) *By order of court.* Except as provided in subparagraph (1) of this paragraph (a), an action will not be dismissed at the plaintiff's instance except upon order of the court and upon such terms and conditions as the court deems proper. Unless otherwise specified in the order, a dismissal under this subparagraph (2) is without prejudice.

(b) *Involuntary dismissal; effect thereof.* (1) Upon its own motion, the court may dismiss any action at any time.

(2) For failure of the plaintiff to prosecute the action or to comply with these rules or with any order of the court, the defendant may move that the court dismiss the action. (*Cf.* Rules 76, 92, and 114.)

(3) Unless the court in its order for dismissal otherwise specifies, a dismissal under paragraphs (b), (c), or (d) of this rule, and any dismissal not provided for in this rule (other than a dismissal for lack of jurisdiction), operates as an adjudication upon the merits.

(c) *Insufficiency of evidence.* (1) Promptly after the plaintiff has completed the presentation of his evidence, the defendant may, by motion, ask for a dismissal of the action on the ground that, on the facts and the law, the plaintiff has not shown a right to recover: *Provided,* That if a counterclaim is pending, the motion shall be deemed to be a motion for judgment that the plaintiff is not entitled as a matter of law to recover. The motion shall be made orally in open court, except that, when a trial has been adjourned following the presentation of the plaintiff's evidence in order to afford the defendant an opportunity to present its evidence at a later time, the trial judge may authorize the submission of such a motion in written form to him within such time as he may fix. The motion shall be without prejudice to the right of the defendant to present evidence if the motion is denied.

(2) If the motion is made in open court and is there denied, no record of the motion or of the action thereon, other than that contained in the transcript, need be made. Such an order of denial shall not be subject to review prior to the submission of the recommended decision on the case in accordance with Rule 134, and the

defendant shall proceed with the presentation of its evidence at the direction of the trial judge.

(3) If the motion is made in open court and is there allowed, the record of trial up to that point shall be filed in accordance with Rule 122(d). After the filing of the record, the trial judge shall enter an order closing proof for the purposes of this paragraph (c), whereupon the parties, in conformity with Rule 134, shall file requested findings of fact and briefs, except that the defendant shall file first.

(4)(i) In a case where (*a*) the trial judge desires to defer his ruling on a motion made orally in open court, or (*b*) the motion is submitted in written form pursuant to his authorization, he may direct the parties to submit to him, within such time and in such sequence as he shall prescribe, such memoranda or briefs in support of and in opposition to the motion as he may require. The trial judge's action on the motion shall be by order filed with the clerk, and the order shall have attached to it the motion (if made in written form) and any memoranda or briefs submitted by the parties pursuant to the trial judge's directive.

(ii) If the motion under this subparagraph (4) is denied, the order shall not be subject to review prior to the submission of the recommended decision on the case in accordance with Rule 134, and the defendant shall proceed with the presentation of its evidence at the direction of the trial judge.

(iii) If the motion under this subparagraph (4) is allowed, the order shall provide for the filing of the record of trial in accordance with Rule 122(d), unless the record has already been filed in the meantime. After the filing of the record, an order shall be entered closing proof for the purposes of this paragraph (c), whereupon the parties, in conformity with Rule 134, shall file requested findings and briefs, except that the defendant shall file first.

(5) If the trial judge allows a motion in accordance with subparagraph (3) or subparagraph (4)(iii) of this paragraph (c), he shall make and file his findings of fact material to the issues raised by the motion and his recommendation for the conclusion of law thereon. The action in allowing the motion shall not be subject to review prior to the filing of findings and a recommended decision is filed upon the entire evidence produced by both parties.

(d) *Effect of counterclaim.* No action over which the court has jurisdiction and in which the defendant has pleaded a counterclaim or filed a motion for leave to plead a counterclaim shall be dismissed over an objection by the defendant, unless the court determines that the counterclaim should also be dismissed: *Provided,* That after the service of the plaintiff's motion for dismissal of the action, the defendant may move that, in lieu of dismissal, the court enter judgment that the plaintiff is not entitled as a matter of law to recover.

(e) *Dismissal of counterclaim, cross-claim, or third-party claim.* The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim.

## IX. PRETRIAL PROCEDURES

### Rule 111. Pretrial orders

(a) *General.* The trial judge may, in his discretion, direct the attorneys for the parties, or any party not represented by an attorney, to take such action in preparation for a pretrial conference or for trial as may aid in the disposition of the cause, including, but not limited to, any of the actions provided for in the subsequent paragraphs of this rule.

(b) *Parties to confer.* The trial judge may direct any party to confer with any other party at any stage of the case on any matter pertaining thereto.

(c) *Admissions.* The trial judge may direct any party to serve on any other party a request for admissions under Rule 72.

(d) *Accounting.* (1) The trial judge may direct any party whose claim or counterclaim is based, in whole or in part, on books of account or other records of that party to furnish to any other party a statement showing the items and figures appearing in such books or records which the claimant intends to prove, with adequate references to the books or records from which such figures were taken, and to make all such books and records, or any part thereof, available for examination by the other party.

(2) The trial judge may direct any party to whom any statement of items and figures has been submitted under subparagraph (1) of this paragraph (d) either (i) to make an examination of the books and records of the submitting party and to furnish to such party a schedule or schedules showing the results of such examination, with specific references to the books and records from which were taken any figures that the examining party has found to differ from the figures contained in the statement submitted; or (ii) to waive any challenge of the accuracy of the statement submitted as reflecting the contents of the books and records of the submitting party.

(e) *Miscellaneous schedule.* The trial judge may direct the submission (or a response to a submission) by any party (1) of statements of contentions as to the applicable measure of damages, or (2) of schedules of items and figures organized in such manner as to explain any assembly of figures (including computations and the components thereof) intended for use in support of a claim, counterclaim, defense, cross-statement, or offset.

(f) *Use of accounting schedules and other submissions.* No statement, schedule, submission, or response thereto made pursuant to paragraph (d) or (e) of this rule shall become evidence in a case until offered and received in evidence at a pretrial conference, at the trial, or upon the hearing of a motion or interlocutory proceeding; nor shall any verification of items or figures be deemed an admission of liability unless expressly so stated. The introduction into evidence of any such statement, schedule, submission, or response shall be subject to the same objections by any party as might be made to the introduction of other evidence.

(g) *Submissions.* (1) The trial judge may direct any party to submit to him (with a copy to any other party)—

(i) a short narrative statement (in the nature of an opening statement at the trial) of the proof to be adduced, either by oral testimony or by documentary evidence, or both;

(ii) a brief statement of his contentions in terms of ultimate facts and conclusions of law, and a succinct statement of points and authorities by way of analysis of legal issues;

(iii) a statement of the issues of fact in controversy;

(iv) a statement of the issues of law;

(v) a list of the prospective witnesses, giving as to each witness the name, address, and occupation, and the issue or issues of fact to which his testimony will be directed;

(vi) a statement showing the location or locations where the party desires that the witnesses be heard, and an estimate of the time that will probably be required in each location for the examination and cross-examination of the party's witnesses at that place; and

(vii) a statement as to when the party will be ready for trial.

(2) Notwithstanding any submission made in good faith pursuant to subparagraph (1) of this paragraph (g), a party may, for good cause shown, alter positions in relation to facts or law, or call witnesses other than those listed, in order to meet the exigencies of the case as it develops.

(h) *Preliminary pretrial memorandum.* The trial judge may direct any party to prepare and submit to any other party a memorandum containing all matters requisite to a pretrial conference at which agreement may be sought as to the authenticity and admissibility of documents, uncontroverted facts, issues of fact, issues of law, and the time and place (or places) and probable duration of the trial.

### Rule 112. Pretrial conferences

(a) *Scheduling of pretrial conference.* In any action, the trial judge may, in his discretion, direct the attorneys for the parties, or any party not represented by an attorney, to appear before him prior to trial in order to consider—

(1) the simplification of the issues;

(2) the necessity or desirability of amendments to the pleadings;

(3) the possibility of avoiding unnecessary proof (i) by the admission of facts and (ii) by the reception of documents in evidence;

(4) the limitation of the number of expert witnesses and the exchange between the parties prior to trial of written statements by such witnesses comprising their direct testimony in the action (*cf.* Rule 71(b)(2));

(5) incorporating in the record factual data or documentary evidence pursuant to proceedings theretofore had under Rule 111; and

(6) such other matters as may aid in the disposition of the action.

(b) *Authority of attorneys.* An attorney appearing at a pretrial conference on behalf of a party, whether the United States or a private party, should preferably be the attorney who will try the case for such party, be thoroughly familiar with the case, and be authorized to act for the party he represents at the conference.

### Rule 113. Pretrial memorandum or order

The trial judge shall make a memorandum or order reciting agreements reached, orders made, and actions taken at any pretrial conference under Rule 112 or pursuant to proceedings under Rule 111. He shall file with the clerk the original of every such memorandum or order, and 1 additional copy for each party for service by the clerk. The pretrial memorandum or order may be modified upon motion filed by a party within 10 days (or such other time as may be fixed by the trial judge) after service. Subject to such modification, the memorandum or order shall become part of the record and shall govern future proceedings in the action.

### Rule 114. Compliance and noncompliance

(a) *Pretrial rules liberally construed.* Each of the foregoing rules relating to pretrial procedure (Rules 111-13) shall be construed liberally to expedite the trial of cases without depriving any party of any just claim, defense, or objection.

(b) *Effect of noncompliance.* Upon the failure or refusal of a party to comply with any order or direction by the trial judge pursuant to the rules relating to pretrial procedure (Rules 111-13), the trial judge may—

(1) order that the facts pertaining to the matter in default shall be taken to be established for the purposes of the action in accordance with the contention of the party submitting documents or requests for admissions;

(2) declare a waiver of challenge of the accuracy of any statement or schedule of items and figures reflecting submissions made pursuant to Rule 111(d) or (e);

(3) refuse to allow the disobedient party to support or oppose designated claims or defenses;

(4) prohibit the disobedient party from introducing in evidence designated documents or items of testimony; or

(5) recommend the dismissal of the action or proceeding, or any part thereof, or the rendition of judgment by default against the disobedient party.

## X. INCIDENTS OF TRIALS

### Rule 121. Incidents of trials before trial judges

(a) *Witnesses; evidence.* The trial judge may call and examine witnesses, including the parties to the action; and he may require the production before him of evidence upon all pertinent matters, including the production of all books, papers, vouchers, writings, documents, plans, drawings, materials, or apparatus of any nature applicable thereto.

(b) *Directing witness to answer.* If any witness, including a party, refuses to answer any question propounded upon oral examination in the course of a trial, the trial judge may direct him to answer.

(c) *Contempt.* If any person, including a party, called as a witness refuses to be sworn (or to affirm) in the course of a trial, or refuses to answer any question after being directed to do so by the trial judge, the refusal may be considered contempt of court.

(d) *Recommendation for dismissal of action.* The trial judge may recommend the dismissal by the court of an action or counterclaim (1) by way of sanction upon the failure or refusal of a party to comply with an order or the requirement of a rule, or (2) for insufficiency of the evidence as provided by Rule 102(c).

### Rule 122. Reporting arrangements; return of transcript

(a) *Record of proceedings.* The court will by contract furnish a reporter to take down the trial proceedings and transcribe the same in any trial held in any State of the United States or the District of Columbia. Unless otherwise ordered by the court or trial judge for good cause shown, the court will not furnish a reporter at any trial held at any other place.

(b) *Reporter; control.* The reporter shall be under the jurisdiction and control of the trial judge.

(c) *Preparation of Transcript and Exhibits.* The preparation of the transcript of trial proceedings, including the exhibits, shall be in conformity with the Instructions to Reporters and Forms contained in Appendix A of these rules.

(d) *Return of Transcript and Exhibits.* Unless otherwise ordered by the trial judge the reporter shall file the transcript of trial proceedings, including the exhibits admitted in evidence or designated to accompany the transcript (Rule 133(e)(2)), with the clerk within 30 days after the conclusion of the trial session at which such proceedings were had. The filing may be accomplished by personally delivering the transcript and exhibits to the clerk's office or by enclosing them in a packet and transmitting them to the Clerk, United States Court of Claims, 717 Madison Place, N.W., Washington, D.C. 20005, in sufficient time for the transcript and exhibits to be filed within the prescribed period. The obligation for the filing of the transcript and exhibits within the prescribed period rests upon the reporter.

(e) *Copies of Transcript.* The parties may obtain copies of the transcript from the reporter at prices fixed in the reporting contract.

#### References in Text

Rule 133(e)(2), referred to in subsec. (d), was renumbered Rule 133(b) by United States Court of Claims General Order No. 1 of 1975, amend. no. 36, issued June 17, 1975, effective July 1, 1975.

### Rule 123. Subpoenas

(a) *Form; issuance.* Every subpoena shall be issued by the clerk under the seal of the court, shall state the name of the court and the title of the action, and shall command each person to whom it is directed to attend and give testimony at a time and place therein specified. In issuing a subpoena (including a subpoena for the production of documentary evidence) to a party requesting it, the clerk shall sign and seal the subpoena but otherwise leave it blank. The party to whom the subpoena is issued shall fill it in before service.

(b) *Subpoenas for attendance of witnesses at scheduled hearing or trial.* (1) At the request of any party, subpoenas for the attendance of witnesses at a hearing or trial shall be issued by the clerk. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within 100 miles (by the shortest usual means of travel) of the place of the hearing or trial specified in the subpoena; but the court, upon proper application and good cause shown, may authorize the service of a subpoena at any other place.

(2) Subpoenas bearing the seal of the court and the signature of the clerk, with the remainder blank, may be issued to the trial judge, who may order service on his own motion or release them to the parties for service.

(3) A subpoena directed to a witness in a foreign country shall be issued under the circumstances and in the manner, and shall be served, as provided in 28 U.S.C. §§ 1781–84.

(c) *Subpoena for production of documentary evidence.* For good cause shown, a subpoena, in addition to requiring attendance, may also command any person to whom it is directed to produce relevant books, papers, documents, or tangible things designated therein. In such a situation, the court upon motion made promptly, and in any event not later than the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive, or (2) require the person in whose behalf the subpoena was issued to advance the reasonable cost of producing the books, papers, documents, or tangible things. Where the circumstances require, the court may act upon such a motion at any time after a copy has been served upon the opposite party.

(d) *Subpoena for taking depositions; place of examination.* (1) The filing of a notice to take a deposition, as provided in Rule 84 or Rule 85, constitutes a sufficient authorization for the issuance by the clerk of a subpoena for the attendance of the persons named or described therein. Subject to the provisions of Rule 82(b), the subpoena may also command any person to whom it is directed to produce designated books, papers, documents, or tangible things which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 83(b). In that event, the subpoena will be subject to the provisions of Rule 87 and paragraph (c) of this Rule 123.

(2) A witness may be required to attend an examination upon deposition only in the county wherein he resides or is employed or transacts his business in person, or at such other convenient place as is fixed by order of the court.

(e) *Service.* (1) A subpoena may be served by the bailiff, by a United States marshal or his deputy, or by any other person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by tendering to him the fees for 1 day's attendance and the mileage allowed by law. (28 U.S.C. § 1821.) When the subpoena is issued on behalf of the United States or an officer or agency thereof, fees and mileage need not be tendered.

(2) The party at whose instance a subpoena is issued shall be responsible for the payment of witness fees and mileage, as well as fees and mileage of the officer who serves the subpoena. The failure to make payment of such charges on demand may be deemed by the court as a

sufficient ground for striking the testimony of such witness.

(f) *Contempt.* Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed contempt of court.

### Rule 124. Proof of rules and regulations

In a trial on the merits, or in making or opposing a motion, a party relying on a rule or regulation shall submit the full authentic text thereof for inclusion in the record, unless it is published in the Federal Register or in the Code of Federal Regulations. A rule or regulation so furnished need not be certified. The court may require the appropriate party to furnish the full authentic texts of additional rules or regulations not published in the Federal Register or in the Code of Federal Regulations.

### Rule 125. Determination of foreign law

A party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The determination of foreign law shall be treated as a ruling on a question of law.

#### REFERENCES IN TEXT

The Federal Rules of Evidence, referred to in text, are set out in the Appendix to this title.

## XI. TRIALS

### Rule 131. Consolidation; separate trials; interlocutory determinations; final judgments

(a) *Consolidation.* When actions involving a common question of law or fact are pending, the trial judge may order a joint trial of any or all the matters in issue in the actions, or he may order the actions consolidated, or he may make such other orders concerning the proceedings therein as may tend to avoid unnecessary costs or delay.

(b) *Separate trials.* The trial judge, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition or economy, may order a separate trial of any claim, counterclaim, or third-party claim, or of any separate issue, or of any number of claims, counterclaims, third-party claims, or issues. The court may enter appropriate orders or judgments with respect to any such issues, claims, or counterclaims that are tried separately.

(c) *Separate determination of liability.* (1) Upon stipulation of the parties, subject to approval by the trial judge, or upon order of the trial judge, a trial may be limited to the issues of law and fact relating to the right of a party to recover, reserving the determination of the amount of recovery, if any, for further proceedings.

(2) In any case, whether or not a stipulation or order has been made under subparagraph (1) of this paragraph (c), the court, upon entering judgment that a party is entitled to recover, may reserve determination of the amount of the recovery for further proceedings. In such event, the judgment on the question of the right to recover shall be final, subject to proceedings had under Rules 151 and 152. Upon the entry of any such final judgment on the right to recover, the trial judge shall proceed with the determination of the amount of recovery. The parties may be allowed a reasonable time within which to stipulate or otherwise agree upon a computation. (*Cf.* Rule 75.) If the parties are unable to agree on the amount of recovery, this issue shall be disposed of in accordance with the rules covering pretrial procedures, trial exceptions, briefs, and argument.

### Rule 132. Taking of evidence

(a) *Relation to procedures before trial.* In conformity with Rules 71 and 111, all depositions, discovery, and pretrial procedures shall be completed before the taking of testimony is begun, but the trial judge, in his discretion, may permit, initiate, or require any of the procedures authorized by Rules 71-76, 81-92, or 111-14 at any time after the trial has commenced.

(b) *Time; place; notice; exhibits.* (1) The taking of evidence shall be begun as expeditiously as possible. Whenever practicable, evidence shall be taken in one continuous session or in a series of consecutive sessions, but the trial judge may, in his discretion, hear portions of the evidence in a case at different times and in different places.

(2) The place of trial shall be fixed by the trial judge, with due regard to (i) the places of residence of the claimant and the witnesses, and (ii) the degree of convenience of all concerned to be served by convening at some central place.

(3) The trial judge shall give to the parties reasonable notice by mail of the time and place of trial or of each nonconsecutive session as he shall designate, and may direct therein that all or stated parts of the evidence be produced.

(4) The availability at the trial of exhibits which have been filed with the clerk and which are desired for use at the trial shall be the responsibility of the party desiring to use them.

(c) *Delay by parties.* Whenever the trial judge has reason to believe that the case is being unnecessarily delayed by the failure of either or both of the parties to produce evidence, he may give notice to the parties and fix a reasonable time, not less than 30 days after the date of the notice, when either or both of the parties must close the evidence. Upon failure of either party to comply, the trial judge may, in his discretion, close the evidence or recommend that the court dismiss the petition or counterclaim.

### Rule 133. Reception of evidence

(a) *General.* In all trials, the testimony of witnesses shall be taken orally in open court, unless otherwise ordered upon good cause shown. The Federal Rules of Evidence are applicable to all trials.

(b) *Documents and objects not admitted.* Where an objection to the introduction of documentary or physical evidence is sustained, the document or object, having been marked for identification, shall upon the request of the party who offered the same, or by direction of the trial judge, be filed by the reporter with the transcript of the evidence, unless the trial judge rules that it clearly appears such evidence is not admissible on any ground.

(c) *Deferred completion of examination; death of witness.* (1) When a time has been set for the production of all or a specified portion of the evidence and the examination or cross-examination of a witness is postponed at the request of a party, such party may be required, in the discretion of the trial judge, to pay all fees and necessary travel and subsistence expenses which are incurred by or for witnesses (present or called) as a result of such postponement. The trial judge's conclusion in such matter shall be noted in the transcript of the evidence.

(2) Should a witness die or otherwise become incapacitated before completion of his testimony, the court will determine the extent to which the testimony so far given by him shall be used and considered.

### REFERENCES IN TEXT

The Federal Rules of Evidence, referred to in subsec. (a), are set out in the Appendix to this title.

### Rule 134. Trial judge's report

(a) *Closing of proof.* After the parties have completed the presentation of the evidence (whether at a pretrial conference, trial, or by means of a stipulation), and after the filing of the transcript (including exhibits) in cases wherein the proceedings have been so recorded, or when, in the opinion of the trial judge, ample opportunity for the presentation of evidence and the filing of the transcript has been afforded, the trial judge shall file with the clerk an order declaring that the proof has been closed. Copies of such order shall be served on the parties by the clerk.

(b) *Where all facts stipulated.* (1) In a case where the parties have stipulated all the pertinent facts, each party shall be deemed, for the purposes of this rule, to have requested that the stipulated facts be found, and the procedures thereafter shall be as provided in the subsequent portions of this rule.

(2) The parties' stipulation may aver or, by letters attached to the stipulation or separately addressed to the trial judge, the parties may state (i) that the stipulation is complete in itself and contains all the pertinent facts, except for appended exhibits (if any) that are submitted for the sole purpose of showing the agreed contents of such documents, and (ii) that the parties do not wish to offer further proof. Upon such a showing, the trial judge shall (subject to Rule 13(b)(6)(ii)) return the case to the court by means of a memorandum report advising that the case is at issue without findings of fact or recommendation for the conclusion of law by him; and such memorandum report shall constitute the order closing proof in the case.

(c) *Requested findings; briefs; time for filing.* Unless otherwise ordered by the trial judge—

(1) The plaintiff shall have 30 days after the service of the trial judge's order closing the proof within which to file requested findings of fact. A brief on the law shall also be filed unless otherwise directed.

(2) The defendant shall have 30 days after service of the plaintiff's requested findings and brief within which to file its requested findings of fact, objections (if any) to the plaintiff's requested findings, and, unless otherwise directed, a brief on the law. In the event of failure by the plaintiff to file requested findings and brief within the required time or any extension thereof, the defendant shall have 30 days after the expiration of the time allowed to the plaintiff within which to file its requested findings and brief or a motion to dismiss for lack of prosecution.

(3) The plaintiff shall have 20 days after service of defendant's requested findings and brief within which to file objections (if any) to defendant's requested findings and, unless otherwise directed, a reply brief. In the event of plaintiff's failure to make timely filing of his requested findings and brief, as provided in subparagraph (1) of this paragraph (c), the provision of this subparagraph (3) shall not apply.

(4) The trial judge may direct the parties to file their requested findings and briefs concurrently instead of consecutively, in which event each party shall, within 30 days after the service of the order closing proof, or such other time as may be fixed by the trial judge, forward the original and necessary copies to the trial judge for filing by him, instead of filing them directly with the clerk's office. After the receipt of findings and briefs from both parties, or after the expiration of the prescribed period, the trial judge will file the requested findings and briefs in the clerk's office, with copies for service by the clerk. Within 20 days after the service of requested findings filed in conformity with this subparagraph (4), either party may (if he has complied with the initial requirement to forward his requested findings and brief to the trial judge) file with the clerk his objections to the requested findings of the opposing party and a reply brief, copies of which will be served by the clerk.

(d) *Form and content of requested findings and objections.* (1) Requests for findings shall be in the form of distinct numbered propositions of the facts which the party desires to have found; each proposition shall be so prepared with respect to its length, subject, and phraseology that the trial judge and the court may conveniently pass upon it; each statement of fact shall be supported by citations to the pages or parts of the record (including transcript and exhibits) relied upon to establish such fact; and the several propositions of fact shall be so arranged as to present a concise statement in orderly and logical (and, preferably, chronological) sequence of the whole case.

(2) Objections to requested findings of fact shall state specifically and with particularity the reasons for objecting to each proposition of fact to which objection is made, and each objection shall be supported by citations to the pages or parts of the record (including transcript and exhibits) relied upon as supporting the objection.

(e) *Content of brief.* Each brief submitted pursuant to this rule shall comply with the requirements of Rule 144(a)-(d).

(f) *Filing requested findings and briefs.* Except as indicated in subparagraph (4) of paragraph (c) of this rule, requested findings, objections thereto, and briefs submitted under this rule shall be filed with the clerk by the parties. (See Rule 214(f) with respect to duplication and number of copies.)

(g) *Failure to file or object.* (1) If any party fails to file requested findings or a brief within the time required by this rule, or as fixed or extended by the trial judge, a memorandum reciting such failure shall be filed with the clerk by the trial judge, whereupon the court may refuse to consider any exceptions to the trial judge's report by the party so in default.

(2) Unless a party has requested a particular finding of fact, the court may refuse to consider his exception to the trial judge's report for failure of the trial judge to make such finding.

(3) Unless a party has objected to a particular requested finding of an adverse party, the court may refuse to consider an exception of the former party to the inclusion of such finding in the trial judge's report.

(4) In his discretion, and when in his judgment such action would expedite the disposition of a case without prejudice to the rights of any party, the trial judge may by order filed with the clerk waive, in whole or in part, the requirements of paragraph (c) of this Rule 134 for the filing of requested findings and briefs by the parties. The prior subparagraphs of this paragraph (g) shall not be applicable with respect to any requirement which has been waived.

(h) *Content of trial judge's report; findings of fact; conclusion of law.* In every case tried on the merits (*i.e.*, wherein there is a closing of proof within the context of this rule, other than the provisions of paragraph (b)(2)), the trial judge shall ascertain the facts from the evidence and file with the clerk a report of his findings of fact and, unless otherwise directed by the court, his opinion and recommendation for the conclusion of law, which report shall constitute a part of the record. The clerk shall serve 5 copies of the report on each party, as provided by Rule 23.

## XII. NOTICE OF INTENTION; EXCEPTIONS; BRIEFS; ARGUMENT; JUDGMENT; REMAND

### Rule 141. Notice of intention to except

(a) *When required.* When the trial judge's report in a case tried on the merits (as defined in Rule 134(h)) includes his opinion and recommendation for the conclusion of law, any party dissatisfied with the trial judge's findings of fact, opinion, or recommendation for the conclusion of law shall, within 30 days after the service of the report, file a notice of intention to except, specifying his intention to except to the findings, opinion, or recommendation, or to any or all of the components of the report. (See Rule 214(i) regarding duplication of notice of intention to except and number of copies to be filed.) Further proceedings shall be in accordance with Rule 143.

(b) *Motion for judgment.* When no notice of intention to except is filed within the time allowed, or in the event of the withdrawal of a notice timely filed, the court will entertain a motion by either party, or a joint motion by the parties, requesting that the court adopt—either (1) in whole or (2) with modifications—the trial judge's findings of fact, opinion, and recommendation for the conclusion of law as the basis for its judgment in the case. (See Rule 214(c) as to duplication and number of copies.)

(c) *When Notice Not Required.* (1) When the trial judge's report in a case tried on the merits contains findings of fact only (without an opinion or recommendation for the conclusion of law), notice of intention to except is not required. Further proceedings shall be in accordance with Rule 143 unless an election is made pursuant to Rule 142.

(2) When the trial judge has filed a memorandum report stating that all the facts have been stipulated (Rule 134(b)(2)), notice of intention to except is not required, and the parties shall have the same periods of time for filing their briefs as are prescribed in Rule 143. Unless otherwise ordered by the court, such a stipulation shall be duplicated by the plaintiff in conformity with Rules 211-14. At the plaintiff's option, the stipulation may be included in his brief or may be duplicated as a separate document and filed with his brief.

### Rule 142. Submissions in certain cases without exceptions and brief

(a) *Application.* The provisions in this rule for elections to submit a case without exceptions and briefs apply only to cases reported on the facts, as defined in Rule 141(c).

(b) *Submission by plaintiff.* In lieu of filing exceptions and brief, a plaintiff may, within 30 days after the service of the trial judge's report, file with the clerk a statement that the plaintiff elects to submit the case on the trial judge's report.

(c) *Submission by defendant.* Within 30 days after the service of plaintiff's exceptions and brief, or a brief without exceptions, or a statement as authorized in paragraph (b) of this rule, the defendant may file a statement that it elects to submit the case on the trial judge's report. When the plaintiff has filed a statement as authorized in paragraph (b) of this rule, defendant shall, if it elects to submit the case on the trial judge's report, file a statement to that effect within the time its exceptions or brief would otherwise be due.

(d) *Reply brief.* When a plaintiff elects to submit the case without exceptions and brief, and the defendant thereafter files exceptions and a brief, or a brief without exceptions, a reply brief on behalf of the plaintiff may be filed within 20 days after service of defendant's exceptions or brief.

### Rule 143. Exceptions and briefs after trial judge's report

(a) *Who may file.* Subject to the provisions of Rule 134(g), Rule 141(a), and Rule 142, any party may except to the trial judge's findings of fact, opinion, or recommendation for the conclusion of law and file his brief on the facts and the law, or he may file a brief on the law without exceptions to the findings of fact.

(b) *Time for filing.* (1) The plaintiff shall have 45 days from the date of the service of the trial judge's report within which to file his exceptions thereto and his brief on the facts and the law of the case, or a brief without such exceptions.

(2) The defendant shall have 30 days from the date of the service of the plaintiff's exceptions and brief, or brief without exceptions, within which to file defendant's exceptions to the trial judge's report and its brief on the facts and the law of the case, or a brief without such exceptions.

(3) The plaintiff shall have 20 days from the date of the service of the defendant's brief within which to file a reply brief.

(4) When the defendant is the only party that files a notice of intention to except, the defendant shall, within 45 days after the service of the trial judge's report, file its exceptions and brief. Thereafter, all proceedings shall be in accordance with subparagraphs (1), (2) and (3) of this paragraph (b) in respect to opposition and reply briefs, except that the plaintiff may oppose and the defendant may reply.

(c) *Duplication of exceptions and briefs.* The exceptions and brief of a party may be contained in a single document or in separate documents, and shall be duplicated in conformity with Rules 211-14. Briefs shall conform to Rule 144. At the end of each exception to findings of fact, appropriate references shall be made to the parts of the record relied upon in support thereof.

(d) *Failure to file.* The failure of a party to file, within the time allowed, the exceptions and brief or brief without exceptions contemplated by paragraph (b) of this rule shall constitute default. In the event of such a default by either party, the court may decline to hear oral argument in behalf of the defaulting party; and for such a default by the plaintiff, the court may dismiss the petition.

### Rule 144. Content of briefs

(a) *Initial brief.* Except in briefs of 10 pages or less, the first brief due under Rule 143 (normally the plaintiff's brief) shall contain, under proper headings and arranged in the following order—

(1) a table of contents;

(2) a table of the constitutional provisions, treaties, statutes, regulations, and cases cited, giving the volume and page in the official edition where they may be found, and arranging the cases in alphabetical order;

(3) a succinct statement of the questions involved, setting forth each question separately;

(4) a concise statement of the case, containing all that is material to the consideration of the questions presented, with appropriate references to the findings of fact, the stipulation of facts, or other pertinent portions of the record, and setting out verbatim in the brief or in an appendix thereto the pertinent portions of constitutional provisions, treaties, statutes, and regulations;

(5) the argument, exhibiting clearly the points of fact and of law being presented, and citing the authorities relied upon; and

(6) a conclusion indicating the relief sought.

(b) *Opposing brief.* An opposing or answering brief (normally the defendant's brief) shall conform to the requirements set out in paragraph (a) of this rule, except that the items referred to in subparagraphs (3) and (4) of that paragraph need not be included unless the party is dissatisfied with the presentation by the other side.

(c) *Reply brief.* A reply brief shall conform to the requirements of paragraph (b) of this rule.

(d) *General.* Briefs must be compact, concise, logically arranged, and free from burdensome, irrelevant, immaterial, and scandalous matter. Briefs not complying with this rule may be disregarded by the court.

(e) *Length of briefs.* (1) Except by leave of the court on motion, principal briefs shall not exceed 50 pages of standard typographic printing or 70 pages of printing by any other process of duplicating or copying, exclusive of pages containing the tables referred to in subparagraphs (1) and (2) of paragraph (a) of this rule, the exceptions (if any) to the trial judge's findings of fact, any stipulation of facts that may be included in the brief under the last sentence of Rule 141(c)(2), and any appendix setting out verbatim the pertinent portions of constitutional provisions, treaties, statutes, regulations, agency or board decisions, court decisions, excerpts from transcripts of testimony, and documentary exhibits, in accordance with subparagraph (4) of paragraph (a) of this rule.

(2) Except by leave of the court on motion, reply briefs shall not exceed 25 pages of standard typographic printing or 35 pages of printing by any other process of duplicating or copying.

(3) The practice of incorporating by reference a brief previously filed is disapproved and any such incorporation will be disregarded. A party wishing to rely upon a previously filed brief may do so by reproducing in an appendix either (i) excerpts thereof now relied upon, or (ii) the entire brief. In either event, the party shall identify the total number of pages considered pertinent in a footnote which is to appear on the first page of the brief. The pages so identified shall be included in the maximum allowable length set forth in subparagraphs (1) and (2) of this paragraph (e).

(4) A motion for leave to exceed the page limitation set forth in subparagraph (1) or subparagraph (2) of this paragraph (e) shall be filed with the clerk prior to the printing or other duplication of the brief and at least 10 days in advance of the date for the filing of the brief, and shall show good cause therefor. (See Rule 214(c) as to duplication and number of copies.) A response to such a motion for leave shall not be permitted.

### Rule 145. Brief of amicus curiae

(a) *When filed.* A brief of an *amicus curiae* may be filed either (1) by leave of court upon motion or (2) without leave, if accompanied by the consent of all parties to the case.

(b) *Content; duplication.* Such a brief shall conform to Rule 144(a), (d), and (e)(1), and shall be duplicated and filed in accordance with Rule 214(h).

(c) *Oral argument.* An *amicus curiae* may not participate in the oral argument without leave of the court upon motion giving extraordinary reasons therefor.

### Rule 146. Argument before the court

(a) *On the merits.* When a case is at issue on the merits and the time has expired for the filing of briefs under Rule 143, it may be assigned to the calendar for argument before the court, but such assignment shall not be made later than the Thursday preceding the opening of the regular monthly session of the court, except when otherwise ordered by the court. A case shall be deemed to be at issue on the merits (1) where the facts have been stipulated and there is no motion for summary judgment, or (2) where a trial judge has filed a report pursuant to Rule 134(h) and his report has not been accepted as the basis of judgment under Rule 141(b). In assignments under clause (2) of the preceding sentence, or where one party has elected to submit the case without exceptions and brief as provided by Rule 142, the opening and closing arguments shall be assigned to the party who filed the first brief.

(b) *On motions.* (1) When the time has expired for filing objections or responses (and replies thereto) to a motion to dismiss, to a motion for judgment on the pleadings, or to a motion for summary judgment, the case may (subject to the provisions of subparagraph (2) of this paragraph (b)) be assigned to the calendar, but such assignment shall not be made later than the Thursday preceding the opening of the regular monthly session of the court, except when otherwise ordered by the court.

(2) In the discretion of the court, a motion of the sort referred to in subparagraph (1) of this paragraph (b) may be acted upon without oral argument.

(c) *On other matters.* Other matters may be calendared for argument at the discretion of the court.

(d) *Date of argument.* Parties will be notified by the clerk of the assignment of cases to the monthly calendars. After having been assigned for argument, the cases to be argued shall be posted in the clerk's office each day for argument on the following day; and if not then argued or submitted by the parties, or by one party in the absence of the other, they shall be disposed of as the court may order.

(e) *Time allowed.* Thirty minutes will be allowed each side for argument before the court: *Provided,* That such time may be restricted or enlarged in any case by order of the court.

(f) *Submission without argument.* A case on the calendar may, with the approval of the court, be submitted without argument (1) by waiver of argument filed with the clerk or stated orally in open court when the case is called, or (2) by failure of the attorneys to appear for argument when the case is called.

### Rule 147. Findings and judgment by the court

(a) *Findings; judgment.* In all actions tried on the facts, the court will find the facts and state separately its conclusion of law, and will enter an appropriate judgment. Except as to a party against whom a judgment is entered by default, every final judgment may grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

(b) *Trial judge's report.* The court may adopt the trial judge's report, including conclusions of fact and law, or may modify it, or reject it in whole or in part, or direct the trial judge to receive further evidence, or refer the case back to him with instructions. Due regard shall be given to the circumstance that the trial judge had the opportunity to evaluate the credibility of the witnesses; and the findings of fact made by the trial judge shall be presumed to be correct.

(c) *Incidental and collateral relief.* As an incident of and collateral to a judgment, the court may issue to any appropriate official of the United States an order directing restoration to office or position, placement in appropriate duty or retirement status, or correction of applicable records.

### Rule 148. Judgment in renegotiation cases

As used in these rules, the word "judgment" shall be deemed to include an order in a renegotiation case determining the amount, if any, of excessive profits.

### Rule 149. Remand

(a) *Issuance of remand order.* At the request of a party or on its own motion, the court may in any case within its jurisdiction by order remand appropriate matters to any administrative or executive body or official, with such direction as may be deemed proper and just.

(b) *Content of remand order.* An order of remand shall (1) delineate the area of further consideration or action deemed warranted on the remand, and (2) fix the extent to which, and the duration of the period (not to exceed 6 months) during which, court proceedings shall be stayed.

(c) *Effect of order by court.* The issuance of an order of remand by the court (as distinguished from the trial judge) shall terminate the suspension (if any) of the reference to the trial judge.

(d) *Service of order.* A certified copy of any order issued pursuant to this rule shall be served by the clerk on the administrative or executive body or official to whom the order is directed. A copy of the order shall be served on each party in conformity with Rule 23.

(e) *Transmittal of administrative record.* Following service of the order as provided for in this rule, the clerk shall transmit the administrative record, if any, to the Department of Justice for return to the administrative or executive body or official to whom the order of remand is directed.

(f) *Advice of administrative action.* In every case in which an order of remand is entered pursuant to this rule, the attorney of record for the party so designated in the order of remand shall advise the court, by letter to the trial judge (with a copy to opposing counsel), of the status of proceedings on remand. The advice shall be given at intervals of 90 days or less, beginning with the date of the order.

### Rule 150. Extension or termination of stay of proceedings on remand; disposition of case

(a) *Extension.* If the administrative or executive body or official has not, during the period of stay provided for in an order of remand pursuant to Rule 149, rendered a decision on the matter remanded, the party to whom opportunity was afforded to obtain further administrative consideration shall, by motion pursuant to

Rule 25, request an extension of the stay of proceedings, or, by motion pursuant to Rule 51, request the initiation of proceedings toward otherwise disposing of the case.

(b) *Disposition at administrative level.* If, during the period of the stay of proceedings as provided for in a remand order, the parties dispose of the case at the administrative level, the plaintiff shall file a motion to dismiss the case with prejudice.

(c) *Decision on remand.* Upon completion of proceedings pursuant to an order of remand under Rule 149, the administrative or executive body or official to whom the order was directed shall forward to the clerk for filing four (4) copies of the decision or final action on remand. A copy of such decision or action shall be served on each party in conformity with Rule 23.

(d) *Action by the parties.* Within 30 days after the filing of a decision or final action pursuant to paragraph (c) of this rule, each party shall file with the clerk an original and 3 copies of a notice, duplicated in accordance with Rule 214(c), indicating whether or not the decision or final action on remand affords a satisfactory basis for disposition of the claim at the administrative level, or whether further proceedings before the court are deemed required, and, if such proceedings are desired, what those proceedings should be. A copy of such notice shall be served on each adverse party in conformity with Rule 23. Thereafter, the court will enter an order prescribing the procedure to be followed, either specially or pursuant to the rules of the court, or take such other action as may be deemed appropriate.

## XIII. REHEARINGS; NEW TRIALS; CERTIORARI

### Rule 151. Rehearings; amendment of judgments; new trials

(a) *Grounds.* (1) A rehearing may be granted, a judgment may be altered or amended, or a new trial may be granted on any ground established by the rules of common law or equity applicable as between private parties.

(2) The court, at any time while a suit is pending before it, or after proceedings for review have been instituted, or within 2 years after the final disposition of the suit, may grant the United States a new trial and stay the payment of any judgment upon satisfactory evidence, cumulative or otherwise, that any fraud, wrong, or injustice has been done the United States.

(b) *Form and time of motion; content; response; action if granted.* A motion for rehearing to alter or amend a judgment or for a new trial shall conform to Rule 51 and, except as provided in paragraph (a)(2) of this rule, shall be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order, or is subject to Rule 25(c). The motion shall state with particularity the points of law or fact which in the opinion of the movant the court has overlooked or misapprehended and shall contain argument in support thereof. Oral argument in support of the motion shall not be permitted. No response to a motion for rehearing is required, but will be considered if filed within 10 days from the date the motion for rehearing is filed. No time extension shall be allowed for filing such a response. If a motion for rehearing is granted the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case. Except by permission of the court a motion or a response to a motion for rehearing shall not exceed 10 pages of standard typographic printing or 15 pages of printing by any other process of duplicating or copying. (See Rule 214(e) as to duplication and number of copies.)

(c) *On initiative of court.* Not later than 30 days after entry of judgment, the court, on its own initiative, may order a rehearing or a new trial or alter or amend a judgment for any reason that would be sufficient to justify such action on motion of a party.

### Rule 152. Relief from judgment or order

(a) *Clerical mistakes.* Clerical mistakes in judgments, orders, or other parts of the record, and errors therein arising from oversight or omission, may be corrected by the court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders.

(b) *Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.; response; reply.* On motion conforming to Rule 51 and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 151(c); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than 1 year after the judgment, order, or proceeding was entered or taken. A motion under this paragraph (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of the court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. The relief provided by this rule shall be in addition to the relief available to the United States under Rule 151(a)(2). A response to a motion under this paragraph may be filed within 15 days after the motion is served. A reply may be filed within 10 days after the service of the response. (See Rule 214(e) as to duplication and number of copies.)

### Rule 153. Harmless error

No error in either the admission or the exclusion of evidence, and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties, will be a ground for granting a new trial or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. At every stage of the proceeding, the court will disregard any error or defect which does not affect the substantial rights of the parties.

### Rule 154. Writs of certiorari

(a) *Certified transcript of the record.* If a party seeking Supreme Court review of any judgment or order of this court desires that a certified transcript of the record accompany the petition for writ of certiorari, the party shall file with the clerk of this court, at least 20 days prior to the time when he is required to file his petition in the Supreme Court, an application requesting a certification of the record. The application shall be in conformity with Rule 214(i) and, except as to the United States, be accompanied by the fee as provided in Rule 223. The entire record shall be so certified unless the application designates particular parts of the record. For the purpose of this rule, the entire record shall be deemed to be comprised, when present, of the petition, answer, dispositive motions, stipulation of facts, transcript of testimony, exhibits, administrative record, trial judge's report, and the court's opinion or order, findings of fact, and conclusion of law, together with papers and orders relating to proceedings under Rule 151 or 152 and, in cases appealed to this court, the record on appeal. Should procedural matters be at issue, the application shall specifically request the inclusion of papers relating thereto.

(b) *Submission of record after petition filed.* Where a certified transcript of the record does not accompany the filing of the petition for writ of certiorari and such transcript is later required, as provided in the Rules of the Supreme Court, the clerk of this court, upon the request of the Clerk of the Supreme Court, or of the party seeking review, will forward such transcript. The party seeking review, other than the United States, shall pay the fee as provided in Rule 223.

## XIV. WUNDERLICH ACT REVIEWS

### Rule 161. Applicability of chapter

The ensuing rules in this chapter (Rules 161–68) shall apply to cases founded on contracts containing disputes clauses subject, potentially, to review, in whole or in part, under the terms of the Wunderlich Act (68 Stat. 81, 41 U.S.C. §§ 321–22), and are designed to supplement the other rules of the court, particularly Rules 31–57 (Chapters III and IV, Pleadings and Motions) and Rule 101 (Summary Judgment). To the extent that a party is entitled to relief outside the Wunderlich Act, a trial de novo, if required, on issues of fact shall be held in conformity with appropriate rules in other chapters.

#### REFERENCES IN TEXT

The Wunderlich Act, referred to in text, is act May 11, 1954, ch. 199, 68 Stat. 81, which is classified generally to chapter 5 (§ 321 et seq.) of Title 41, Public Contracts. For complete classification of this Act to the Code, see Tables volume.

### Rule 162. Pleadings

(a) *Petition.* Every petition founded on a contract containing a disputes clause shall make clear the relationship, if any, of the Wunderlich Act to the relief sought. Every such petition shall state specifically whether relief is sought (1) exclusive of that Act (*e.g.*, for a trial de novo on all issues); (2) only under that Act; or (3) partially under and partially outside the Act; and (4) as to (2) and (3), (i) whether section 1 (41 U.S.C. § 321) or section 2 (41 U.S.C. § 322) of the Act is applicable, or both sections are applicable; and (ii) if section 1 of the Act is applicable, why the administrative decision is or is not entitled to finality. Any such administrative decision shall be reproduced in the petition as an appendix thereto.

(b) *Sufficiency of petition.* (1) A motion to dismiss a petition for alleged failure to comply with the provisions of paragraph (a) of this rule shall be passed upon by the trial judge, who may recommend that the motion be granted, in which event his action shall be subject to review under Rule 53(b)(3).

(2) A determination by the trial judge in favor of the sufficiency of a petition, or permitting or ordering an amendment or more definite statement, shall not be subject to review.

(c) *Answer.* The answer to a petition founded on a contract containing a disputes clause shall make clear the relationship, if any, of the Wunderlich Act to the allegations of the petition or to the defenses pleaded. Within the context of Rules 37, 38, and 40, the answer shall assert or deny the finality of an administrative decision or assert failure to exhaust administrative remedies. If the defense relies upon the finality of an administrative decision not mentioned in the petition, such administrative decision shall be reproduced in the answer as an appendix thereto.

#### REFERENCES IN TEXT

The Wunderlich Act, referred to in subsecs. (a) and (c), is act May 11, 1954, ch. 199, 68 Stat. 81, which is classified generally to chapter 5 (§ 321 et seq.) of Title 41, Public Contracts. For complete classification of this Act to the Code, see Tables volume.

That Act and the Act, referred to in subsec. (a), mean the Wunderlich Act.

### Rule 163. Dispositive motions

(a) *Assertion of defenses by motion.* In any case to which this chapter applies, the defenses of accord and satisfaction, release, statute of limitations, res judicata, lack of jurisdiction of the subject matter or the person, and failure to exhaust administrative remedies may be asserted in a motion for summary judgment or, when appropriate, by a motion for judgment on the pleadings or by a motion to dismiss. Any such motion shall state that it is filed pursuant to this paragraph.

(b) *Motion for summary judgment.* (1) *In support of an administrative decision.* Subject to the provisions of Rule 101(c), any party may move for summary judgment in support of an administrative decision, stating that the motion is filed pursuant to this subparagraph.

(2) *In opposition to an administrative decision.* Subject to the provisions of Rule 101(c), any party may by motion or cross-motion for summary judgment attack an administrative decision for failure to comply with the standards of the Wunderlich Act. Any such motion or cross-motion shall state that it is filed pursuant to this subparagraph and shall specify the basis of the alleged failure, *i.e.,* (i) whether such failure rests upon an error or errors of law within the purview of section 2 of the Act (41 U.S.C. § 322), (ii) whether such failure rests upon lack of support by substantial evidence, arbitrariness, caprice, etc., within the purview of section 1 of the Act (41 U.S.C. § 321), or (iii) whether such failure rests both upon errors of law and upon lack of support of findings of fact by substantial evidence, arbitrariness, caprice, etc.

(3) *Specificity required.* (i) Subject to the division required by the preceding subparagraph (2) of this paragraph (b), the memorandum or brief in support of the attacking motion or cross-motion shall list separately and in numbered paragraphs (*a*) the conclusions of law deemed erroneous and (*b*) the findings of fact deemed lacking in support by substantial evidence (or deemed arbitrary, capricious, etc.).

(ii) On each error of law cited, the memorandum or brief in support of the motion or cross-motion shall state the reasons for the challenge of the administrative decision, cite the authorities relied upon, and state the conclusion of law deemed warranted by the citations.

(iii) On each factual issue challenged, the memorandum or brief in support of the motion or cross-motion shall state why the administrative finding is not entitled to finality and shall cite the portions of the record deemed to refute the administrative finding. Citations shall be by page number of the transcript of testimony, and by specific identification of the exhibit, and the page number thereof.

(iv) If the trial judge determines that a memorandum or brief filed under this subparagraph (3) has insufficient specificity, he may require by order that such memorandum or brief be supplemented in such particulars as he may designate, and his action in this regard shall not be subject to review.

(c) *Organization of responses.* The organization of a response to a motion or cross-motion attacking an administrative decision shall be governed by the organization of the memorandum or brief in support of the challenging motion or cross-motion. Thereafter, the content of such a response shall include refutations of each challenge of a conclusion of law or finding of fact, as required by subparagraphs (2) and (3) of paragraph (b) of this rule.

#### REFERENCES IN TEXT

The Wunderlich Act, referred to in subsec. (b)(2), is act May 11, 1954, ch. 199, 68 Stat. 81, which is classified generally to chapter 5 (§ 321 et seq) of Title 41, Public Contracts. For complete classification of this Act to the Code, see Tables volume.

### Rule 164. The administrative record

(a) *Filing of record.* Within 60 days after the filing of a petition within the purview of this chapter, or upon the filing of an answer asserting the finality of an administrative decision not mentioned in the petition, the defendant (acting through the Department of Justice) shall file with the clerk the entire original administrative record (or such portions thereof as may be stipulated by the parties), appropriately certified, upon which the administrative decision was based. The clerk shall promptly notify all other parties of the filing.

(b) *Certification of record.* Every administrative record presented to the clerk for filing shall be certified as genuine and (in the absence of a stipulation under the preceding paragraph) complete by an appropriate official on behalf of the department, agency, or board concerned.

### Rule 165. Time for filing motions, responses, and replies; duplication; copies

(a) *Time for filing motions.* A dispositive motion under Rule 163 may be filed at any time, except that the filing of a motion for summary judgment shall be subject to the provisions of Rule 101(a), (b), and (c).

(b) *Direction to file.* (1) *Order by trial judge.* When 30 days have elapsed after the filing of defendant's answer and no dispositive motion has been filed, the trial judge may, in his discretion, by order direct one party or the other to proceed by dispositive motion within such time as he may specify, and his order shall not be subject to review. If the trial judge decides not to direct either party to proceed by dispositive motion, the trial judge shall take such other action as he deems appropriate.

(2) *Failure to comply; consequences.* Failure of a party to comply with an order issued pursuant to subparagraph (1) of this paragraph (b), within the time specified in such order or any extension thereof, may be deemed a refusal to comply, with consequences as provided in Rule 76(b)(2) and (3).

(c) *Time for filing objections, responses, and reply briefs.* Unless otherwise ordered by the court (or the trial judge), the time for filing objections and responses (including cross-motions for summary judgment) shall be governed by Rule 52(b)(1), and the time for filing reply briefs shall be governed by Rule 52(b)(2).

(d) *Duplication; copies.* The duplication and number of copies of dispositive motions, responses, and replies filed pursuant to Rule 163(a) shall be governed by the terms of Rule 214(d)(2)(i), while any such paper filed pursuant to Rule 163(b) shall be governed by Rule 214(d)(2)(ii).

### Rule 166. References to and opinions by trial judges; review by the court

(a) *As to motions under rule 163(a).* References to trial judges of cases within the purview of this chapter will be suspended, as provided in Rule 14(b)(2), by the filing of a dispositive motion under Rule 163(a).

(b) *As to motions under rule 163(b).* References to trial judges of cases within the purview of this chapter will not be suspended by the filing of a motion or cross-motion for summary judgment under Rule 163(b): *Provided,* That upon the completion of filing of the motion or cross-motion for summary judgment, the response thereto, and the reply to the response, the trial judge shall review the motion papers and if he deems the issues to be limited to issues of law within the purview of section 2 of the Wunderlich Act (41 U.S.C. § 322), he shall by order so inform the court, and the reference to him shall thereupon be suspended as provided in Rule 14(b)(2), and his order shall not be subject to review.

(c) *Opinion by trial judge.* In each case within the purview of this chapter, the trial judge to whom the case is referred shall, unless the reference to him is suspended under the provisions of paragraph (a) or paragraph (b) of this rule or by order of the court, prepare and file with the clerk his opinion on the issues.

(d) *Notice of trial judge's opinion.* Upon the filing of the trial judge's opinion, the clerk shall serve 5 copies thereof on each party, as provided by Rule 23.

(e) *Review by the court.* Review by the court of the opinion of the trial judge may be had in conformity with Rule 54(b)(3). The court may decline to consider any citations to the administrative record which were not cited for the consideration of the trial judge.

## XV. APPEALS; TRANSFERS; AND REFERENCES

### Rule 171. Appeals from the Indian Claims Commission

(a) *Time for appeal.* (1) When an appeal is permitted by law from the Indian Claims Commission to the Court of Claims, the time within which an appeal may be taken shall be 3 months from the date of the filing of the final or interlocutory determination of the Commission with the clerk of the Commission, except that upon a showing of excusable neglect based upon the failure of a party to learn of the filing of the determination, the Commission may extend the time for appeal not to exceed 30 days from the expiration of the original time herein prescribed.

(2) The running of the time for appeal is terminated by the filing of a timely motion with the Commission for rehearing or amendment of findings; and the full time for appeal fixed in paragraph (a)(1) of this rule commences to run and is to be computed from the entry of an order by the Commission finally disposing of such motion.

(b) *How taken.* A party may appeal from a final or interlocutory determination of the Commission by filing with the Commission a notice of appeal, plus 1 additional copy for each other party to the proceeding. The notice of appeal shall specify the party or parties taking the appeal, shall designate the determination, or part thereof, appealed from, and shall set forth a concise statement of the points relied on.

(c) *Notification to other parties.* Notification of the filing of the notice of appeal shall be given by the clerk of the Commission to each party to the proceeding (other than the party or parties taking the appeal) by mailing a copy of the notice of appeal to his attorney of record or, if the party is not represented by an attorney, then to the party at his last-known address. Such notification is sufficient notwithstanding the death of the party or of his attorney prior to the giving of the notification. The clerk of the Commission shall note on the Commission's docket the names of the persons to whom he mails the copies, with date of mailing. The failure of the clerk of the Commission to give the notification called for by this paragraph (c) will not affect the validity of an appeal.

(d) *Failure to perfect appeal.* (1) Failure of the appellant, after filing a notice of appeal in accordance with paragraph (b) of this rule, to take any of the further steps to secure review of the final or interlocutory determination appealed from will be a ground for such action as the court deems appropriate, which may include dismissal of the appeal.

(2) Failure to perfect an appeal from an interlocutory determination shall not constitute a waiver of the party's right to challenge such interlocutory determination in any appeal from any final determination subsequently made in the case.

(e) *Dismissal by parties or commission.* If an appeal has not been docketed by the court, the parties, with the approval of the Commission, may dismiss the appeal by stipulation filed with the Commission, or the Commission may dismiss the appeal upon motion by the appellant and notice to the other party or parties.

### Rule 172. Record on appeal

(a) *Content.* (1) Subject to the provisions of the other subparagraphs of this paragraph (a), the record on appeal shall consist of all the pleadings, the transcript of the testimony, all the documentary evidence and other exhibits, the final or interlocutory determination of the Commission (including its findings of fact, conclusions of law, and opinion), and the notice of appeal.

(2) Any party may, at any time before the record on appeal is filed with the court, file with the clerk of the Commission a written designation of such motions, objections, orders, or other papers of record in the cause as he may deem necessary for a full determination of the cause on appeal, and such papers shall be included in the record on appeal along with the papers referred to in subparagraph (1) of this paragraph (a).

(3) By written stipulation of the parties filed with the clerk of the Commission at any time before the record on appeal is filed with the court, there may be omitted from the record on appeal any of the documents mentioned in subparagraph (1) of this paragraph (a).

(4) If the parties believe that the questions presented by an appeal can be determined without an examination of the record made up in accordance with subparagraphs (1) and (2) of this paragraph (a), the parties may prepare, sign, and file with the clerk of the Commission, at any time before the record on appeal is filed with the court, an agreed statement of the case, showing how the questions at issue arose and how they were decided by the Commission, and setting forth only so many of the facts averred and proved, or sought to be proved, as are essential to a decision of the questions by the court. The agreed statement shall include a copy of the final or interlocutory determination appealed from, a copy of the notice of appeal with its filing date, and a concise statement of

the points to be relied on by the appellant. The Commission, if it approves the agreed statement, may add to it such further documents of record in the cause as the Commission may consider necessary to present fully the questions raised by the appeal. The agreed statement as approved by the Commission, plus any documents added by the Commission, shall constitute the record on appeal.

(b) *Certification.* The clerk of the Commission shall append to the record on appeal a certificate identifying the contents thereof with reasonable definiteness.

(c) *Filing with the court.* (1) Subject to the provisions of the other subparagraphs of this paragraph (c), the record on appeal shall be filed with the clerk of this court by the clerk of the Commission within 30 days from the date of the filing of the notice of appeal with the Commission.

(2) When more than one appeal is taken from the same final or interlocutory determination of the Commission, the Commission may prescribe a period longer than 30 days for the filing of the record on appeal with the court. A copy of any such order shall be filed with the clerk of the court.

(3) The time for the filing of the record on appeal with the court in any proceeding may be enlarged by the Commission for a period not to exceed 60 days beyond the final date fixed by or under the authority of this paragraph (c), if an application for enlargement, showing good cause therefor, is filed with the Commission prior to the expiration of the prescribed period. Copies of all orders of enlargement shall be filed with the clerk of the court.

(d) *Docketing of appeals.* The clerk of the court shall enter upon a separate docket all appeals brought to and pending in the court from the Indian Claims Commission.

(e) *Cross-appeals.* When cross-appeals are taken, the first party to file his notice of appeal shall be regarded as the appellant for the purposes of these rules.

(f) *Correction or modification.* If anything material to a question raised by either party is omitted from the record on appeal by error or accident, or is misstated therein, the parties by stipulation or the Commission, either before or after the record is filed with the court, or the court on a proper suggestion or on its own initiative, may direct that the omission or misstatement shall be corrected and, if necessary, that a supplemental record shall be certified and filed with the court by the clerk of the Commission. All other questions as to the content or form of the record on appeal shall be presented to the court by proper motion.

(g) *Printing.* Unless otherwise ordered by the court, it will not be necessary to print the record on appeal. (In this connection, however, see the last sentences of paragraphs (a) and (b) of Rule 173.)

(h) *Return to the Commission.* After the appeal has been disposed of by the court, the record on appeal shall be returned to the Commission by the clerk of the court.

### Rule 173. Briefs on appeals

(a) *Appellant's brief.* The appellant shall, within 60 days from the docketing of an appeal in the court, file with the clerk of the court a brief which complies with Rule 144(a), (d), and (e)(1) as to content and with Rule 214(h) as to duplication and number of copies. There shall be added to the brief, in the form of an appendix or supplement, a copy of the final or interlocutory determination appealed from, together with a copy of any opinion of the Commission; and the appellant may also include in the appendix or supplement any other parts of the record that he desires to have specially considered by the court.

(b) *Appellee's brief.* Within 60 days from the filing of the appellant's brief, the appellee shall file with the clerk of the court a brief which complies with Rule 144(b), (d), and (e)(1) as to content and with Rule 214(h) as to duplication and number of copies. There may be added to the appellee's brief, in the form of an appendix or supplement any parts of the record which the appellee desires to have specially considered by the court and which have not been set out in the appendix or supplement to the appellant's brief.

(c) *Reply brief.* The appellant may file a reply brief within 30 days after the filing of the appellee's brief. If a reply brief is filed, it shall be in conformity with Rule 144(c), (d), and (e)(2) and with Rule 214(h).

(d) *References and citations.* (1) The parties shall include in the table of contents or index to their initial briefs, or as a separate page (or pages) of the initial brief, a reference to each interlocutory or final order, determination, or decision appealed from, in chronological order or listing, setting forth the date, nature, Indian Claims Commission docket number, and, if available, the citation thereof in the volume of the Indian Claims Commission, by volume and page number (*e.g.,* 12 Ind. Cl. Comm. 301 (1963)).

(2) In the event that any citation referred to in subparagraph (1) of this paragraph (d) is not available at the time the briefs are filed, such citation or a list of citations shall be filed by each party when available at or prior to oral argument of the appeal.

### Rule 174. Argument on appeals

(a) *Placing on calendar.* (1) Except as indicated in the other subparagraphs of this paragraph (a), only appeals in which the briefs required by Rule 173(a) and (b) have been filed, and in which reply briefs have been filed or the time for the filing of reply briefs shall have expired, on or before the Thursday immediately preceding the opening of a monthly series of arguments before the court, shall be placed on the calendar for such series.

(2) By leave of the court, appeals may be placed on a monthly calendar of cases for argument without regard to the requirements of subparagraph (1) of this paragraph (a).

(3)(i) If the appellant in a proceeding fails to file a brief within the time prescribed by Rule 173(a), or if the appellee fails to file a brief within the time prescribed by Rule 173(b), the court may at any time, on motion of the opposing party or on its own initiative, place the appeal on a monthly calendar of cases for argument.

(ii) In the case of a default by the appellant, the appeal may be dismissed for nonprosecution if, when the appeal is called, the appellant does not show good cause against such dismissal. In the case of an appeal from an interlocutory determination of the Commission, the dismissal shall always be without prejudice.

(b) *Argument.* After the appeals on a monthly calendar have been assigned for argument, a list of the appeals to be heard shall be posted in the clerk's office each day for argument on the following day. If an appeal is not then argued or submitted by the parties, or by one party in the absence of the other, it shall be disposed of as the court may order.

### Rule 175. Certified questions

(a) *Certification.* When the Commission certifies to this court a question of law concerning which instructions are desired for the proper disposition of a claim, the certificate shall contain a statement of the claim and of the facts on which such question arises. Questions of fact cannot be certified. The certification must be confined to definite and distinct questions of law.

(b) *Docketing.* The filing of the certification of the question with the clerk of the court shall constitute the docketing of the cause. The procedure thereafter shall be as in cases on appeal.

(c) *Appellant.* The claimant before the Commission shall, for the purposes of the presentation of the question, be considered the appellant in this court.

### Rule 179. Appeals from district courts

(a) *When and how taken.* When an appeal to this court is permitted by law from a final judgment in a district court in a civil action based on the Federal Tort Claims Act, the procedure for taking such appeal shall be the same as provided in the Federal Rules of Appellate Procedure, except that no bond will be required in such appeal.

(b) *Proceedings after appeal docketed.* After the appeal has been docketed in this court, all proceedings thereafter in the case shall be as provided by Rules 173 and 174, relating to cases appealed from the Indian Claims Commission to the United States Court of Claims.

#### REFERENCES IN TEXT

The Federal Tort Claims Act, referred to in subsec. (a), is classified generally to section 1346(b) and chapter 171 (§ 2671 et seq.) of Title 28, Judiciary and Judicial Procedure.

The Federal Rules of Appellate Procedure, referred to in subsec. (a), are set out in the Appendix to this title.

### Rule 181. Transfers from district courts

(a) *Filing and fee.* When the transfer of a case from a district court to this court is permitted by law, the case shall be filed in this court upon the receipt by the clerk of a certified copy of the record made in the district court, including the order of that court granting the transfer. The clerk shall serve a notice of this filing on the parties as provided in Rule 23. Where all required fees in the district court are shown to have been paid, no filing fee will be required.

(b) *Petition; Copies.* Sixteen copies of the complaint filed in the district court shall be filed with the clerk of this court within 20 days after the filing required in paragraph (a) of this rule. These copies, containing the necessary changes in the caption, shall be duplicated in conformity with Rule 214(a), and service will be made on the United States as provided in Rule 22(a).

(c) *Procedure.* After the filing and service as provided for in paragraph (b) of this rule, all further proceedings shall be in accordance with the rules prescribed for cases filed in this court in the first instance.

### Rule 183. Referral of cases by the Comptroller General

(a) *Service of notice; time for response.* Upon the filing of a case referred to the court by the Comptroller General, the clerk shall serve a notice, as provided in Rule 23, on each person whose name and address are shown by the papers transmitted and who appears to be interested in the subject matter of the reference, which notice shall set forth the filing of the reference and state that the person notified appears to have an interest therein and that such person shall have 90 days after such service within which to appear and assert his claim by filing a petition in accordance with Rule 21. At the same time, the clerk shall forward a copy of each such notice to the Attorney General.

(b) *Procedure after notice.* After the service of notice upon the interested person or persons, all further proceedings for the disposition of the case shall be in accordance with the rules prescribed herein for other cases.

(c) *Failure of party to appear.* If no interested plaintiff appears and files his petition within the time specified in the notice served by the clerk, the case shall be submitted to the court upon the papers filed and upon such evidence, if any, as may be produced by the Attorney General.

## XVI. THE CLERK'S OFFICE

### Rule 191. Judgments and orders

(a) *Entry of judgment.* When the court enters a judgment, the clerk shall forthwith make a notation thereof on the docket.

(b) *Notice.* Immediately upon the entry of an order or judgment, the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 23 upon every party affected thereby, and upon any official or body to whom an order is directed under Rule 147(c) or Rule 149(a), and shall make a note on the docket of the mailing. Such mailing is sufficient notice for all purposes for which notice of the entry of an order is required by these rules. Lack of notice of the entry by the clerk does not affect the time allowed for filing motions under Rule 151.

(c) *Record.* The clerk shall keep, in such form and manner as the court may prescribe, a correct copy of every judgment or order subject to review by certiorari, and any other order which the court may direct to be kept.

### Rule 192. Docket and calendars

(a) *Docket.* It shall be the duty of the clerk to keep a general docket on which shall be entered the title and nature of all suits brought in the court, the names of the attorneys filing such suits, the designated attorneys of record, and all other proceedings had during the progress of the case.

(b) *Calendars.* The clerk, under the direction of the court, shall prepare a calendar for each session of the court.

### Rule 193. Withdrawal of papers and exhibits

(a) *Temporary withdrawal.* The attorney of record for either party, or a party not represented by an attorney, may, except where the court otherwise directs, temporarily withdraw papers and exhibits on file in the clerk's office for a period not to exceed 30 days: *Provided,* That upon notice from the clerk, the attorney or party may be required to return such papers and exhibits before the expiration of the 30-day period. The attorney or party withdrawing such papers and exhibits shall be required to sign and leave with the clerk a proper receipt describing the papers and exhibits so withdrawn.

(b) *Withdrawal for trial.* The reporter engaged to transcribe the evidence may temporarily withdraw all papers and exhibits for use during any trial session. Upon the withdrawal of papers and exhibits for trial, the reporter shall sign a blanket receipt for such papers and exhibits, and they shall remain in his custody until returned to the clerk's office.

(c) *Permanent withdrawal.* No papers or exhibits shall be permanently withdrawn from the clerk's office except on motion for good cause shown and upon such terms as the court may order.

(d) *Physical exhibits.* All physical exhibits will be disposed of by the court on its own motion unless withdrawn by a party within 90 days after the final disposition of the case.

## XVII. ATTORNEYS

### Rule 201. Admission to practice

(a) *Qualifications; oath.* Any person of good moral character who has been admitted to practice in the Supreme Court of the United States or the highest court of any state, territory, possession, or the District of Columbia, or the United States Court of Customs and Patent Appeals, or the United States Court of Appeals for the District of Columbia Circuit, and is in good standing therein, may be admitted to practice as an attorney in this court (1) upon oral motion or (2) by verified application, as provided in this rule, and upon taking or subscribing to the following oath:

I, ——————, do solemnly swear (or affirm) that I will support the Constitution of the United States and that I will demean myself in an upright manner as an attorney of this court, so help me God.

(b) *Upon oral motion.* (1) *Before the court.* The oral motion for admission may be made in open court by a member of the bar of this court or, if the court is not in session, before the chief judge or the senior judge present.

(2) *Before a trial judge.* (i) *Upon oral motion:* The oral motion for admission may be made by a member of the bar of this court before a trial judge sitting outside Washington, District of Columbia, in the conduct of a trial, pretrial conference, hearing, or interlocutory proceeding in which the applicant is to participate. As a preliminary to the motion, the attorney who moves the admission shall request the applicant to complete the appropriate form obtained from the trial judge, which form shall thereafter be submitted to the trial judge for transmission to the clerk.

(ii) *Without oral motion.* In the absence of a motion for admission in conformity with subdivision (i) of this subparagraph (2), the applicant may advise the trial judge of his qualifications as set forth in paragraph (a) of this rule. Upon consideration thereof, and upon representation by the attorney that he will promptly apply to the clerk for admission by verified application as provided in paragraph (c) of this rule, the trial judge may admit the applicant for the particular proceeding before the trial judge in which he is to participate.

(c) *By verified application.* Admission may be made upon presentation to the clerk of a verified application (forms for which may be obtained from the clerk) showing that the applicant is possessed of the qualifications described in paragraph (a) of this rule. The application shall be accompanied by (1) a certificate of a judge or of the clerk of any of the courts specified in paragraph (a) of this rule that the applicant is a member of the bar of such court and is in good standing therein; (2) two letters or signed statements of members of the bar of this court or of the Supreme Court of the United States, not related to the applicant, stating that the applicant is personally known to them, that he possesses all the qualifications required for admission to the bar of this court, that they have examined his application, and that they affirm that his personal and professional character and standing are good; and (3) an oath in the form prescribed in paragraph (a) of this rule, signed by the applicant and administered by an officer authorized to administer oaths in the state, territory, possession, or the District of Columbia, where the oath is administered.

(d) *Fee for admission.* (1) *Assessment.* Unless the applicant is an attorney representing the United States before this court, an admission fee of $10 shall be paid in cash or by check payable to the clerk of the United States Court of Claims.

(2) *Payment.* (i) *To the clerk.* The admission fee shall be paid to the clerk (*a*) prior to the making of a motion as prescribed in subparagraph (1) of paragraph (b) of this rule or (*b*) upon presentation to the clerk of the verified application prescribed by paragraph (c) of this rule.

(ii) *To the trial judge (upon oral motion).* The admission fee shall be paid to the trial judge by check payable to the clerk of the United States Court of Claims prior to the making of a motion as prescribed in subdivision (i) of subparagraph (2) of paragraph (b) of this rule, for transmission by him to the clerk, together with the form required by the same subdivision.

(e) *Admission of foreign attorneys.* An attorney barrister, or advocate who is qualified to practice in the highest court of any foreign state may be specially admitted for purposes limited to a particular case. He shall not, however, be authorized to act as attorney of record. In the case of such applicants, the oath shall not be required and there shall be no fee. Such admission shall be only on written motion of a member of the bar of this court, filed with the clerk at least 3 days prior to the consideration of the motion by the court.

### Rule 202. Disbarment

Where it is shown to the court that any member of its bar has been disbarred from practice in the Supreme Court of the United States or in any other Federal Court, or in any court of record of any state, territory, or possession, or has been guilty of conduct unbecoming a member of the bar of this court, he shall be forthwith suspended from practice before this court; and he shall be disbarred unless he shows good cause to the contrary within 30 days after notice is mailed to him at the address shown in the clerk's records.

### Rule 203. Attorneys of record

(a) *One for each party.* There shall be but one attorney of record for a party in any case at any one time, and such attorney of record shall be an individual (and not a firm) who has been admitted to practice before this court pursuant to Rule 201. Any other attorneys assisting the attorney of record shall be designated as of counsel.

(b) *Registration of address.* On appearing in a suit, the attorney of record shall register with the clerk of the court a post office address to which all notices required by these rules or ordered by the court may be sent. If he changes his address during the pendency of such suit, the attorney of record shall notify the clerk.

(c) *Change by plaintiff.* A plaintiff may by leave of court on motion change his attorney at any time. The motion may be signed by the plaintiff in person, or by the newly designated attorney accompanied by an affidavit of appointment executed by such attorney. If the consent of the previous attorney of record is annexed to or endorsed on the motion, substitution shall be accomplished by an appropriate entry on the docket by the clerk. When the motion is not thus shown to have the consent of the previous attorney, he shall be notified of the filing of the motion, and shall have 10 days to show cause why the motion should not be allowed.

(d) *Withdrawal of attorney.* No attorney of record for a plaintiff or a third party may withdraw his appearance except by leave of the court on motion and after notice is served on his client.

(e) *Death of attorney.* If the attorney of record dies, a suggestion of his death shall be made, and a motion to substitute another attorney admitted to practice before this court may be made by the plaintiff.

### Rule 204. Officers and employees of the court as attorneys

(a) *Practice of law.* No person serving as a judge or in any other position with this court shall practice as an attorney or counselor in any court or before any agency of the United States, or otherwise engage in the practice of law, while continuing in that position, except when he represents himself or some member of his immediate family; nor shall any such person, after separating from a position with this court, ever participate, by way of any form of professional consultation or assistance (to anyone other than the court), in any case in which he participated in any way while occupying such position.

(b) *Judges, trial judges, clerk, secretary to court.* No person serving as a judge, or as a trial judge, or as the clerk, or as the secretary to this court shall, after separating from that position, practice as attorney or counselor in this court until 2 years shall have elapsed after such separation; nor shall any such person ever participate, by way of any form of professional consultation or assistance (to anyone other than the court), in any case that was pending in this court during the period while he was serving in such position.

## XVIII. DUPLICATION; COPIES

### Rule 211. General

(a) *Conformity required.* All papers to be filed with the clerk shall be duplicated and filed in conformity with these rules as to methods of duplication, form, size, and number of copies. The clerk shall refuse to file any paper which is not in substantial conformity with this rule or not in clear type.

(b) *Additional adverse party defined.* As used in these rules, the phrase "additional adverse party" means any party other than the plaintiff (or plaintiffs joined in one petition) and the defendant (the United States).

### Rule 212. Duplication

(a) *Printing.* All requirements of printing in this chapter may be satisfied by the use of (1) printing by ordinary typographic methods, or (2) duplication by any process capable of producing a clear black image on white paper, but not including ordinary carbon copy: *Provided,* That in each instance the duplication shall conform to the requirements of Rule 213(a) or (b) as to paper, size, and form, and of Rule 213(d) as to pagination.

(b) *Waiver of printing.* On motion assigning good cause therefor, the court may waive the printing of any paper. Upon the allowance of any such motion, the paper shall be mimeographed; and the waiver shall, in the absence of limitation in the order, apply to all papers subsequently to be filed in the case.

(c) *Mimeographing and typewriting.* When printing is not required, acceptable means of duplication include mimeographing and typewriting as specified in Rules 213 and 214. Papers so duplicated shall conform to the requirements of Rule 213(c) as to size and form, and of Rule 213(d) as to pagination.

### Rule 213. Form and size

(a) *Typographic printing.* All papers duplicated by ordinary typographic printing shall be on unglazed paper and shall be in such size and form that they can be conveniently bound together so as to make a volume having pages 6⅛ by 9¼ inches and type matter 4⅛ by 7⅛ inches, with type never smaller than small pica or 11-point type.

(b) *Other Duplication.* Any paper duplicated pursuant to the provisions of Rule 212(a)(2) may (1) be made to conform to the requirements of paragraph (a) of this rule as to size of page, type matter, and type, or (2) be duplicated on pages not exceeding 8½ by 11 inches, with type matter not exceeding 6½ by 9½ inches. Papers duplicated in conformity with clause (2) shall be double spaced (except that quoted and indented material may be single spaced), shall, if covering both sides of the sheet, be duplicated on paper of sufficient quality that the duplication process does not bleed through the sheet, shall be bound or attached on the left margin and unfolded, in book form, and shall have legible margins when bound or attached. They need not be justified on the right margin.

(c) *Mimeographing or typewriting.* All papers duplicated by mimeographing or typewriting shall be on pages not exceeding 8½ by 11 inches, with type matter not exceeding 6½ by 9½ inches. They shall be double spaced (except that quoted and indented material may be single spaced), shall cover one side of the sheet only, and shall be bound or attached on the left margin and unfolded.

(d) *Page numbers.* The first page of each separate document shall be numbered 1. Page numbers shall be in large, distinct type and shall appear in the upper outside corner of the page.

### Rule 214. Specific papers; duplication; number of copies

(a) *Petition.* (1) *Duplication.* Every petition shall be printed in conformity with Rule 212(a) and Rule 213(a) or (b), unless the requirement of printing is waived by the court on motion pursuant to Rule 212(b), in which event the petition shall be mimeographed in conformity with Rule 212(c).

(2) *Number of copies.* (i) *Printed.* Sixteen copies of a printed petition (one designated as the original) shall be filed: *Provided,* That an original and 4 copies of the petition in typewritten form (see Rule 213(c)) may be filed initially, to be followed within 20 days thereafter by the filing of 16 printed copies.

(ii) *Mimeographed.* Every motion for the waiver of the printing of a petition shall be accompanied by an original and 4 copies of the petition in typewritten form, to be followed, within 20 days after the allowance of the motion, by the filing of 16 copies of the petition in mimeograph form; or the motion may be accompanied by 16 mimeographed copies (one designated as the original) in lieu of any copies in typewritten form. (See Rule 213(c) for the requirements of typewriting or mimeographing.)

(b) *Responsive pleadings.* (1) *Duplication.* Every answer, reply, or other responsive pleading shall be printed in conformity with Rule 212(a) and Rule 213(a) or (b), unless the requirement of printing is waived pursuant to Rule 212(b), in which event the responsive pleading shall be mimeographed in conformity with Rule 213(c).

(2) *Number of copies.* Sixteen copies of each responsive pleading (one designated as the original) shall be filed, plus 5 additional copies for each additional adverse party, as defined in Rule 211(b).

(c) *Procedural motions.* (1) *Duplication.* Any procedural motion (as defined in Rule 52(c)), any objection or response thereto, any brief, memorandum of law, or affidavit included therein or attached thereto (as required by Rule 51(c)), and any request for review pursuant to Rule 53(b)(3) of an order entered pursuant to Rule 53(b)(1), may be typewritten in conformity with Rule 213(c), unless the party elects to have it printed or mimeographed. (See Rule 212(a) and Rule 213(a) and (b) for the requirements of printing, and Rule 213(c) for the requirements of mimeographing.)

(2) *Number of copies.* (i) *General:* Except as provided in subdivisions (ii), (iii), and (iv) of this subparagraph (2), an original and 3 copies of each paper described in the preceding paragraph shall be filed.

(ii) *Request for review; motion for judgment.* An original and 11 copies shall be filed of a request for review pursuant to Rule 53(b)(3), or of a motion for judgment pursuant to Rules 54(b)(3)(iii) and 141(b).

(iii) *Motion for production; motion for call.* An original and 5 copies shall be filed of a motion for an order to produce pursuant to Rule 74(a), or of a motion for call pursuant to Rule 75.

(iv) *Additional copies for adverse parties.* For each additional adverse party, as defined in Rule 211(b), there shall be filed 1 additional copy of any motion within the categories defined in subdivisions (i), (ii), and (iii) of this subparagraph.

(d) *Dispositive motions.* (1) *Duplication.* Any dispositive motion (as defined in Rule 52(a)), any response or reply thereto (as authorized by Rule 52(b)), any brief, memorandum of law, or affidavit included in or attached thereto (as required by Rule 51(c)), and any request for review pursuant to Rule 54(b)(3) of a recommendation made pursuant to Rule 54(b)(1), may be typewritten in conformity with Rule 213(c), unless it exceeds 5 pages in length, in which event it shall be printed in conformity with Rule 212(a) and Rule 213(a) or (b).

(2) *Number of copies.* (i) An original and 15 copies of each paper described in the preceding subparagraph (1) of this paragraph (d), with the exception of papers under Rule 163(b), shall be filed, plus 2 additional copies for each additional adverse party, as defined in Rule 211(b).

(ii) As to papers filed under Rule 163(b), an original and 3 copies shall be filed, plus 2 additional copies for each additional adverse party, as defined in Rule 211(b).

(e) *Motions for rehearing, for new trial, for amendment of judgment, or for relief from judgment or order.* (1) *Duplication.* Any motion for rehearing, for a new trial, or for amendment of judgment (Rule 151), or for other relief from a judgment or order (Rule 152), including any brief in support thereof or in response thereto, may be typewritten in conformity with Rule

213(c), unless the party elects to have it printed in conformity with Rule 212(a) and Rule 213 (a) or (b), or mimeographed in conformity with Rule 213(c).

(2) *Number of copies.* An original and 11 copies of each paper described in the preceding subparagraph shall be filed, plus 1 additional copy for each additional adverse party, as defined in Rule 211(b).

(f) *Requested findings.* (1) *Duplication.* Requested findings, including briefs in support thereof and objections thereto, to be filed pursuant to Rule 134(c)–(e) may be typewritten in conformity with Rule 213(c), unless the party elects to have them mimeographed in conformity with Rule 213(c), or printed in conformity with Rule 212(a) and Rule 213(a) or (b).

(2) *Number of copies.* An original and 3 copies of each paper described in the preceding subparagraph shall be filed, plus 1 additional copy for each additional adverse party, as defined in Rule 211(b).

(g) *Exceptions.* (1) *Duplication.* Exceptions pursuant to Rule 143 shall be printed in conformity with Rule 212(a) and Rule 213(a) or (b), unless printing is waived pursuant to Rule 212(b), in which event they shall be mimeographed in conformity with Rule 213(c).

(2) *Number of copies.* Sixteen copies of exceptions (one designated as the original) shall be filed, plus 5 additional copies for each additional adverse party, as defined in Rule 211(b).

(h) *Briefs.* (1) *Duplication.* Briefs submitted pursuant to Rules 143 and 173 shall be printed in conformity with Rule 212(a) and Rule 213(a) or (b), unless printing is waived pursuant to Rule 212(b), in which event they shall be mimeographed in conformity with Rule 213(c).

(2) *Number of copies.* Sixteen copies (one designated as the original) of each brief under Rules 143 and 173 shall be filed, plus 5 additional copies for each additional adverse party, as defined in Rule 211(b). (See paragraphs (c), (d), (e), and (f) of this rule for information regarding duplication and number of copies of briefs other than those submitted under Rules 143 and 173.)

(i) *Miscellaneous.* (1) *Duplication.* All papers not specifically mentioned in the preceding paragraphs of this rule may be typewritten in conformity with Rule 213(c), unless the party elects to have them mimeographed in conformity with Rule 213(c) or printed in conformity with Rule 212(a) and Rule 213(a) or (b).

(2) *Number of copies.* An original and 3 copies of each paper described in the preceding subparagraph shall be filed, plus 1 additional copy for each additional adverse party, as defined in Rule 211(b).

## XIX. FEES

### Rule 221. Fees for filing petitions

(a) *Petitions under rule 63(a).* At the time of the filing of a petition under Rule 63(a), there shall be paid a fee of $10 plus $1 for each party plaintiff (other than the first party plaintiff named in the petition) demanding a separate judgment.

(b) *Other petitions.* Except for petitions filed under Rule 63(a), a fee of $10 shall be paid at the time of the filing of any petition or intervening petition, but a fee of $5 shall apply where, upon written application accompanying the petition, it is shown that the case involves less than $500 and that it is not a class case. In any case where a $5 fee has been paid and the judgment of the court is for $500 or more, an additional amount of $5 shall be paid to the clerk of the court before a transcript of the judgment is furnished.

### Rule 222. Fees for copies

(a) *Opinions and reports.* For each printed copy of an opinion by the court or of an opinion or report by a trial judge, a fee of 25 cents is fixed for 5 pages or less, 35 cents for those over 5 pages and not more than 10 pages, 45 cents for those over 10 and not more than 20 pages, and 50 cents for those of more than 20 pages.

(b) *Judgments or other documents.* (1) A fee of 10 cents a folio is fixed for furnishing certified copies of judgments.

(2) Copies of other documents on file may be obtained by the use of a coin-operated photocopy machine in the clerk's office.

### Rule 223. Fee for record on certiorari

A fee of $5 shall be charged any party other than the United States for certifying a record pursuant to Rule 154.

### Rule 224. Fees in cases appealed to this court

A filing fee of $10 shall be collected by the clerk for any appeal (other than an appeal by the United States) filed in the Court of Claims from a decision of the Indian Claims Commission or from a decision of a United States District Court under 28 U.S.C. § 1504.

## APPENDIX A

### INSTRUCTIONS TO REPORTERS; FORMS

Reference is made to Rules 122 and 133(e)(2) for reporting arrangements, including the requirement for the recording of proceedings, the control of the reporter, and the return of the transcript and exhibits.

The following instructions and forms are intended to guide reporters in preparing the transcripts of testimony taken and proceedings had before the trial judges of the United States Court of Claims.

1. *Caption page.* There shall be stated on the caption page (a) the style of the cause in which the testimony is taken; (b) the place and date of its taking; (c) the identity of the party by whom each witness is called; (d) the names of the trial judge; and (e) the appearances of counsel. (See Form A.)

2. *Testimony.* It shall appear in the transcript of the proceedings and testimony by whom each witness was examined and cross-examined. At the top of each page shall appear the name of the witness and the nature of his examination, such as "Roe—direct," "Roe—cross," "Roe—redirect."

3. *Preparation of transcript.* The reporter shall transcribe all testimony on nontransparent white paper, either 8½ inches wide by 11 inches long, or 8 inches wide by 10½ inches long, bound on the left margin. The pages shall be numbered consecutively. It is not necessary

for the witnesses to sign the transcripts of their testimony.

4. *Exhibits.* All exhibits offered by either of the parties shall bear the caption and number of the case, the exhibit numbers (in figures), whether for plaintiff or defendant, and the number of sheets in each exhibit. All exhibits admitted in evidence or designated to accompany the transcript shall accompany and be filed with the transcript of the testimony, but shall not be affixed thereto.

5. *Certificate of reporter.* The reporter shall append to the transcript of the testimony a certificate similar to Form B. The certificate shall be signed by the reporter.

6. *Index.* At the beginning of each volume of the transcript of testimony, there shall be an index containing (a) the names of the witnesses examined, citing the pages of the transcript where direct, cross-, redirect, or recross-examination of the respective witnesses began; and (b) the exhibits in the case, first for the plaintiff and then for the defendant, with a brief statement of the nature of each of the exhibits and with references to the pages of the transcript where said respective exhibits were (1) offered and (2) received in evidence. In addition, upon the preparation of the final transcript, where the number of pages exceeds 500, a master index containing the same information shall be prepared and bound separately.

## FORM A

### IN THE UNITED STATES COURT OF CLAIMS

No. _____

JOHN DOE, PLAINTIFF

*v.*

THE UNITED STATES, DEFENDANT

CHICAGO, ILLINOIS,

*Monday, ________, 19____ 10 a.m.*

(TESTIMONY FOR PLAINTIFF OR DEFENDANT)

The parties met, pursuant to notice of the trial judge, at the time above stated, in Room 1614, United States Courthouse and Federal Building, Chicago, Illinois.

Present: Hon. A. B. See, Trial Judge; John A. Jones, Esq., counsel for plaintiff; and William B. Smith, Esq., counsel for defendant.

Testimony on behalf of the plaintiff (or defendant) was taken as follows:

Richard Roe, a witness produced on behalf of the plaintiff (or defendant), having first been duly sworn by said trial judge, was examined, and in answer to interrogatories testified as follows:

Q. State your name, etc.

A. ____________________

Q. Have you, etc.?

A. ____________________

## FORM B

### CERTIFICATE OF REPORTER

I, X. Y. Zee, reporter, hereby certify that at the time and place aforesaid, I did cause to be taken down and transcribed the proceedings in this case, including the questions propounded to and the answers given by said witnesses so called by plaintiff (or defendant); and that the foregoing record is a correct transcript of the proceedings and testimony so had therein.

In witness whereof I have hereunto set my hand this day of , 19

(Signed) X. Y. ZEE,

*Reporter, 200 Equitable Building, Chicago, Ill.*

## APPENDIX B

### COURTROOMS OF THE UNITED STATES COURT OF CLAIMS IN CHICAGO, LOS ANGELES, NEW YORK, AND SAN FRANCISCO [1]

Chicago:
United States Courthouse & Federal Building
Room 1614
219 South Dearborn Street
Chicago, Illinois 60604
Los Angeles:
Federal Building
Room 8549
300 North Los Angeles Street
Los Angeles, California 90012
New York:
Federal Office Building
Rooms 230 and 238
26 Federal Plaza
New York, New York 10007
San Francisco:
Federal Building
Room 2041
450 Golden Gate Avenue
San Francisco, California 94102

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[1] No facilities exist at any of these locations for the receipt or forwarding of papers. The judges and all other personnel of the Court of Claims are stationed at Washington, c/o United States Court of Claims, 717 Madison Place, N.W., Washington, D.C. 20005.

## APPENDIX C

### PROCEDURE IN COMMON CARRIER CASES

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## PROCEDURE IN COMMON CARRIER CASES [1]

### I. Carrier's Request for Admission of Facts

1. *Time for filing request.* In every suit filed by a common carrier for the recovery of freight and/or passenger transportation charges, the carrier shall, at the time the petition is filed or within 30 days thereafter, file with the clerk of the court a request for admission by the defendant of the genuineness of any relevant documents described in and exhibited with the request and of the truth of the material of fact relied on by the carrier for recovery in the action.

2. *Form and content of request.* The request shall conform to the following requirements:

(A) *Duplication.* The request, with accompanying schedules and documents, may be typewritten, or may be printed, mimeographed, or otherwise mechanically reproduced from a typewritten original, provided that all copies filed with the clerk shall be clearly legible and that the words and figures shown therein shall be in large enough type to be read without difficulty.

(B) *Copies; filing; service.* When the request is typewritten, an original to be retained by the clerk and 4 copies to be served on defendant, as provided in Rule 22, shall be filed by the plaintiff. If the request is mimeographed, printed, or otherwise reproduced from a typewritten original, the plaintiff shall, in addition to the 5 copies prescribed by the preceding sentence, file 1 additional copy for each Government agency for which the shipment or shipments in suit were made. Such additional copy or copies shall be served on defendant as provided in Rule 22.

(C) *Signature of attorney.* The request shall be signed by the attorney of record for the plaintiff.

(D) *Numbered paragraphs; material facts.* The statements contained therein shall be properly separated and numbered and shall consist of specific statements of material facts which the plaintiff expects to prove as opposed to general allegations of the kind used in pleadings.

(E) *Attachments.* There shall be attached to the request copies of any contracts, letters, or other documents (excluding tariffs and other documents referred to in the schedules required by paragraphs 2(G) and 2(I) hereof) which plaintiff proposes to offer in evidence, in order that the genuineness of such documents may be admitted by the defendant and the necessity of calling a witness to identify the same may be avoided.

(F) *Nature of dispute; statement of issues.* The statements in the request shall be sufficiently explicit to show the nature of the dispute and the specific reason or reasons why the plaintiff believes it is entitled to recover higher rates or charges than those allowed by the Government. The word "dispute," as used in the preceding sentence, means the shipment or shipments with respect to which the General Accounting Office or other agency of the Government determined that the carrier's charges had been overpaid or refused to pay the carrier's supplemental bills covering such shipments, rather than subsequent shipments which are not in dispute except for the fact that the overpayments determined as to the shipments in dispute have been deducted from the amount of the carrier's bills covering such subsequent shipments. In order to show the nature of the dispute there shall be attached to or included in plaintiff's request a "statement of the issues" which, with respect to each group of the carrier's bills involving the same issue, shall consist of a brief narrative statement of such issue with a reference to (1) court decisions involving the same issue, or (2) the tariffs or other authority relied upon by plaintiff, and the tariffs or other authority which plaintiff believes defendant relied upon in making deductions for claimed overpayments to the carrier or in refusing to pay the carrier's supplemental bills for claimed undercharges.

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[1] Effective December 2, 1957. This revision was adopted July 2, 1957, amending the Memorandum Order of March 11, 1953 (effective April 1, 1953). The revised order of July 2, 1957, contained the following preamble:

> Practically all suits filed in the Court of Claims by common carriers for the recovery of freight and passenger transportation charges require a consideration of freight classifications, tariffs, and related data, and involve determinations of the rates and computations of the charges due, based on the application of such classifications and tariffs. Most of the actions have resulted from a determination made by the General Accounting Office or other Government agency that there was an overpayment of the carrier's charges by the Government or from the refusal of the General Accounting Office or a Government corporation to pay supplemental bills submitted by carriers for claimed undercharges. In all these cases, the Department of Justice relies on the General Accounting Office and other agencies of the Government for the information required in the defense of the suits, including a redetermination by the General Accounting Office of the amounts due the carriers. In order to secure a more expeditious disposition of these cases by (a) disposing of cases or claims, wherever possible, through the filing of requests for the admission of facts and response thereto, or through the medium of pretrial conferences; (b) limiting the issues to carrier's bills which are actually in dispute; and (c) ascertaining in advance of trial the amount that either party would be entitled to recover in the event of a decision in its favor, it is ordered:

(G) *Schedule: Claim for transportation of property.* Where the claim is for the recovery of charges for the transportation of *property* for the Government, there shall be attached to the request a detailed schedule, prepared by or under the supervision of the general auditor, comptroller, or other principal accounting officer of the carrier. The schedule shall contain the following factual information:

(1) *List of carrier's bills in dispute.* The number of each of the carrier's bills for the shipments in dispute (as distinguished from the number of a subsequent bill from which the GAO made a deduction following its determination of an overpayment on the bill in dispute).

(2) *Detail for each bill of lading.* For each bill of lading in dispute, covered by each bill referred to in (1) above, the following facts:

(a) the number and symbol of each bill of lading;

(b) the date of the shipment;

(c) the origin and the destination of the shipment;

(d) a description of the commodity or commodities shipped, including a description of the packing where this affects the rate;

(e) car number and initial;

(f) the weight of the shipment including the minimum carload weight when greater than the actual weight;

(g) when the shipment in dispute consists of one or more carloads of mixed commodities a description of the different commodities, and the respective weights thereof loaded in each car, including minimum carload weights where such weights affect the rates;

(h) the rates claimed for each article in the shipment and for any accessorial services;

(i) the total freight charges on each bill of lading;

(j) amounts refunded by carrier, if any, and the dates thereof;

(k) if the overpayment determined by GAO or other agency has been deducted from the carrier's subsequent bill or bills, the number of such subsequent bill or bills, the amount deducted, and the date thereof;

(*l*) the total amount paid the carrier;

(m) the balance due;

(n) a specific reference to the item or items in designated tariffs authorizing the charges claimed, including the classification rating if necessary, and authorization for any accessorial charges claimed; or to a Section 22 quotation;

(*o*) the Government file reference number as obtained from GAO Form 1003, the Certificate of Indebtedness, or other document issued by the GAO, or, in the event there is no GAO reference number, the name of the Government paying agency and bureau, the disbursing office voucher number, and the date of payment;

(p) if the shipment in dispute consists in whole or in part of a through transit movement, (1) the through assessable charges from the original point of shipment to the final destination, including a description of the commodity, the transited weight, the through rate, the tariff or special authority for the through rate used, and, if local tonnage is involved, the weight thereof, the points between which local tonnage moved, and the rates and charges assessed against such tonnage; (2) detail of the net amounts paid to and beyond the transit station, including references to the "inbound" and "outbound" shipments by bill of lading number and symbol; date of shipment, origin and destination, weight rate, and the net amounts paid to the respective "inbound" and "outbound" carriers, naming them and identifying the bill numbers on which such payments were made; and (3) the balance due, *i.e.*, the difference between the through assessable charges, including the charges on local tonnage, if any, and the respective net amounts paid on the "inbound" and "outbound" shipments; and

(q) a brief statement as to the basis for the claim or other brief statement which the carrier deems necessary to explain the peculiarities of the shipment.

(3) *Computation for typical bill of lading.* Following the listing of the information herein required with respect to each group of carrier's bills involving the same issue or basis of freight charge computation, the carrier shall either (i) include in the schedule a computation of the freight charges on one bill of lading, typical of each group, showing how it computed the freight charges for that bill of lading, setting forth the basis or formula used, and referring to the specific items in particular tariffs or other authority which it relied upon for that purpose, or (ii) attach a worksheet showing such computation and information with respect to each typical bill of lading.

(H) *Certification and signature of carrier: Property.* The schedule shall be certified by the general auditor, comptroller, or principal accounting officer of the carrier, as follows:

I, ——————, the ——————
(Name) (Title)
——————, of the ——————
(Name of Carrier)
————————————

do hereby certify that the above and foregoing schedule has been prepared from the books and records of said company for use in a suit in the United States Court of Claims, entitled —————— v. The United States, No. ——, and that to the best of my knowledge, information, and belief the matters contained therein are true and correct. To certify which, witness my hand at ——————— this —— day of —————, 19

————————————

(Signature of general auditor, comptroller, or principal accounting officer.)

(I) *Schedule: claim for transportation of passengers.* Where the claim is for the recovery of charges for the transportation of *passengers* for account of the Government, there shall be attached to the request a schedule, prepared by or under the supervision of the general auditor, comptroller, or other principal accounting officer of the carrier. The schedule shall contain the following factual information:

(1) *List of carriers' bills in dispute.* The number of each of the carrier's bills in dispute (as distinguished from the number of a subsequent bill from which the GAO made a deduction following its determination of an overpayment on the bill in dispute).

(2) *Detail: each transportation request or warrant.* For each transportation request or warrant in dispute, covered by each bill referred to in (1) above, the following facts:

(a) the symbol and number of each Government transportation request or warrant in dispute;

(b) the date of service;

(c) the origin and destination of the travel;

(d) the class or type of service;

(e) whether the travel was "one way" or "round trip";

(f) the number of the special movement, if any;

(g) the route of travel;

(h) the number of persons that traveled;

(i) the gross per capita fare;

(j) the assessable passenger charges;

(k) the amount paid, and by what Government office and where located;

(*l*) amounts refunded by carrier, if any, and the dates thereof, and the Government office to which refunded and where located;

(m) where an overpayment was determined by the Government and deducted from a carrier's subsequent bill, the number of such subsequent bill, the amount of the deduction, and the date thereof;

(n) the total amount paid, and by what Government office and where located;

(*o*) the balance due;

(p) the tariff reference and item or special rate authority;

(q) the Government file reference; and

(r) a brief statement as to the basis for the claim, including, where appropriate, a brief explanation showing the extent to which the ticket issued by the carrier was not used, and the value of the unused part of the ticket.

(J) *Certification and signature of carrier: passengers.* The schedule covering the transportation of passengers shall be certified in the same manner as provided in (H) above, except that where a request includes schedules pertaining to claims for both the transportation of passengers and freight, one certification shall suffice for all schedules.

3. *Plaintiff's noncompliance: consequences.* In the event a plaintiff in any action within the purview of this order fails or refuses to comply with the provisions hereof, the trial judge may (1) refuse to allow it to support designated claims or prohibit it from introducing in evidence designated documents or items of testimony, or (2) may report such noncompliance to the court for appropriate action, which may include a dismissal of the petition or any part thereof.

### II. DEFENDANT'S RESPONSE

4. *Time for filing; trial judge's order.* Promptly after the filing of the plaintiff's request, the trial judge to whom the case is assigned shall, by order filed with the clerk, fix a reasonable time within which the defendant shall file its response to the request. A copy of such order shall be served on the parties as provided in Rule 23.

5. *Copies; service; signature.* The defendant's response shall consist of an original to be filed with the clerk and 4 copies to be served on plaintiff as provided in Rule 23. The response shall be signed by defendant's attorney of record and shall comply with the terms of paragraph 2(A) hereof.

6. *Agreement; modification; denial.* The defendant shall file such response within the time fixed by the trial judge, agreeing to the separate items of fact, modifying the same in accordance with the facts known by the defendant, specifically denying the same, or setting forth in detail the reasons why it cannot truthfully admit or deny designated portions of the request.

7. *Defendant's statement of issues.* If defendant does not agree with plaintiff's "statement of the issues," it shall attach to or include in the response its "statement of the issues," which, with respect to each group of the carrier's bills involving the same issue, shall consist of a brief narrative statement of the issue (as defendant contends) with reference to (1) a court decision involving the same issue, or (2) the tariffs or other authority relied upon by defendant.

8. *Verification of carrier's computations.* If the defendant finds that the schedule attached to plaintiff's request, or any portion thereof affecting the amount claimed, is incorrect on the basis of the tariffs, Section 22 quotations, or other authority relied on by plaintiff in its request, there shall be attached to the response a schedule prepared by the defendant, setting forth the facts and figures as to the amount of freight charges which defendant asserts would be due on each carrier's bill if the court holds that the tariffs or other authorities relied on by plaintiff in its request are applicable, and showing how the defendant arrived at any changes or corrections in the amounts claimed by plaintiff.

9. *Schedule: defendant's basis for applicable charges.* If the defendant claims that the tariffs, Section 22 quotations, or other authority relied on by plaintiff are inapplicable with respect to any of the carrier's bills listed in plaintiff's request, there shall be attached to the response a schedule prepared by the defendant, setting forth the facts and figures in detail as

to the amount of freight or passenger charges defendant claims is due on each disputed carrier's bill and containing a specific reference to the item or items in designated tariffs, Section 22 quotations, or other authority relied on by defendant in support of its contention. The schedule shall also comply with the terms of paragraph 2(G)(3) hereof.

10. *Failure to deny or respond within specified time: consequences.* Except where the response details the reasons why the defendant cannot admit or deny a particular statement in the request, any fact not so modified or denied in the response shall be deemed admitted, and the failure of the defendant to file its response within the time specified by the trial judge shall be taken as an admission of all the facts as set forth in the request.

11. *Qualified denial of facts available to defendant: consequences.* Where the request sets forth any facts that are within the knowledge of the General Accounting Office or of the department or agency of the defendant for which the transportation was performed—and these specifically include but are not limited to the facts and figures which plaintiff, by this order, is directed to include in its schedules—a response stating that defendant cannot truthfully admit or deny such facts, or a denial based on a lack of knowledge by defendant's attorney of record, shall be deemed an admission thereof: *Provided,* That such a response shall not be deemed an admission if accompanied by the sworn statement of the official in charge of the records that a search has been made for the necessary documents or information and that the documents or information cannot be found.

12. *Relation to pleadings; time for filing answer or counterclaim.* In all cases to which this order applies, the time for filing defendant's answer and any counterclaim asserted by it shall, without regard to the provisions of Rules 38 and 40, be contemporaneous with the date fixed by the trial judge for filing defendant's reponse to plaintiff's request. At its option, the defendant may include the response in its answer or counterclaim, which pleadings, nevertheless, shall otherwise comply with the rules applicable to them.

### III. APPLICATION TO SPECIAL CASES; TRIAL JUDGE'S ORDER

13. *Pending cases.* The trial judge may invoke the provisions of this order with respect to any pending case of the class covered by the terms hereof, including cases in which judgment has been entered in favor of the plaintiff pursuant to Rule 131(c). In such pending cases, the trial judge shall fix the time within which plaintiff's request, as well as defendant's response thereto, is to be filed.

14. *Cases where issues are limited; typical bills.* The trial judge may also invoke the provisions of this order, or applicable portions thereof as specified by him, with respect to any case of the class covered by the terms of this order, where the trial in the first instance has been limited to the issues of law and fact relating to the right of plaintiff to recover. In that event, and in a case where the petition covers a number of bills of lading, involving a common issue of law or fact, the plaintiff's request and the defendant's response shall be limited to the matters that are essential to enable the court to determine the issues of fact and law relating to the right of plaintiff to recover, and the schedules attached to plaintiff's request and to defendant's response shall cover only one typical bill of lading, or such representative bills of lading as the trial judge decides are necessary, to enable the court to determine the question of defendant's liability. If the court holds that the plaintiff is entitled to recover, judgment to that effect shall be entered in accordance with Rule 131(c).

### IV. TRIAL JUDGE'S RESPONSIBILITY

15. *Time extensions.* The trial judge may, in his discretion, grant necessary extensions of time for compliance with any of the provisions of this order.

16. *Procedural disputes: disposition.* Prior to the time the case is submitted to the court, the trial judge shall resolve all questions and disputes with respect to to the procedure to be followed in compliance with this order.

### V. ACCEPTANCE OF RESPONSE; PRETRIAL; JUDGMENT

17. *Plaintiff's acceptance of response.* If a plaintiff is willing to accept the amount shown to be due it in defendant's response, or, where a counterclaim has been filed, is willing to accept the net amount shown to be due plaintiff in the response after deducting the amount of defendant's counterclaim, plaintiff's attorney of record shall sign and file with the clerk an original typewritten and 2 carbon copies of a statement entitled "Plaintiff's Acceptance of the Amount Defendant Admits Is Due," stating therein that the response shows that a specified sum is due plaintiff or, where a counterclaim has been filed, that the response shows that the net amount due plaintiff after deducting the amount of the counterclaim is a specified sum, and that plaintiff consents to the entry of judgment in the amount specified in favor of plaintiff in full settlement and satisfaction of all claims asserted in the petition and request for admission of facts.

18. *Pretrial conference; fixing amount of recovery.* When plaintiff does not file an acceptance of the amount shown to be due in the response, a pretrial conference shall be held for the purpose of (1) resolving all issues and recording an agreement for the entry of a judgment or for a dismissal of the petition or any part thereof, or (2) segregating the carrier's bills in dispute from those not in controversy and fixing the amount that either party would be entitled to recover in the event of a decision in its favor, and/or (3) taking any other action that may aid in the prompt disposition of the suit.

19. *Trial judge's report; entry of judgment.* Where all material issues are disposed of through the filing by plaintiff of its acceptance of the amount shown to be due in defendant's response, or at a pretrial conference, or by the defendant's failure to file its response within the time fixed by the trial judge, judgment may be entered on recommendation of the trial judge, as set forth in his memorandum report, or on a motion for summary judgment.

### VI. CASES WITHIN PRIMARY JURISDICTION OF INTERSTATE COMMERCE COMMISSION

20. *Referral to Interstate Commerce Commission: defendant's motion for.* In any suit subject to the terms of this order, if defendant contends, whether on the basis of the freight charge computations used by plaintiff or on the basis of the freight charge computations used by defendant, that any of the carrier's bills listed in the request raise issues within the primary jurisdiction of the Interstate Commerce Commission and intends to move the court to refer such issues to that agency, defendant shall file the motion with the clerk at the time fixed for the filing of its response under this order. The motion shall comply with Rule 51 and shall contain: (1) an identification of the carrier's bills involved unless all the bills in suit are included in the motion; (2) a description of the commodities shipped and a statement respecting any other factors which are pertinent to the issues covered by the motion; (3) a reference to the applicable tariffs and a copy of the pertinent provisions thereof; (4) a precise statement of the issue or issues to be referred; and (5) a statement as to whether the Interstate Commerce Commission has construed the cited tariffs in prior decisions or has clarified the factors underlying them, citing the pertinent decisions, if any.

21. *Plaintiff's response to defendant's motion for referral.* Plaintiff's response to the motion shall be filed in the manner prescribed by Rule 51 and within 30 days after service of the motion, and shall state whether plaintiff concurs in the motion. If plaintiff contends that the Interstate Commerce Commission has construed the tariffs referred to in defendant's motion or has clarified the factors underlying them in previous decisions, the response shall cite such decisions.

22. *Referral to Interstate Commerce Commission: plaintiff's motion for.* If plaintiff, in any case subject to the terms of this order, contends that any of the carrier's bills in suit raise issues within the primary jurisdiction of the Interstate Commerce Commission and intends to move the court to refer such issues to that agency, plaintiff's motion shall be filed not later than 30 days from the date defendant's response is filed and shall conform to the requirements of paragraph 20 hereof.

23. *Defendant's response to plaintiff's motion for referral.* Defendant's response to plaintiff's motion shall conform to the requirements of paragraph 21 above.

24. *Effect of filing referral motion.* The trial of any case subject to the terms of this order in which a motion for referral is filed shall be deferred until the motion has been finally acted upon by the trial judge or by the court (see Rule 53(b)).

25. *Failure to file referral motion in specified time: consequences.* The failure of either party to file, within the time prescribed above, a motion requesting the court to refer a pending case or any part thereof to the Interstate Commerce Commission may be deemed good cause for denying any such motion thereafter filed.

## APPENDIX D

### PROCEDURE IN CONGRESSIONAL REFERENCE CASES

(28 U.S.C. §§ 792(a), 1492, 2509)

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### General Order of the Chief Commissioner, United States Court of Claims

(Entered Sept. 1, 1969, and subsequently amended)

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1. *Purpose.* The purpose of this order is to specify procedures applicable to cases referred to the chief commissioner under the enabling act, cited in the caption.

2. *Service of notice.* Upon referral of a case to the chief commissioner by either House of the Congress, the clerk, after docketing the same, shall serve a notice, as provided in Rule 23 of the Rules of the Court of Claims (except that the notice shall be from the chief commissioner rather than in the name of the court), on each person whose name and address are shown by the papers transmitted and who appears to be interested in the subject matter of the reference, which notice shall set forth the filing of the reference and state that the person notified appears to have an interest therein and that such person shall have 90 days within which to file his petition. At the same time the clerk shall forward a copy of each such notice to the Attorney General.

3. *Procedure after notice.* After service of notice upon the interested person or persons, all further proceedings for the disposition of the case shall be in accordance with the rules prescribed for such cases generally by the chief commissioner in this Order.

4. *Petition.* Any person served with notice pursuant to paragraph 2 of this Order who desires to assert a claim may do so by filing a petition in accordance with Rules 21 and 35 (or Rule 36) of the Rules of the Court of Claims, except that the petition shall be captioned as provided in paragraph 7 of this Order.

5. *Failure of party to appear.* If no interested claimant files his petition within the time specified in the notice served by the clerk, the case may be reported upon the papers filed and upon such evidence, if any, as may be produced by the Attorney General.

6. *Role of chief commissioner.* The 1966 enabling act (cited in the caption) directs the chief commissioners to prescribe rules and regulations for congressional reference cases and "to require the application of the pertinent rules of practice of the Court of Claims insofar as feasible." Accordingly, the Rules of the Court of Claims are adopted by reference, to the extent feasible, and subject in some instances to stated modifications and specific exclusions herein stated.

Upon the filing of a petition, the chief commissioner by order will refer the case to a trial commissioner. He will also designate a review panel of three commissioners of the court to sit in appellate review of the trial commissioner's decision in the case. He will designate one of the review panel members as presiding commissioner of the panel. The decision of the review panel, consisting of findings of fact and conclusions, when submitted to the chief commissioner by filing thereof with the clerk, shall be transmitted by the chief commissioner to the appropriate House of Congress. The chief commissioner will entertain no appeals or requests for review of any rulings or actions by a trial commissioner or a review panel. General Orders, as in the present instance, will emanate from the chief commissioner. Specific orders will also be issued by him in the reference of cases to trial commissioners and in the designation of review panels. Otherwise, orders in specific cases will emanate from the trial commissioners and the review panels.

7. *Captions.* Title 28 U.S.C. § 2509(b), as amended, provides that "none of the rules, rulings, findings, or conclusions authorized by this section shall be subject to judicial review." The role of the United States Court of Claims in congressional reference cases is limited in that none of the procedures in such cases may be before the court. All papers, including pleadings and motions by the parties and the orders and reports of the trial commissioners and the review panels, shall be captioned as follows:

BEFORE THE CHIEF COMMISSIONER

Of The

UNITED STATES COURT OF CLAIMS

---

In Congressional Reference Case No. ——

(Filed ————)

8. *Subpoenas.* Every subpoena (authorized by Title 28 U.S.C. § 2509(b)) shall be captioned as above and issued by the trial commissioner to whom the case is referred. Subpoenas requiring travel of more than 100 miles to place of trial must have attached thereto an order of approval by the chief commissioner.

9. *Sanctions.* Title 28 U.S.C. § 2509(f), as amended, provides as follows:

> (f) Any act or failure to act or other conduct by a party, a witness, or an attorney which would call for the imposition of sanctions under the rules of practice of the Court of Claims shall be noted by the panel or the trial commissioner at the time of occurrence thereof and upon failure of the delinquent or offending party, witness, or attorney to make prompt compliance with the order of the panel or the trial commissioner a full statement of the circumstances shall be incorporated in the report of the panel.

There is absolutely no delegation of judicial power from the Court of Claims to the chief commissioner, the trial commissioner, or the review panel, in congressional reference cases. Accordingly, any rule of the Court of Claims hereinafter adopted by reference in this Order which provides sanctions shall be read, construed, and applied in conformity with the stated limitation.

10. *Admission to practice.* Any attorney representing a claimant in a congressional reference case may file (and appear as attorney of record in) the proceeding if he is a member of the bar of the United States Court of Claims or, if not, upon certification to the clerk that he is a member in good standing of the bar of the highest court of any state in the Union (or the District of Columbia). Any claimant (except a corporation) in a congressional reference case may proceed prose.

11. *Adoption by reference.* (a) *Generally.* Subject to the exclusions hereinafter specifically listed in paragraph 14 of this Order, the Rules of the Court of Claims shall be applied to congressional reference cases insofar as feasible. Generally, feasibility may be determined by substitution of the words "chief commissioner," "trial commissioner," "review panel," or combinations thereof, for the words "chief of the trial division," "trial judge," and "court" according to the context of the specific rule.

(b) *Pleadings and motions; parties.* Rules 31-42 (Pleadings), except those portions of Rule 38 referring to dispositive motions, Rules 51, 52(c), (d), and (e), 53, and 55 (Motions), and Rules 61-66 (Parties) are adopted, and the foregoing test of feasibility shall be applied. Counterclaims (Rules 40 and 102(d) and (e)) may have no application, but the rules are retained in order to determine the position of offsets. Third-party practice (Rule 41) likewise may have no application, but retention of it cannot result immediately in prejudice to anyone.

(c) *Discovery; depositions; pretrial.* Rules 71-92 and 111-14 are adopted, as above indicated, subject only to the caveat stated in paragraph 9 of this Order relating to sanctions.

(d) *Reference of cases.* Congressional reference cases will be referred to trial commissioners in conformity with paragraph 6 hereof, whereupon Rules 13, 14, and 134 (pertaining to commissioners and their reports) will apply. On this basis, Rules 121-25 (pertaining to incidents of trials before commissioners) and Rules 131-33 (pertaining to trials) may be followed, subject only to the limitations hereinabove noted as to sanctions.

(e) *Review of commissioners' actions.* By substituting "review panel" for "the chief judge or a judge in chambers" and "court" in Rule 12(d), and by similar substitution of "review panel" for "court" and "decision" for "judgment" in Rules 53(c), 141-47, and 151-53, the review panels will take the place of the court in requests for review, oral arguments, and decision.

12. *Duplication.* The provisions of Chapter XVIII, Duplication; Copies (Rules 211-14), are adopted by reference, to the extent feasible, and subject to the following specific qualifications: (a) No printing by ordinary typographic methods will be required in congressional reference cases of submissions of counsel to a trial commissioner or review panel. Duplication may be by any process capable of producing a clear black image on white paper. Where typewritten copies are specified as acceptable by the rules, they must be clearly legible. (b) Where the rules call for 16 copies, 7 will be accepted in lieu thereof, except that as to the petition, 12 copies will be required.

13. *Fees.* Filing fees as set by Rules 221 and 222 will be required.

14. *Rules Deemed Not Pertinent.* The following additional rules of the Court of Claims shall have no application to congressional reference cases: Rule 5 (Name and Seal of the Court);

Rule 6(b) (Annual Term); Rule 7 (Sittings by Court and Panels); Rule 8 (Appellate Functions of the Court); Rule 26 (Bond to Stay Execution of Order of Renegotiation Board); Rules 52(a) and (b) and 54 (dispositive motions); Rule 57 (Secretary to the Court or Clerk Authorized to Act on Certain Motions); Rule 86 (Depositions Pending Certiorari); Rule 101 (Summary Judgment); Rule 102(b) and (c) (Involuntary Dismissal; Effect Thereof: [and] Insufficiency of Evidence); Rule 123 (Subpoenas); Rule 147(c) (Incidental and Collateral Relief); Rule 148 (Judgment in Renegotiation Cases); Rule 149 (Remand); Rule 150 (Extension or Termination of Stay of Proceedings on Remand; Disposition of Case); Rule 151(a)(2) (new trials); Rule 154 (Writs of Certiorari); Rules 161-66 (Wunderlich Act Reviews); Rules 171-83 (comprising Chapter XV, Appeals; Transfers; and References [to the Court of Claims]); Rule 201 (Admission to Practice); and Rules 223 and 224 (Fee for Record on Certiorari [and] Fees in Cases Appealed to the Court).

## APPENDIX E

### FORMS OF BONDS AND POWERS OF ATTORNEY IN RENEGOTIATION CASES

### I. BOND WITH CORPORATE SURETY

The following is the form of bond with a corporate surety to be filed under Rule 26(c):

UNITED STATES COURT OF CLAIMS

No. ——

——— ———, PLAINTIFF *v.* THE UNITED STATES, DEFENDANT

BOND

KNOW ALL MEN BY THESE PRESENTS: That we ————, as principal, and ————, as surety, are held and firmly bound unto the Renegotiation Board and/or the United States, in the sum of $—— to be paid to the Renegotiation Board and/or the United States, for the payment of which well and truly to be made we bind ourselves and each of us and our successors and assigns, jointly and severally, firmly by these presents.

SIGNED, sealed, and dated this —— day of ———, 19—.

WHEREAS, the Renegotiation Board by its order dated ——— determined that the above-named principal realized excessive profits from contracts and subcontracts subject to renegotiation, during the fiscal year ended ———, in the amount of $——; and

WHEREAS, said principal has filed or is about to file a petition in the United States Court of Claims for a redetermination of the amount of the aforesaid excessive profits:

NOW, THEREFORE, the condition of this obligation is such that if the above-named principal shall well and truly pay the amount of profits determined by the United States Court of Claims to be excessive, after adjustment on account of taxes measured by income, other than Federal taxes, under Section 103(f) of the Renegotiation Act (50 U.S.C. APP. § 1213(f), less any tax credit applicable thereto under Section 1481 of the Internal Revenue Code of 1954, with interest thereon as required by law, or if said principal, in the event that said proposed proceeding in the United States Court of Claims is not timely filed, or after filing is dismissed or otherwise concluded without a determination by order of the said court as to the amount of excessive profits, shall well and truly pay the amount of excessive profits to be eliminated under the order of the Renegotiation Board, less any tax credit applicable thereto under Section 1481 of the Internal Revenue Code of 1954, with interest thereon as required by law, then this obligation shall be void; otherwise it shall be and remain in full force and effect and the surety shall be bound unto the United States for the payment of the amount due under the determination of excessive profits of the Renegotiation Board or the United States Court of Claims.

*(Corporate seal)*
*Attest:*

————————
*Secretary*

————————
[SEAL]
*(for an individual plaintiff)*

————————
*(for a corporate plaintiff)*
*By:* ————————
*Title*

————————
*Surety*
*By:* ————————
*Title (Surety corporate seal)*

### II. BOND WITH COLLATERAL

The following is the form of bond with collateral to be filed under Rule 26(d):

UNITED STATES COURT OF CLAIMS

No. ——

——— ———, PLAINTIFF *v.* THE UNITED STATES, DEFENDANT

BOND

KNOW ALL MEN BY THESE PRESENTS: That ———— is (are) held and firmly bound unto the Renegotiation Board and/or the United States in the sum of ——— ($——) Dollars to be paid to the Renegotiation Board and/or the United States, for the payment of which, well and truly to be made, the said ———— bind(s) himself (herself, itself, or themselves) and his (her, its, or their) successors and assigns, firmly by these presents.

SIGNED, sealed, and dated this —— day of ———, 19—.

WHEREAS, the Renegotiation Board by its order dated ——— determined that the above-named ———— realized excessive profits from contracts and subcontracts subject to renegotiation, during the fiscal year ended ——, in the amount of $——; and

WHEREAS, the above-named ———— has (have) filed or is (are) about to file a petition in the United States Court of Claims for redetermination of the amount of the aforesaid excessive profits:

NOW, THEREFORE, the condition of this obligation is such that if the above-named ———— shall well and truly pay the amount of profits determined by the United States Court of Claims by order to be excessive, after adjustment on account of taxes measured by income, other than Federal taxes, under Section 103(f) of the Renegotiation Act (50 U.S.C.

App. § 1213(f), less any tax credit applicable thereto under Section 1481 of the Internal Revenue Code of 1954, with interest thereon as required by law, or if the above-named ——— in the event that said proposed case in the United States Court of Claims is not timely filed, or after filing is dismissed or otherwise concluded without a determination by order of the said court as to the amount of excessive profits, shall well and truly pay the amount of excessive profits to be eliminated under the order of the Board, less any tax credit under Section 1481 of the Internal Revenue Code of 1954, with interest thereon as required by law, then this obligation shall be void; otherwise it shall be and remain in full force and effect.

The above-bounded obligator(s), in order the more fully to secure the Renegotiation Board and/or the United States in the payment of the aforementioned sum, hereby pledge(s) as security therefor marketable public securities of the United States in a sum equal at their par value to the aforementioned sum, to wit: ——— ($——) Dollars, which said marketable public securities are numbered serially and are in the denominations and amounts, and are otherwise more particularly described as follows:

———

———

which said marketable public securities are being herewith deposited with the Clerk of the United States Court of Claims and his receipt taken therefor.

Contemporaneously herewith, the undersigned has also executed and delivered an irrevocable power of attorney and agreement in favor of the Clerk of the United States Court of Claims, authorizing and empowering him, as such attorney, to collect or sell or transfer or assign the above-described marketable public securities so deposited, or any part thereof, or any such securities substituted therefor, in case of any default in the performance of any of the above-named conditions or stipulations.

——— [SEAL]
*(for an individual petitioner)*

*(Corporate seal)* *Attest:*
——— *Secretary*

*(for corporate petitioner)*
*By:* ——— *Title*

## III. POWER OF ATTORNEY AND AGREEMENT BY CORPORATION

The following is the form of power of attorney and agreement by a corporation to be filed under Rule 26(d):

### POWER OF ATTORNEY AND AGREEMENT BY CORPORATION

KNOW ALL MEN BY THESE PRESENTS: That ———, a corporation duly incorporated under the laws of the State of ——— and having its principal office in the city of ———, State of ———, in pursuance of a resolution of the Board of Directors of said corporation, passed on the —— day of ———, 19—, a duly certified copy of which resolution is hereto attached, does hereby constitute and appoint the Clerk of the United States Court of Claims as attorney for said corporation, for and in the name of said corporation to collect or to sell, assign, and transfer certain marketable public securities of the United States, the property of said corporation, described as follows:

| *Title of securities* | *Total face amount* | *Denomination* | *Serial number* | *Interest dates* |
|---|---|---|---|---|
| | | | | |

Such marketable public securities having been deposited by it, pursuant to the Act of July 30, 1947, c. 390, 61 Stat. 646, as security for the faithful performance of any and all of the conditions or stipulations of a certain obligation entered into by it with (here enter "the Renegotiation Board and/or the United States") under date of ———, which is hereby made a part thereof, the undersigned agrees that, in case of any default in the performance of any of the conditions and stipulations of such undertaking, its said attorney shall have full power to collect said marketable public securities or any part thereof without notice, at public or private sale, or to transfer or assign to another for the purpose of effecting either public or private sale, free from any equity of redemption and without appraisement or valuation, notice and right to redeem being waived, and the proceeds of such sale or collection, in whole or in part, to be applied to the satisfaction of any damages, demands, or deficiency arising by reason of such default, as may be deemed best, and the undersigned further agrees that the authority herein granted is irrevocable and shall apply to such other securities of a like nature which may be substituted therefor.

And said corporation hereby for itself, its successors and assigns, ratifies and confirms whatever its said attorney shall do by virtue of these presents.

In witness whereof, the ———, the corporation hereinabove named, by ——— (name and title of officer), duly authorized to act in the premises, has executed this instrument and caused the seal of the corporation to be hereto affixed this —— day of ———, 19—.

*Attest:*
———
*(Corporate seal) Secretary*

*By:* ———
*Title*

State of ———,
*County of* ———, *ss:*

Before me, the undersigned, a notary public within and for the said county and State, personally appeared ——— (name and title of officer), and for and in behalf of said ———, corporation, acknowledged the execution of the foregoing power of attorney.

Witness my hand and notarial seal this —— day of ———, 19—.
[Notarial seal]

————————————
Notary Public
My Commission Expires ———.

## IV. POWER OF ATTORNEY AND AGREEMENT BY INDIVIDUAL

The following is the form of power of attorney and agreement by an individual to be filed under Rule 26(d):

### POWER OF ATTORNEY AND AGREEMENT BY INDIVIDUAL

KNOW ALL MEN BY THESE PRESENTS: That I (we), —————, do hereby constitute and appoint the Clerk of the United States Court of Claims as attorney for me (us), and in my (our) name to collect or to sell, assign, and transfer certain marketable public securities of the United States, being my (our) property described as follows:

| *Title of securities* | *Total face amount* | *Denomination* | *Serial number* | *Interest dates* |
|---|---|---|---|---|
| | | | | |
| | | | | |
| | | | | |

Such marketable public securities having been deposited by me (us) pursuant to the Act of July 30, 1947, c. 390, 61 Stat. 646, as security for the faithful performance of any and all of the conditions or stipulations of a certain obligation entered into by me (us) with (here enter "the Renegotiation Board and/or the United States") under date of ———, which is hereby made a part thereof, I (we) agree that, in case of any default in the performance of any of the conditions and stipulations of such undertaking, my (our) said attorney shall have full power to collect said marketable public securities or any part thereof, or to sell, assign, and transfer said marketable public securities or any part thereof without notice, at public or private sale, or to transfer or assign to another for the purpose of effecting either public or private sale, free from any equity of redemption and without appraisement or valuation, notice and right to redeem being waived, and the proceeds of such sale or collection, in whole or in part, to be applied to the satisfaction of any damages, demands, or deficiency arising by reason of such default, as may be deemed best, and I (we) further agree that the authority herein granted is irrevocable and shall apply to such other securities of a like nature which may be substituted therefor.

And for myself (ourselves), my (our several) administrators, executors, and assigns, I (we) hereby ratify and confirm whatever my (our) said attorney shall do by virtue of these presents.

In witness whereof, I (we) hereinabove named have executed this instrument and affixed my (our) seal this —— day of ———, 19—.

————————————[SEAL]

STATE OF ——————,
*County of* ——————, *ss:*

Before me, the undersigned, a notary public within and for the said county and State, personally appeared ———— (name of obligor), and acknowledged the execution of the foregoing power of attorney.

Witness my hand and notarial seal this —— day of ———, 19—.

————————————
Notary Public

[Notarial seal]

My Commission Expires ———.

# RULES OF THE UNITED STATES CUSTOMS COURT

*As amended to January 1, 1977*

1. THE RULES

Rule
1.1 Effective Date of Rules; Scope and Construction.

2. THE COURT

2.1 The Court Name, Seal, and Term.
2.2 Sessions of the Court.
2.3 Assignment of Actions

3. COMMENCEMENT OF ACTION; SUMMONS; COMPUTATION OF TIME

3.1 Forms of Action.
3.2 Commencement of action
3.3 Denied Protest; Single Civil Action.
3.4 Summons—Denied Protest: Form and Content.
3.5 Summons by American Manufacturers, Producers, or Wholesalers; Form and Content.
3.6 Time.

4. PLEADINGS; MOTIONS

4.1 Service and Filing of Pleadings and Other Papers.
4.2 General Rules of Pleading: Alternative Claims.
4.3 Form of Pleadings.
4.4 Pleadings.
4.5 Content of Complaint in a Civil Action Pursuant to 28 U.S.C. § 2632, as Amended.
*4.5A Content of Complaint in an Appeal for reappraisement.
*4.5B Content of Complaint in a Protest.
4.6 Content of Answer.
4.7 Defenses and Objections: When and How Presented.
4.8 Amendments of Pleadings.
4.9 Motion for Judgment on the Pleadings.
4.10 Marked Pleadings.
4.11 Signing of Papers.
4.12 Motion Practice.
4.13 Application for Three-Judge Panel.

5. PARTIES

5.1 American Manufacturers, Producers, or Wholesalers; Practice.

6. DISCOVERY

6.1 General Provisions Governing Discovery.
6.2 Request for Admissions.
6.3 Interrogatories to Parties.
6.4 Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes.
6.5 Failure To Make Discovery: Sanctions.

7. DEPOSITIONS

7.1 Stipulations Regarding Deposition and Discovery Procedure.
7.2 Depositions To Perpetuate Testimony.
7.3 Depositions Upon Oral Examination.
7.4 Depositions of Witnesses Upon Written Interrogatories.
7.5 Use of Depositions in Court Proceedings.

Rule
7.6 Persons Before Whom Depositions May Be Taken.
7.7 Commissions—Letters Rogatory.
7.8 Costs.

8. SUBMISSION ON AGREED STATEMENT OF FACTS; SUMMARY JUDGMENT; DISMISSAL OF ACTIONS

8.1 Submission on Agreed Statement of Facts.
8.2 Summary Judgment.
8.3 Dismissal of Actions.

9. PRETRIAL PROCEDURE

9.1 Notice of Trial.
9.2 Pretrial Orders.
9.3 Pretrial Conferences.
9.4 Records Introduced in Evidence.
9.5 Compliance noncompliance.
9.6 Documents Specially Admissible by Statute When Value Is in Issue.

10. TRIALS

10.1 Subpoena.
10.2 Proof of Official Record.
10.3 Consolidation; Joint Trials; Severance.
10.4 Reception of Evidence.
10.5 Exceptions Unnecessary.
10.6 Contempt.

11. ORAL ARGUMENT; AMICUS CURIAE; POST TRIAL PROCEEDINGS

11.1 Oral Argument.
11.2 *Amicus Curiae.*
11.3 Briefs.
11.4 Proposed Findings of Fact and Conclusions of Law.
11.5 Decisions; Judgments.

12. REHEARINGS; RETRIALS; AMENDMENT OF JUDGMENTS

12.1 Rehearings; Retrials.
12.2 Amendment of Judgments.

13. APPEALS

13.1 Appeals—Procedures.
13.2 Interlocutory Appeals—Procedures.

14 THE CLERK'S OFFICE

14.1 Judgments and Orders.
14.2 Books and Records Kept by the Clerk.
14.3 Access to and Withdrawal of Papers.
14.4 Exhibits—Disposition.
14.5 Photostatic Copying of Documents.
14.6 Reserve File.
14.7 Suspension Procedure.
14.8 Suspension Disposition File.
14.9 Disposition of Pending Actions.

15. THE MARSHAL

15.1 Duties; Fees.

16. ATTORNEYS

16.1 Attorneys—Admission to Practice.
16.2 Disbarment or Other Disciplinary Action.
16.3 Notice of Appearance; Attorney of Record; Substitution of Attorneys.

17. DUPLICATION; COPIES

17.1 Form; Size; Copies; Conformity.

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*It is contemplated that the passage of time will eliminate the necessity for this rule, whereupon it will be deleted.

## CHAPTER I. THE RULES

### Rule 1.1. Effective Date of Rules; Scope and Construction

(a) *Effective date.* These rules shall become effective on October 1, 1970.

(b) *Scope and construction.* These rules govern all proceedings in the United States Customs Court and shall be so construed as to promote the just, speedy, and inexpensive determination of every action. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except as provided for in Rule 14.9(b). Where, in any proceeding or in any instance, there is no applicable rule of procedure, the judge or judges, before whom the action is pending, may prescribe the same.

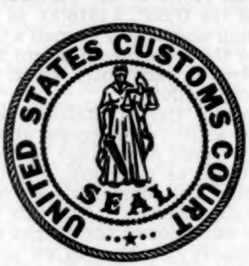
## CHAPTER II. THE COURT

### Rule 2.1. The Court Name, Seal, and Term

(a) *Name.* The name of the court, as fixed by 28 U.S.C. § 251, is "United States Customs Court."

(b) *Seal.* The seal of the court shall contain the words "United States Customs Court" on the outer edge and a figure of Justice with the balance scales engraved in the center with the word "seal" thereunder.

(Here appears a facsimile of the seal.)



(c) *Annual term.* The annual term of the court shall commence on the second Monday in September of each year and shall continue until the commencement of the next succeeding term.

### Rule 2.2. Sessions of the Court

(a) *In the United States.* An action shall be assigned by the chief judge to a judge or judges for purposes of trial, evidentiary hearing, or oral argument of a dispositive motion, at such time and in such place as the chief judge may designate in accordance with the provisions of 28 U.S.C. § 256(a).

(b) *Evidentiary hearings in foreign countries.* (1) A judge of the court may preside at an evidentiary hearing in a foreign country when the chief judge, either on his own initiative or upon motion of a party, so authorizes.

(2) The chief judge shall grant such authorization only if he finds that the laws of the foreign country do not prohibit such a hearing and the interests of economy, efficiency and justice will be served by such a hearing.

(3) Before issuing an authorization for a hearing, the chief judge shall request the Department of State to advise whether or not the foreign country objects to holding the evidentiary hearings within its boundaries.

(4) Within 10 days after the chief judge has issued an order authorizing an evidentiary hearing in a foreign country, any party to the action may file an interlocutory appeal from such order, pursuant to the provisions of 28 U.S.C. § 1541(b).

### Rule 2.3. Assignment of Actions

(a) *Assignment.* An action shall be assigned by the chief judge for trial upon the filing of a notice of trial pursuant to Rule 9.1. Upon motion of either party and for good cause shown, or upon his own initiative, the chief judge may assign an action prior to the filing of a notice of trial.

(b) *Reassignment.* An action may be reassigned by the chief judge upon the death, resignation, retirement, illness or disqualification of the judge to whom it has been assigned, or upon other special circumstances which may warrant reassignment.

## CHAPTER III. COMMENCEMENT OF ACTION; SUMMONS; COMPUTATION OF TIME

### Rule 3.1. Forms of Action

(a) *Civil action under 28 U.S.C. § 2632, as amended.* An action which is commenced in the United States Customs Court by the filing of a summons pursuant to 28 U.S.C. § 2632, as amended, shall be known as a civil action.

(b) *Appeal for reappraisement.* An action arising in the United States Customs Court filed pursuant to section 501 or section 516(a) of the Tariff Act of 1930, as amended (19 U.S.C. § 1501 or § 1516(a), as amend) and forwarded to the court pursuant to section 501 or section 516(c) of said amended act (19 U.S.C. § 1501 or § 1516(c), as amended), shall be known as an appeal for reappraisement.

(c) *Protest.* An action arising in the United States Customs Court filed pursuant to section 514 or section 516(b) of the Tariff Act of 1930, as amended (19 U.S.C. § 1514 or § 1516(b), as amended) and forwarded to the court pursuant to section 515 or section 516(c) of said amended act (19 U.S.C. § 1515 or § 1516(c), as amended) shall be known as a protest.

### Rule 3.2. Commencement of Action

(a) *Summons: Filing; fee.* A civil action is commenced by a party to contest (1) denial of a protest under section 515 of the Tariff Act of 1930, as amended (19 U.S.C. § 1515, as amended); (2) a decision of the Secretary of the Treasury under section 516 of the Tariff Act of 1930, as amended (19 U.S.C. § 1516, as amended); or (3) a determination by the Secretary of the Treasury under section 201 of the Antidumping Act, 1921, as amended (19 U.S.C. § 160, as amended), that a class or kind of merchandise is not being, nor likely to be, sold in the United States at less than its fair value, or under section 303 of the Tariff Act of 1930, as amended (19 U.S.C. § 1303, as amended), that a bounty or grant is not being paid or bestowed, by filing a summons with the clerk of the court and by paying to him a filing fee of $5.

(b) *Summons: Filing by Mail; date of filing.* For purposes of commencement of an action, a summons sent by registered or certified mail properly addressed to the clerk of the court at One Federal Plaza, New York, New York 10007, with the proper postage affixed and return receipt requested, shall be deemed filed as of the date of postmark.

(c) *Summons: By whom filed.* A summons in an action commenced by an individual in his own behalf may be filed by such individual, or by an attorney admitted to practice before this court. A summons in an action commenced by a corporation, partnership or other voluntary association may be filed only by an attorney admitted to practice before this court.

(d) *Summons: Number of copies.* (1) An original and 4 copies of the summons shall be filed with the clerk in an action commenced to contest denial of a protest under section 515 of the Tariff Act of 1930, as amended (19 U.S.C. § 1515, as amended): *Provided,* That when the action includes, as permitted by Rule 3.3(b), protests denied at more than one port of entry, an additional copy of the summons shall be filed at the same time for each such different port of entry.

(2) An original and 5 copies of the summons shall be filed with the clerk in an action commenced to contest a decision of the Secretary of the Treasury under section 516 of the Tariff Act of 1930, as amended (19 U.S.C. § 1516, as amended): *Provided,* That when the action includes entries involving more than one consignee or agent, or more than one port of entry, an additional copy of the summons shall be filed at the same time for each such different consignee or agent and for each such different port of entry.

(3) An original and 3 copies of the summons shall be filed with the clerk in an action commenced to contest a determination by the Secretary of the Treasury under section 201 of the Antidumping Act, 1921, as amended (19 U.S.C. § 160, as amended), that a class or kind of merchandise is not being, nor likely to be, sold in the United States at less than its fair value, or under section 303 of the Tariff Act of 1930, as amended (19 U.S.C. § 1303, as amended), that a bounty or grant is not being paid or bestowed.

(e) *Summons: Date of filing; Motion to correct.* (1) The records of the clerk, including the date of filing stamped on the summons, or when sent by registered or certified mail the date of postmark, shall be final and conclusive evidence of the date on which a summons was filed unless a motion to correct the record is made and granted pursuant to subparagraph (2) of this paragraph (e).

(2) A party who contends that the effective filing date of a summons should be a date other than the date shown in the records of the clerk may seek a corrective order by motion made pursuant to Rule 4.12, and the court may, upon satisfactory proof that the records of the clerk with respect to the filing date were incorrect, order the record corrected.

(f) *Amendment.* At any time in its discretion and upon such terms as it deems just, the court may allow any summons or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the summons issued.

(g) *Summons: Service.* Upon filing of a summons it shall be signed by the clerk under the seal of the court and the clerk shall return a copy, together with a receipt for payment of the filing fee, to the person who filed the summons, and shall make service of the summons as prescribed by subparagraphs (1), (2), and (3) of this paragraph (g).

(1) When the United States is an adverse party, except in an action commenced under section 516(d) of the Tariff Act of 1930, as amended (19 U.S.C. § 1516(d), as amended), the clerk shall make service of the summons: upon the Attorney General, by delivery or by mailing a copy to the Chief, Customs Section, Department of Justice; and upon the Secretary of the Treasury, by delivery or by mailing a copy to the Assistant Chief Counsel for Customs Litigation, Bureau of Customs,[1] and by delivery or by mailing a copy to the district director for the customs district in which the protest was denied, or, in which the liquidation of an entry is contested under section 516(c) of the Tariff Act of 1930, as amended (19 U.S.C. § 1516(c), as amended).

(2) When a civil action is commenced to contest a decision of the Secretary of the Treasury under section 516(c) of the Tariff Act of 1930, as amended (19 U.S.C. § 1516(c), as amended), the clerk shall also deliver or mail a copy of the summons to the consignee or agent of the consignee involved in each entry which is the subject of the civil action.

(3) When the United States is an adverse party in an action commenced under section 516(d) of the Tariff Act of 1930, as amended (19 U.S.C. § 1516(d), as amended), the clerk shall make service of the summons upon the persons named in subparagraph (1) of this paragraph (g) with the exception of the district director.

(h) *Documents furnished in an action other than one commenced under 19 U.S.C. § 1516(d), as amended.* Upon service of the summons on the appropriate district director, he shall, in accordance with 28 U.S.C. § 2632(f), as amended, forthwith transmit the following items, if they exist, to the court as part of the official record of the civil action:

(1) consumption or other entry;
(2) commercial invoice;
(3) special customs invoice;
(4) copy of protest;
(5) copy of denial of protest in whole or in part;
(6) importer's exhibits;
(7) official samples;
(8) any official laboratory reports; and
(9) the summary sheet.

If any of the aforesaid items do not exist in the particular action, an affirmative statement to that effect shall be transmitted as part of the official record.

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[1] Any reference in these rules to the Bureau of Customs should be understood as a reference to the United States Customs Service.

(i) *Documents Furnished in an Action Commenced Under 19 U.S.C. § 1516(d), as Amended.* Upon service of the summons in an action commenced under section 516(d) of the Tariff Act of 1930, as amended (19 U.S.C. § 1516(d), as amended), on the Secretary of the Treasury, he, or his designee, shall, in accordance with 28 U.S.C. § 2632(g), as amended, forthwith transmit the following items, if they exist, to the court as part of the official record of the civil action:

(1) a certified copy of the transcript of any hearing held by the Secretary in the particular proceeding which resulted in the challenged determination; and

(2) a certified copy of all notices, determinations, or other matters which the Secretary has caused to be published in the Federal Register in connection with the particular proceeding described in subparagraph (1) of this paragraph (i).

**Rule 3.3. Denied Protest; Single Civil Action**

(a) *Single civil action.* Only one civil action may be commenced to contest the denial of a single protest and, except as otherwise provided in paragraph (b) of this rule, only one denied protest may be included in a single civil action. However, separate summonses filed by different authorized persons with respect to any one category of merchandise that is the subject of the same denied protest shall be deemed to be part of a single civil action.

(b) *Common issue; more than one protest.* A single importer contesting denial of more than one protest filed by him or by an authorized person in his behalf may include, at the same time, in a single civil action, any number of such denied protests when all such denied protests involved the same category of merchandise and involve a common issue or issues.

(c) *Improperly included protests.* Whenever it appears to the court that one or more denied protests were improperly included in a civil action, any such improperly included protest shall, after affording the parties an opportunity to be heard, be severed from the civil action and dismissed, unless: within 30 days from the order of severance, plaintiff perfects a separate civil action for each such improperly included denied protest by filing a separate summons in the form, manner and with the content as prescribed by these rules; and pays to the clerk of the court a filing fee of $5 for each such separate summons together with, in the discretion of the court, costs not to exceed $10.

**Rule 3.4. Summons—Denied Protest: Form and Content**

(a) *Form and content: General.* A summons in a civil action commenced to contest the denial of a protest under section 515 of the Tariff Act of 1930, as amended (19 U.S.C. § 1515, as amended) shall be substantially in the form as shown in Appendix A and shall set forth:

(1) the name of the plaintiff;

(2) with respect to each denied protest included in the civil action, the protest number, the date the protest was filed, and the date the protest was denied by mailing of a notice of denial or by operation of law;

(3) with respect to each entry of merchandise involved in a denied protest included in the civil action, the port of entry, the entry number, the date of entry, and the date of liquidation;

(4) with respect to each category of merchandise covered by an entry involved in a denied protest included in the civil action, the name of each such category of merchandise with respect to which the denial of the protest is contested in the civil action;

(5) a statement that each denied protest included in the civil action was filed and denied as prescribed by law, and that all liquidated duties, charges or exactions were paid at the port of entry unless otherwise shown, which statement shall be signed by the attorney filing the summons, or by an individual filing the summons in his own behalf;

(6) the name, post office address, and telephone number of the attorney filing the summons or of an individual filing the summons in his own behalf;

(7) with respect to each denied protest included in the civil action, the address of the district director for the customs district in which the protest was denied; and

(8) where more than one protest is included in a single civil action pursuant to Rule 3.3(b), a concise statement clearly setting forth the category of merchandise and the common issue involved.

(b) *Appraised value.* When the administrative decision contested in the civil action involved the appraised value of merchandise, the summons shall also set forth:

(1) a statement of the appraised value and the statutory basis believed to have been used; and

(2) the statement of value and the statutory basis which was claimed in the protest to be proper.

(c) *Classification, rate or amount.* When the administrative decision contested in the civil action involved the classification of merchandise or rate of duty assessed thereon, the summons shall also set forth:

(1) the paragraph or item number under which the merchandise was classified, and the rate of duty which was assessed; and

(2) the paragraph or item number under which the merchandise was claimed in the protest to be subject to classification and the rate of duty which was claimed in the protest to be applicable.

(d) *Other.* When any other administrative decision is contested in the civil action, the summons shall also set forth:

(1) the specific nature of the other administrative decision as listed in 28 U.S.C. § 1582(a), as amended; and

(2) the claim which was made in the protest.

**Rule 3.5. Summons by American Manufacturers, Producers, or Wholesalers: Form and Content**

(a) *Form and content of summons in a civil action arising under 19 U.S.C. § 1516(c), as amended: General.* A summons in a civil action commenced to contest a decision of the Secretary of the Treasury under section 516(c) of the Tariff Act of 1930, as amended (19 U.S.C. § 1516(c), as amended) shall be substantially in the form as shown in Appendix B-1 and shall set forth:

(1) the name and status of the plaintiff;

(2) with respect to each entry of merchandise included in the civil action, the date of mailing of the notice of liquidation sent pursuant to section 516(c) of the Tariff Act of 1930, as amended (19 U.S.C. § 1516(c), as amended);

(3) with respect to each entry of merchandise included in the civil action, the port of entry, the entry number, the date of entry, and the date of liquidation;

(4) a description of the designated imported merchandise;

(5) the name, signature, post office address, and telephone number of the attorney filing the summons or of the individual filing the summons in his own behalf;

(6) with respect to each entry of merchandise included in the civil action, the name and address of the consignee or his agent; and

(7) with respect to each entry of merchandise included in the civil action, the address of the district director for the customs district in which the entry was liquidated.

(b) *Appraised value.* When the decision contested in the civil action involved the appraised value of merchandise, the summons shall also set forth:

(1) a statement of the appraised value and the statutory basis believed to have been used; and

(2) the statement of value and the statutory basis which was claimed in the petition to be proper.

(c) *Classification, rate or amount.* When the decision contested in the civil action involved the classification of merchandise or rate of duty assessed thereon, the summons shall also set forth:

(1) the item number under which the merchandise was classified and the rate of duty which was assessed; and

(2) the item number under which the merchandise was claimed in the petition to be subject to classification, and the rate of duty which was claimed in the petition to be applicable.

(d) *Nonassessment of countervailing or antidumping duties.* When the decision contested is the Secretary of the Treasury's failure to assess countervailing or antidumping duties, the summons shall so indicate.

(e) *Form and content of summons in a civil action arising under 19 U.S.C. § 1516(d), as amended: General.* A summons in a civil action commenced to contest a determination by the Secretary of the Treasury under section 516(d) of the Tariff Act of 1930, as amended (19 U.S.C. § 1516(d), as amended) shall be substantially in the form as shown in Appendix B-2 and shall set forth:

(1) the name and status of the plaintiff;

(2) a brief description of the contested determination by the Secretary of the Treasury;

(3) the date of such determination by the Secretary of the Treasury;

(4) the date of filing with the Secretary of the Treasury the plaintiff's written notice of a desire to contest such determination;

(5) the date of publication by the Secretary of the Treasury of the notice of a desire to contest such determination;

(6) the name, signature, post office address, and telephone number of the attorney filing the summons or of the individual filing the summons in his own behalf.

**Rule 3.6. Time**

(a) *Computation.* In computing any period of time prescribed or allowed by these rules, or by order of the court, the date of the act, event, or default from which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or a legal holiday, [1] in which event the period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

(b) *Extension.*

(1) Except as provided in Rules 14.6(e) and 14.8(e), when, by these rules or by a notice given thereunder or by order of the court, an act is required or allowed to be done at or within a specified time, the court may upon motion, for good cause shown, order the period extended.

(2) Every motion for extension of time must set forth therein the specific number of additional days requested, the date to which the extension is to run, the extent to which the time for the performance of the particular act has been previously extended, and the reason or reasons upon which the motion for extension is based, and shall be filed no later than 5 days prior to the expiration of the period allowed for the performance of the act to which the motion relates (including any previous extension of time). An objection or response thereto shall be filed within 5 days after service of such motion. The foregoing requirement as to filing may be waived by the court upon a showing, in a separate motion for leave to file out of time, that the delay in filing was the result of excusable neglect or circumstances beyond the control of the party.

(3) No disposition shall be made until the court acts upon the motion for extension of time.

(4) If the motion for an extension of time is denied and less than 5 days remain of the time to perform the act, or the time to perform the act has expired, the act may be performed within 5 days after the court enters the order denying the extension of time.

(c) *Additional time after service by mail.* Whenever a party has the right or obligation to do some act or take some proceeding within a prescribed period after the service of a pleading, motion, or other paper upon him, and the service is made by mail, 5 days shall be added to the prescribed period.

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[1] Effective January 1, 1971, the legal holidays are: New Years' Day, January 1; Washington's Birthday, third Monday in February; Memorial Day, last Monday in May; Independence Day, July 4; Labor Day, first Monday in September; Columbus Day, second Monday in October; Veterans Day, fourth Monday in October; Thanksgiving Day, fourth Thursday in November; Christmas Day, December 25; and any other day designated as a holiday by the President or the Congress of the United States.

(d) *When time begins to run.* In computing any period of time prescribed by these rules, or by order of the court, the period of time shall begin to run on the day after the date of service of a pleading, motion, or other paper unless otherwise particularly specified in these rules.

## CHAPTER IV. PLEADINGS; MOTIONS

### Rule 4.1. Service and Filing of Pleadings and Other Papers

(a) *Service.* Every order required by its terms to be served, every pleading, written motion, written notice, appearance, brief, and other papers, shall be served upon each of the parties affected thereby and filed with the court in the following manner:

(1) upon the court, by filing with the clerk the original thereof and such copies as may be required by these rules;

(2) upon a party other than the United States, by delivery or by mailing a copy to the attorney of record for such party at his office address;

(3) upon a party not represented by an attorney, by delivery or by mailing a copy to such party at the address noted of record;

(4) upon the United States, by delivery or by mailing a copy to the Office of the Assistant Attorney General of the United States, Chief, Customs Section, 26 Federal Plaza, New York, New York 10007.

(b) *Delivery defined.* "Delivery" within these rules means handing a copy of the paper to be served to the attorney or party; or leaving it at his office with his clerk or other person in charge thereof; or, if the office is closed, by depositing the paper enclosed in a sealed wrapper addressed to the attorney or party in his office, letterbox or drop.

(c) *Mailing defined.* "Mailing" within these rules means depositing in the United States mail, properly addressed, with adequate postage affixed thereto. Service by mail is completed upon mailing.

(d) *Proof of service.* Papers presented for filing shall contain an acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service and of the name of the person served, certified by the person who made service. Proof of service may appear on or be affixed to the papers filed. The clerk may, for good cause shown, permit papers to be filed without acknowledgment or proof of service but shall require such to be filed promptly thereafter.

(e) *Filing.* The filing of pleadings and other papers with the court as required by these rules may be made by delivery or by mailing to the clerk of the court at One Federal Plaza, New York, New York 10007, or, at places other than New York, with his appointed deputy clerk, where such pleadings or other papers relate to an action scheduled to be tried at that place. Filing is completed upon receipt by the clerk or his appointed deputy clerk, except that a pleading or other paper, mailed to the court at New York, shall be deemed filed as of the date of postmark if sent by registered or certified mail properly addressed to the clerk of the court at the aforementioned address, with the proper postage affixed and return receipt requested.

(f) *Date of filing; motion to correct.* The provisions of Rule 3.2(e), concerning the date of filing and motion to correct, applicable to summonses, shall also be applicable to pleadings and other papers.

### Rule 4.2. General Rules of Pleading: Alternative Claims

(a) Each statement made in a pleading shall be simple, concise and direct.

(b) A party may set forth two or more claims or defenses alternatively, regardless of consistency.

(c) All statements shall be made subject to the obligations set forth in Rule 4.11(c).

(d) All pleadings shall be so construed as to do substantial justice.

### Rule 4.3. Form of Pleadings

(a) *Caption; names of parties; designation; pagination.* Every pleading and other paper to be filed with the court shall contain a caption in large and distinct type setting forth the name of this court, UNITED STATES CUSTOMS COURT, the title of the action, the court number, and a designation showing the nature of the pleading or other paper. In the complaint the title of the action shall include the names of all the parties, but in subsequent pleadings or papers it is sufficient to state the name of the first party on each side with an appropriate indication of other parties. The pagination of each pleading or other paper shall commence with page 1.

(b) *Paragraphs; separate statements.* All allegations of claim or defense shall be made in numbered paragraphs. The contents of each paragraph shall be limited as far as practicable to a statement of a single set of circumstances. A paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense, other than denials, shall be stated in a separate count or defense, whenever a separation facilitates the clear presentation of the matter set forth.

(c) *Adoption by reference; exhibits.* Statements in a pleading may be adopted by reference in a different part of the same pleading, or in another pleading, or in any motion. A copy of any written instrument which is an exhibit to a pleading is part thereof for all purposes, unless otherwise indicated, but the adverse party shall not be deemed to have admitted the truth of the allegations in such exhibit merely because he has failed to deny them explicitly.

### Rule 4.4. Pleadings

(a) *Filing of complaint and answer.* A plaintiff who desires to try or otherwise prosecute an action shall serve upon the opposite party and file with the court a complaint to which an answer shall be filed. There shall be a reply to an alternative claim or an affirmative defense contained in an answer. No other pleading shall be allowed, except that the court may order a reply to an answer.

(b) *Demand for a complaint.* A defendant who desires to have an action tried or otherwise prosecuted shall serve upon the opposite party and file with the court a demand for a complaint. Upon the service and filing of such demand, the plaintiff, in the absence of other disposition, shall serve upon the opposite party and file with the court a complaint within the time period prescribed by Rule 4.7 for filing an answer.

### Rule 4.5. Content of Complaint in a Civil Action Pursuant to 28 U.S.C. § 2632, as Amended

(a) *General.* The complaint in a civil action shall set forth:

(1) a statement of plaintiff's standing in the action;

(2) a statement that the protest was timely filed;

(3) a statement, when appropriate, that all liquidated duties have been paid;

(4) a description of the merchandise involved;

(5) a specification of the contested customs decision or decisions; and

(6) a demand for judgment for the relief to which plaintiff deems himself entitled.

(b) *Value.* If the contested customs decision involves the value of merchandise, the complaint shall also set forth:

(1) the date and country of exportation;

(2) a statement of the appraised value or values;

(3) a statement of the claimed statutory basis or bases of value;

(4) a statement of the amount or amounts of the unit value claimed to be the correct value or values, or a statement of how the claimed value may be computed; and

(5) concise allegations of plaintiff's contentions of fact and law in support of the above.

(c) *Classification.* If the contested customs decision involves the classification of merchandise, the complaint shall also set forth:

(1) the tariff paragraph or item number of the statute, including all modifications and amendments thereof, under which the merchandise was classified, and the rate of duty imposed;

(2) the tariff description and the paragraph or item number of the statute, including all modifications and amendments thereof, under which the merchandise is claimed to be properly subject to classification and the rate of duty claimed to be applicable; and

(3) concise allegations of plaintiff's contentions of fact and law in support of the above.

(d) *Other.* If the contested customs decision involves any other administrative decision, the complaint shall also set forth:

(1) a statement of the nature of the alleged error in the decision; and

(2) concise allegations of plaintiff's contentions of fact and law in support of his position.

### Rule 4.5A. Content of Complaint in an Appeal for Reappraisement

The complaint in an appeal for reappraisement shall set forth:

(1) a statement of plaintiff's standing in the action;

(2) the date of appraisement or notice of appraisement, whichever is appropriate;

(3) the place where the appeal for reappraisement was filed and the date it was received;

(4) a description of the merchandise involved;

(5) the date and country of exportation;

(6) a statement of the appraised value or values;

(7) a statement of the claimed statutory basis or bases of value;

(8) a statement of the amount or amounts of the unit value claimed to be the correct value or values;

(9) concise allegations of plaintiff's contentions of fact and law in support of the claimed statutory basis or bases of value and the claimed unit value or values; and

(10) a demand for judgment for the relief to which plaintiff deems himself entitled.

### Rule 4.5B. Content of Complaint in a Protest

The complaint in a protest shall set forth:

(1) a statement of plaintiff's standing in the action;

(2) the date of liquidation or other customs decision complained of;

(3) the date and place where the protest was filed;

(4) a statement, where appropriate, that all liquidated duties have been paid;

(5) a statement of the customs decision complained of, including, where appropriate, the tariff description and the paragraph or item number of the statute, including all modifications and amendments thereof, under which the merchandise was classified and the rate of duty imposed;

(6) a statement of the nature of the alleged error in the customs decision;

(7) where appropriate, the tariff description and the paragraph or item number of the statute, including all modifications and amendments thereof, under which the merchandise is claimed to be properly subject to classification and the rate of duty claimed to be applicable;

(8) concise allegations of plaintiff's contentions of fact and law in support of his position; and

(9) a demand for judgment for the relief to which plaintiff deems himself entitled.

### Rule 4.6. Content of Answer

(a) *General.* The answer to a complaint shall:

(1) admit or deny in separately numbered paragraphs, corresponding to the paragraphs of the complaint, the allegations in the complaint;

(2) if there is a denial of an allegation, contain a concise statement of the defendant's contention as to the facts or law concerning the matter denied; and

(3) if the information known or readily obtainable by defendant is insufficient to enable it to form a belief as to the truth of an allegation, the answer shall so state and such statement shall have the effect of a denial.

(b) *Value.* If the action involves the value of merchandise, the answer shall also set forth:

(1) an affirmative statement of the statutory basis or bases of appraisement; and

(2) If the defendant claims a basis or bases of value or an amount or amounts of unit values different from the appraised basis or amount, such different basis or amount.

(c) *Classification.* If the defendant claims a classification or rate of duty different from the liquidation classification or assessed rate, the answer shall also set forth such different classification or rate of duty.

(d) *Alternative claims or affirmative defenses.* If the defendant desires to make an alternative claim or set forth an affirmative defense in its answer, such alternative claim or affirmative defense shall be designated as such and set forth in separately numbered paragraphs.

### Rule 4.7. Defenses and Objections: When and How Presented

(a) *Time for answer and reply.* (1) Except as otherwise provided in these rules, defendant shall file its answer within 60 days after the service of the complaint.

(2) Except as otherwise provided in these rules, the service of a motion permitted under this rule shall modify the above period of time as follows: If the court denies the motion or postpones its disposition until the trial on the merits, the answer shall be served within 30 days after service by the clerk of the order of the court or within the time remaining to answer as provided under subparagraph (1) of this paragraph (a), whichever period is longer.

(3) If the court grants a motion for a more definite statement pursuant to paragraph (d) of this rule, the answer shall be served within 30 days after the service of the more definite statement.

(4) When these rules provide for the filing of a reply to an answer, the reply shall be filed within 30 days after service of the answer.

(b) *Defenses: how presented.* The following defenses may be made by a motion to dismiss: (1) that plaintiff has no standing in the matter; (2) lack of jurisdiction of the subject matter; (3) failure to perform conditions precedent; and (4) failure to state a claim upon which relief may be granted. A motion making any of these defenses may be made before answer.

(c) *Preliminary hearings.* Any party may move before trial for a separate hearing and determination of the defenses enumerated (1), (2), (3), and (4) in paragraph (b) of this rule.

(d) *Motion for more definite statement.* Any party may move for an order to make any pleading more definite and certain. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 30 days after service by the clerk of the order of the court or such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such other order as it deems just.

(e) *Motion to strike.* Upon motion of defendant before answer, or upon motion of plaintiff within 30 days after the service of the answer upon him, or upon the court's own motion at any time, the court may order stricken from the complaint or answer any redundant, immaterial, impertinent, or scandalous matter.

(f) *Waiver of defenses.* Except for jurisdictional defenses, a party waives all defenses not set forth in its answer or reply and objections which it does not present by motion as provided in this rule.

### Rule 4.8. Amendments of Pleadings

(a) *Amendments.* A party may amend his pleading once as a matter of course at any time before service on him of a responsive pleading or of a motion to dismiss. If the pleading is one to which no responsive pleading is permitted, a party may amend at any time within 30 days after the pleading is served. Otherwise, a party may amend his pleading only by written consent of the adverse party or by leave of the court upon motion; and leave shall be freely given when justice requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading, or within 30 days after service of the amended pleading, whichever period is longer, unless the court orders otherwise.

(b) *Amendments to conform to the evidence.* When issues not raised by the pleadings are tried by express consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendments of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment. If evidence is objected to at trial on the ground that it is not within the scope of the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be served thereby and the objecting party fails to satisfy the court that the admission of such evidence will prejudice him in maintaining his action or defense upon the merits. The court shall afford the objecting party an opportunity to meet such evidence.

(c) *Form and filing.* Every amendment of a pleading shall:

(1) include so much of the prior pleading as may be required to show clearly how the pleading is to stand amended;

(2) comply with the requirements of Rules 4.3 and 4.11 as to caption, designation, and signature;

(3) carry designation as the first, second, or subsequent amended pleading; and

(4) comply with the pertinent requirements of Rule 17.1, except that upon a proper showing, by motion filed with the clerk or during pretrial conference or at trial, that the proposed amendments are minor in character or of such brevity as to warrant the use of pasters or interlineation, the court may waive the requirements of this clause (4) of this paragraph (c) and permit such amendments to be made by pasters or interlineation. When the requirements of clause (4) apply, the same number of copies of the amendments shall be filed as in the case of the pleading that is to stand amended.

### Rule 4.9. Motion for Judgment on the Pleadings

After the complaint and answer are filed, any party may move for judgment on the pleadings: *Provided,* That no such motion may be filed after the action has been set for trial, except by prior order of the court upon motion. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and are not excluded by the court, the motion shall be treated as one for summary judgment and shall be disposed of as provided in Rule 8.2, and all parties shall be given reasonable opportunity to present all material made pertinent to such motion by Rule 8.2.

### Rule 4.10. Marked Pleadings

At or prior to the commencement of a trial, the attorney for the plaintiff, unless excused by the court from so doing, shall submit to the trial judge and to counsel for the opposing party a copy of the complaint marked to indicate those allegations which have been admitted or denied in whole or in part.

### Rule 4.11. Signing of Papers

(a) *Parties other than the United States.* Every pleading or other paper of a party other than the United States represented by an attorney shall bear the typewritten name of the individual attorney who shall sign the same, and state the name, address, and telephone number of the attorney of record on the face thereof. A party who is not represented by an attorney shall set forth his post office address and telephone number in his initial pleading and shall sign his pleadings and papers.

(b) *The United States.* Every pleading or other paper of the United States shall be signed by the Chief, Customs Section, in behalf of the Assistant Attorney General, Civil Division, Department of Justice.

(c) *Effect of signature.* The signature of an attorney or a party constitutes certification by him that he has read the pleading or paper, and that to the best of his knowledge, information, and belief there is good ground to support it. The signature of an attorney also constitutes a representation by him that he is authorized to represent the party or parties in whose behalf the pleading or paper is filed.

### Rule 4.12. Motion Practice

(a) *Assignment of motions—Motion Part.* All motions shall be filed with the clerk. When the action to which a motion pertains has been assigned to a judge or judges pursuant to Rule 2.3(a), the motion shall be referred by the clerk to that judge or judges. Unless otherwise provided by these rules, all other motions shall be referred by the clerk to the motion part of the court.

(b) *Content of motions.* Every application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be in writing, shall state the grounds therefor, shall set forth the relief or order sought, and shall be accompanied by a proposed order except when the motion is consented to by all the parties.

(c) *Time to Respond.* Except as provided in Rules 3.6(b), 14.6(e) and 14.8(e), an objection or response to a contested motion shall be filed within 10 days after service of such motion, except that an objection or response to a dispositive motion, i.e., a motion to dismiss the action, a motion for judgment on the pleadings, and a motion for summary judgment, shall be filed within 30 days after service of such motion. On a dispositive motion the moving party shall have 15 days from the date of service of the objections or response to file a reply.

(d) *Briefs; Memoranda; Affidavits.* Any brief, memorandum of citations, or affidavit submitted in support of any motion, or in support of any objection or response to a motion, shall be included in or attached to each copy of such motion, objection, or response.

(e) *Order to Show Cause.* An order to show cause to bring on a motion may be granted only upon a clear and specific showing by affidavit of good and sufficient reasons why procedure other than by notice of motion is necessary.

### Rule 4.13. Application for Three-Judge Panel

Any party to an action may move, after issue has been joined but not later than 10 days after the filing of a notice of trial, for the designation by the chief judge of three judges of the court to hear and determine the action. Such motion shall be filed with the clerk of the court and referred to the chief judge. It shall state specifically the issue of the constitutionality of an Act of Congress, a proclamation of the President or an Executive order, or the broad or significant implications in the administration or interpretation of the customs laws claimed to be involved, and shall otherwise conform to the requirements of Rule 4.12(b). The time to respond and the filing of briefs, memoranda, and affidavits shall be governed so far as applicable by Rules 4.12(c) and (d).

## CHAPTER V. PARTIES

### Rule 5.1. American Manufacturers, Producers, or Wholesalers; Practice

(a) *Party in interest.* A party in interest in an action filed under section 516(c) of the Tariff Act of 1930, as amended (19 U.S.C. § 1516(c), as amended) shall be deemed to be a defendant for the purposes of the application of these rules to that action.

(b) *Trial, participation.* A party in interest who does not file responsive pleadings as required by these rules shall not be permitted to engage in the active conduct of the litigation unless, on motion for good cause shown, the court orders otherwise. If the court permits such a party to participate, the pleadings filed by the defendant, the United States, shall also be considered the pleadings of such party in interest for all purposes.

## CHAPTER VI. DISCOVERY

### Rule 6.1. General Provisions Governing Discovery

(a) *Discovery methods.* Except as otherwise provided by Rule 7.1, parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property for inspection and other purposes; and, requests for admissions. Unless the court orders otherwise, the frequency of use of these methods is not limited.

(b) *Scope of discovery.* Unless otherwise ordered by the court in accordance with these rules, the scope of discovery is as follows:

(1) Parties may obtain discovery regarding any matter, not privileged, which is relevant to

the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things, and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissable at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) Subject to the provisions of subparagraph (3) of this paragraph (b), a party may obtain discovery of documents and tangible things prepared in anticipation of litigation or for trial by or for another party, by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing of good cause therefor, except that a statement concerning the action or its subject matter previously given by the party or any agent of his seeking the statement may be obtained without such a showing. A statement of a party is (i) a written statement signed or otherwise adopted or approved by the party or his agent, or (ii) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by the party or his agent and contemporaneously recorded.

(3) By means of written interrogatories, pursuant to Rule 6.3, a party may require any other party to identify each person whom the other party expects to call as an expert witness at the trial, and to state the subject matter on which the expert is expected to testify.

In relation to the expert testimony to be adduced at the trial, the court, on its own motion or the motion of a party, may require the submission or exchange of statements of the proposed direct testimony of expert witnesses, in narrative or question and answer form, or summaries of experts' reports. Every such summary shall contain the substance of the report in terms of conclusions and the principal facts deemed to support the expert's conclusions.

(c) *Protective orders.* Upon motion by any party or by the person from whom discovery is sought, and for good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including, but not limited to, one or more of the following:

(1) that the discovery not be had;

(2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(5) that discovery be conducted with no one present except persons designated by the court;

(6) that a deposition, after being sealed, be opened only by order of the court;

(7) that a trade secret, or confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; or

(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

(d) *Sequence and timing of discovery.* Unless the court, upon motion, for the convenience of parties and witnesses and in the interest of justice, orders otherwise, methods of discovery may be used in any sequence; and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery: *Provided,* That no measure for discovery may be initiated prior to the filing of an answer.

(e) *Supplementation of responses.* A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to the identity and location of persons having knowledge of discoverable matters, and the identity of each person expected to be called as an expert witness at trial and the subject matter on which the expert is expected to testify.

(2) A party who knows or later learns that his response is incorrect is under a duty seasonably to correct the response.

(3) A duty to supplement responses may be imposed by order of the court, by agreement of the parties, or at any time prior to trial through request for supplementation of prior responses.

### Rule 6.2. Request for Admissions

(a) *Scope and content.* After an answer has been filed a party may serve upon any other party a written request for admissions. A request for admissions may contain:

(1) a statement of the material matters of fact as to which it is believed that there is no substantial controversy between the parties (such statements being phrased clearly and coherently in the form of distinct propostions, with the various paragraphs and subparagraphs appropriately numbered or lettered), followed by a request that the party served admit the truth of such matters of fact; and

(2) a list accurately describing documents that are to be offered in evidence, accompanied by a written request for the admission of the genuineness of any relevant document described in and exhibited with the request or a written request that the party served consent to the admission in evidence of the documents so listed and exhibited with the request.

(b) *Response to request for admissions.* (1) Each matter as to which an admission is requested shall be deemed admitted unless, within 60 days after the service thereof or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney.

(2) The reasons for each objection made shall be stated. The answer shall specifically admit or deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission. If a party must qualify his answer or can admit only a part, he shall specify so much of it as is admitted to be true and shall qualify or deny the remainder. Lack of knowledge or information shall not be given as a reason to fail to admit or deny unless the answering party states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. Reasons for refusal to concede the genuineness of documents and objections to the admission of documents in evidence shall be stated in such terms as to enable the party making the request for admissions to understand the challenge and prepare to meet it if he can.

(c) *Order to compel more proper answer.* The party who requested the admissions may move for an order with respect to the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter be admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pretrial conference or at a designated time prior to trial.

(d) *Effect of admission.* Any matter admitted under this rule is conclusively established for purposes of the pending action only; it does not constitute an admission by the particular party for any other purpose, and cannot be used against him in any other civil or criminal action or in any other proceeding.

(e) *Relief from admission.* The court, on motion, may permit withdrawal of an admission if the court finds that the party seeking withdrawal acted with due diligence and that the other party will not be prejudiced thereby.

### Rule 6.3. Interrogatories to Parties

(a) *Availability; procedures for use.* After an answer is filed, any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is the United States or a public or private corporation or a partnership or association, by any officer or agent, who shall furnish such information as is available to the party.

The interrogatories shall be so arranged that after each separate question there shall appear a blank space reasonably calculated to enable the answering party to have his answer typed in: *Provided,* That an answering party who elects to have each question retyped prior to having his answer typed in, shall be permitted to do so. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers and objections within a period designated by the party submitting the interrogatories, not less than 60 days after the service thereof or within such shorter or longer time as the court may allow. The party submitting the interrogatories may move for an order under Rule 6.5 with respect to any objection to or other failure to answer an interrogatory.

(b) *Scope; use at trial.* Interrogatories may relate to any matters which can be inquired into under Rule 6.1 and the answers may be used to the extent permitted by the rules of evidence.

(c) *Option to produce business records.* Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit, or inspection of such business records, or from a compilation, abstract, or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained, and to afford to the party serving the interrogatory reasonable opportunity to examine, audit, or inspect such records and to make copies thereof or compilations, abstracts, or summaries therefrom.

### Rule 6.4. Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes

(a) *Scope.* Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting in his behalf, to inspect and copy any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, with or without the use of detection devices) or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 6.1 and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspecting, measuring, surveying, photographing, testing, or sampling the merchandise in issue or any designated object or operation thereon, within the scope of Rule 6.1.

(b) *Procedure.* The request may be served upon any party after an answer is filed. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within a period designated in the request, not less than 30 days after the service thereof or within such shorter or longer time as the parties may agree or the court may allow. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless it is objected to, in which event the reasons for objections shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 6.5 with respect to any objection to or other failure to respond to the request, or any part thereof, or any failure to permit inspection as requested.

**Rule 6.5. Failure to Make Discovery: Sanctions**

(a) *Motion for order compelling discovery.* Upon reasonable notice to other parties and all persons affected thereby, a party may apply for an order compelling discovery as follows:

(1) *Motion.* (i) If a deponent or a party fails to answer a question propounded or submitted under Rules 6.3, 7.3, or 7.4, the party seeking discovery may apply for an order compelling an answer.

(ii) If a party, in response to a request for inspection submitted under Rule 6.4, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the party seeking discovery may apply for an order compelling inspection in accordance with the request.

(iii) On matters relating to a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

(2) *Evasive or incomplete answer.* For purposes of this paragraph (a), an evasive or incomplete answer is a failure to answer.

(b) *Failure to comply with order.* (1) If a deponent fails to be sworn or to answer a question after being directed to do so by the court, the failure may be considered a contempt of court.

(2) If any party or a person designated under Rule 7.3(b)(4) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under paragraph (a) of this rule, the court may make such orders in regard to the failure as are just, including, among others, the following:

(i) an order that the matters regarding which the order was made, or any other designated facts, shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(ii) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(iii) an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

(c) *Failure of party to attend at deposition or serve answers to interrogatories or respond to request for inspection.* If a party or a person designated under Rule 7.3(b)(4) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 6.3, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 6.4, after proper service of the request, the court, on motion, may make such orders in regard to the failure as are just, including any action authorized under subdivisions (i), (ii), and (iii) of subparagraph (b)(2) of this rule.

The failure to act described in this paragraph may not be excused on the ground that the discovery sought is objectionable, unless the party failing to act has applied for a protective order, as provided by paragraph (c) of Rule 6.1.

## CHAPTER VII. DEPOSITIONS

**Rule 7.1. Stipulations Regarding Deposition and Discovery Procedure**

Unless the court orders otherwise, the parties, by written stipulation filed with the clerk of the court; (1) may modify the procedures provided by these rules so as to permit other methods of discovery; and (2) may take any deposition provided for in these rules before any person, at any time or place, upon any notice, and in any manner, and when so taken such deposition may be used in the same manner as other depositions.

**Rule 7.2. Depositions to Perpetuate Testimony**

(a) *Pending action.* (1) *Motion.* A party who desires to perpetuate testimony in any action pending in the court shall file a motion therefor. The supporting papers shall move for an order authorizing such party to take the deposition of the persons to be examined for the purpose of perpetuating their testimony, and shall show, in addition:

(i) the subject matter of the action;

(ii) the facts which the party desires to establish by the proposed testimony and his reasons for desiring to perpetuate it;

(iii) the names and addresses of the persons to be examined and the substance of the testimony which the party expects to elicit from each; and

(iv) if notice of trial has not been filed, a reason as to the party's inability to serve and file such a notice at that time.

(2) *Order and examination.* If the court is satisfied that the perpetuation of the testimony will prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The deposition may then be taken in accordance with these rules.

(b) *Pending appeal.* If an appeal from a judgment of the court has been taken, or before the taking of an appeal, if the time therefor has not expired, the judge or judges who rendered the decision may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings before the court. In such case, the party who desires to perpetuate the testimony may make a motion, which shall be referred by the clerk to the judge or judges who rendered the decision, for leave to take depositions, upon the same notice and service thereof as if the action was pending before such judge or judges. The motion shall show: (1) the names and addresses of the persons to be examined and the substance of the testimony expected to be elicited from each; and (2) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, the court may make orders of the character provided for in subparagraph (a)(2) of this rule and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in actions pending before the court.

**Rule 7.3. Depositions Upon Oral Examination**

(a) *When depositions may be taken.* After an answer is filed and by leave of court upon motion, any party may take the testimony of any person, including a party, by deposition upon oral examination. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 10.1.

(b) *Notice of examination: general requirements; special notice; production of documents and things; deposition of organization.* (1) A party desiring to take the deposition of any person upon oral examination shall file a motion therefor. The motion shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. If a subpoena *duces tecum* is to be served on the person to be examined, a designation of the materials to be produced thereunder shall be attached to or included in the motion.

(2) A motion to take the deposition of a party may be accompanied by a request for the production of documents and tangible things at the taking of the deposition.

(3) The court may, for good cause shown, enlarge or shorten the time for taking the deposition.

(4) A party may in his motion name as the deponent a public or private corporation or a partnership or association or a department or agency of the United States, or a bureau, division or section of any such department or agency, and designate with reasonable particularity the matters on which examination is requested. The organization so named shall designate one or more officers, directors, or managing agents, or other persons duly authorized and qualified, to testify in its behalf as to matters known or available to the organization. This subparagraph (b)(4) does not preclude taking a deposition by any other procedure authorized in these rules.

(c) *Examination and cross-examination; record of examination; oath; objections.* Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of Rule 10.4. The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically and shall be transcribed.

All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions on the party taking the deposition and require him to transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

(d) *Motion to terminate or limit examination.* At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court may order the officer conducting the examination to cease from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 6.1(c). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order.

(e) *Submission to witness; changes; signing.* When the testimony is fully transcribed, the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and readings are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer, with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing, or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within 30 days of its submission to him, the officer shall sign it and state on the record the fact of the waiver, or of the illness or absence of the witness, or the fact of the refusal to sign, together with the reasons, if any, given therefor; and the deposition may then be used as fully as though signed, unless, on a motion to suppress under Rule 7.5(d)(3), the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(f) *Certification and filing by officers; exhibits; copies; notice of filing.*

(1) The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. He shall then securely seal the deposition in an envelope endorsed with the title of the action and marked "Deposition of [here insert name of witness]," and shall promptly deliver it, or send it by registered or certified mail, to the clerk of the court for filing and give prompt notice of its filing to all other parties.

Documents and things, unless objection is made to their production for inspection during the examination of the witness, shall be marked for identification and annexed to and sent with the deposition, and may be inspected and copied by any party, except that the person producing the materials may substitute copies to be marked for identification, if he affords to all parties fair opportunity to verify the copies by comparison with the originals.

(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

### Rule 7.4. Depositions of Witnesses Upon Written Interrogatories

(a) *Serving interrogatories; motion.* A party desiring to take the deposition of any person upon written interrogatories shall file a motion therefor. The motion shall state the name and address of the person who is to answer the interrogatories and the name or descriptive title and address of the officer before whom the deposition is to be taken and shall include a copy of the proposed interrogatories. Within 15 days after the motion is granted, an adverse party may serve cross-interrogatories. Within 10 days thereafter, redirect interrogatories may be served. Within 10 days thereafter, recross-interrogatories may be served. The court may, for good cause shown, enlarge or shorten the time specified herein.

(b) *Officer to take responses and prepare record.* A copy of the order and copies of all interrogatories served shall be delivered or mailed by the clerk of the court immediately to the officer designated in the order. The officer shall then proceed promptly, in the manner provided by Rule 7.3, to take the testimony of the witness in response to the interrogatories and to prepare, certify, and deliver the deposition, or send it by registered or certified mail, to the clerk of the court for filing, attaching thereto the copy of the order and the interrogatories received by him, and give prompt notice of its filing to all parties.

### Rule 7.5. Use of Depositions in Court Proceedings

(a) *Use of depositions.* At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any one of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness.

(2) The deposition of a party, or of any one who at the time of taking the deposition was an officer, director, managing agent, or a person designated under Rules 7.3(b)(4) and 7.4(a) to testify on behalf of a public or private corporation, partnership, or association which is a party, may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: that the witness is dead; that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; that the party offering the deposition has been unable to procure the attendance of the witness by a subpoena; or, upon motion, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts.

(5) Substitution of parties does not affect the right to use depositions previously taken.

(6) When an action in this court has been dismissed or decided and another action involving the same subject matter is afterwards tried between the same parties, or their representatives or successors in interest, all depositions lawfully taken and any duly filed in the former action may be used in the latter, as if originally taken therefor: *Provided*, That the proponent offering a deposition gives notice to the other litigants in the pending action 30 days before trial. For the purpose of this subparagraph (6), the term "party" includes the United States, the American manufacturer, producer, or wholesaler, and the party for whose account the merchandise was imported.

(b) *Objections to admissibility.* Subject to the provisions of Rule 7.7 and subparagraph (d)(2) of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof, for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(c) *Effect of taking or using depositions.* A party does not make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition, or any part thereof, for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by an adverse party of a deposition as described in subparagraph (a)(2) of this rule. At the trial, hearing, or interlocutory proceeding, any party may rebut any relevant evidence contained in a deposition, whether introduced by him or by any other party.

(d) *Effect of errors and irregularities in depositions.* (1) *As to disqualification of officer.* Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(2) *As to taking of deposition.* (i) Objections to the competency of a witness, or to the competency, relevancy, or materiality of testimony, are not waived by failure to make them during the taking of an oral deposition, unless the ground of the objection is one which might have been obviated, removed, or cured if presented at that time.

(ii) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived, unless reasonable objection thereto is made at the taking of the deposition.

(iii) Objections to the form of written interrogatories submitted under Rule 7.4 are waived, unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other interrogatories and within 10 days after service of the last interrogatories authorized.

(3) *As to completion and return of deposition.* Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 7.3 and 7.4, are waived, unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

### Rule 7.6. Persons Before Whom Depositions May Be Taken

(a) *Within the United States.* Within the United States or within a territory or insular possession subject to the dominion of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held, or before a person appointed by the court. A person so appointed shall have power to administer oaths and take testimony.

(b) *In foreign countries.* In a foreign country, depositions may be taken on notice (1) before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, or (2) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of his commission to administer any necessary oath and take testimony, or (3) pursuant to a letter rogatory issued in the name of the President of the United States under the seal of the court to take oral testimony.

(c) *Disqualification for interest.* No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action.

### Rule 7.7. Commissions—Letters Rogatory

(a) *How issued.* Commissions or letters rogatory shall be issued in the name of the President of the United States and under the seal of the court to examine witnesses resident in another country, whenever it shall appear to the satisfaction of the court that the testimony of said witnesses is necessary and important in such action, that the attendance of such witnesses cannot reasonably be had in the United States, and that the ends of justice would not warrant an oral deposition or hearing outside the United States.

(b) *When issued.* Commissions or letters rogatory to take depositions shall be issued only upon order pursuant to a motion made in writing, after answer is filed, setting forth the names and addresses of the witnesses whose testimony is sought, the facts which are expected to be proved, the necessity for the testimony, and why their attendance at the trial cannot reasonably be had.

(c) *Cross-interrogatories: How served.* The proposed interrogatories shall be annexed to the motion for a commission or letters rogatory. Unless the court orders otherwise: cross-interrogatories shall be served within 15 days after the motion is granted; within 10 days thereafter, redirect interrogatories may be served; and within 10 days thereafter, recross-interrogatories may be served.

(d) *Objections to interrogatories.* Objections to all interrogatories may be made at the trial to the same extent and under the same conditions as provided in Rule 7.5(d) with respect to depositions on oral examination. Any objections to such interrogatories which are required to be made prior to the commission or issuance of the letters rogatory shall be served within the time provided for the next succeeding interrogatories, or in the case of recross-interrogatories, within 10 days after the service thereof.

(e) *Commissions—Letters rogatory: To whom issued; taking of testimony; use of testimony.* (1) Commissions may be issued to an American consul, or to a notary public, or other officer authorized to administer oaths by the laws of the country where the deposition is taken. Letters rogatory may be issued to a foreign or international tribunal, officer, or agency and may be addressed "To the Appropriate Judicial Authority in [here name the country]."

(2) Such commissions or letters rogatory, together with all interrogatories, shall be forwarded by the clerk of the court immediately after the time for filing objections to the last interrogatory has expired, or, if objection is made, immediately after the court's ruling on the last interrogatory becomes final, with directions to proceed promptly to take the testimony of the witness in response to all the interrogatories and to prepare, certify, and return the deposition to the clerk of the court, attaching thereto the commission or letters rogatory and all interrogatories received by him.

(3) The answers of each witness under oath to all interrogatories shall be in writing and signed by him. The testimony so taken may be used in the same manner as prescribed in Rule 7.5.

(f) *Return, notice, filing of deposition.* Upon the return of the deposition the clerk of the court shall open and file it forthwith and give notice thereof to the parties. Any written motion to suppress such deposition, or any part thereof, shall be filed with the clerk within 30 days after the mailing of the notice.

### Rule 7.8. Costs

All costs, charges, and expenses incident to taking depositions shall be borne by the party making application for the same unless otherwise provided for by stipulation or order of the court.

## CHAPTER VIII. SUBMISSION ON AGREED STATEMENT OF FACTS; SUMMARY JUDGMENT; DISMISSAL OF ACTIONS

### Rule 8.1. Submission on Agreed Statement of Facts

(a) *General requirements.* An action may be submitted at any time without brief or complaint or formal amendment of any prior pleading by filing with the clerk of the court a submission on agreed statement of facts, signed by the parties or their attorneys, together with a proposed decision and judgment. Within 5 days after a proposed submission on agreed statement of facts is filed with the office of the Assistant Attorney General, Civil Division, Department of Justice, the plaintiff shall advise the court in writing as to the date of such filing.

(b) *Submission of valuation issues.* If the submission involves a valuation issue, it shall, wherever practicable, in addition to other information required by law, contain the following:

(1) the name or invoice description of the merchandise;

(2) the statutory basis of appraisement and the amount of the appraised value or the equivalent thereof;

(3) the statutory basis under which the merchandise is claimed to be dutiable;

(4) the claimed dutiable value;

(5) a statement that the protest was filed, and the action commenced, within the time provided by law, and that all liquidated duties have been paid;* and

(6) a statement of the facts necessary to bring the merchandise within the claimed statutory basis of value.

(c) *Submission of issues other than valuation issues.* If the submission involves an issue other than a valuation issue it shall, wherever practicable, in addition to other information required by law, contain the following:

(1) the name or invoice description of the merchandise;

(2) the tariff description under which the merchandise was classified;

(3) the tariff paragraph or item number, including all modifications and amendments thereof, under which the merchandise was classified, and the rate of duty imposed;

(4) the tariff description under which the merchandise is claimed to be classifiable;

(5) the tariff paragraph or item number, including all modifications and amendments thereof, under which the merchandise is claimed to be classifiable and the rate of duty claimed to be applicable;

(6) a statement that the protest was filed, and the action commenced within the time provided by law, and that all liquidated duties have been paid;

(7) a statement of facts sufficient to bring the merchandise within the claimed statutory provision; and

(8) if the submission involves an issue other than the classification of, or rate of duty chargeable upon, an importation;

(i) a statement identifying the nature of the protested decision,

(ii) a concise statement of the claim or claims made with regard to the disputed decision, and the relief requested by plaintiff, and

(iii) a concise statement of facts sufficient to sustain the aforesaid claims as a matter of law.

(d) *Proposed decision and judgment.* The proposed decision and judgment shall be substantially in the form set forth in Appendix C, with appropriate additions and deletions if the action does not involve valuation or classification.

### Rule 8.2. Summary Judgment

(a) *Motion; time for filing.* Subject to the provisions of paragraph (c) of this rule, a party may, at any time after a responsive pleading has been filed, move with or without supporting affidavits for a summary judgment in his favor upon all or any part of the action.

(b) *Annexation of statement.* Upon any motion for summary judgment, there shall be annexed to the motion a separate, short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried. The papers opposing a motion for summary judgment shall include a separate, short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried. All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party.

(c) *When leave is required.* A motion for summary judgment may not be filed by any party, except by prior order of the court upon motion, (1) after the action has been set for trial, or (2) after the filing of a stipulation of the parties or a pretrial memorandum containing all of the material facts, or (3) after the filing of his response to a motion for summary judgment by an adverse party.

(d) *Motion and proceedings thereon.* After a motion for summary judgment has been filed and served, and after expiration of the time allowed by Rule 4.12 for filing a response thereto, such motion may, upon motion of a party or by the court on its own motion, be set down for oral argument. Judgment shall be rendered in favor of the party entitled thereto as a matter of law, if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact.

(e) *Action not fully adjudicated on motion.* If, on motion under this rule, judgment is not rendered upon the whole action and a trial is necessary, the court may ascertain (if it is practicable to do so upon the basis of examining the pleadings and the evidence before it and interrogating counsel) what material facts exist without genuine controversy and what material facts are actually in good faith controverted. It shall thereupon, if practicable, make an order specifying the facts that appear to be without genuine controversy, and they shall be deemed established for all purposes in the action.

The court may make any other order as may aid in the disposition of the action.

(f) *Form of affidavits; further testimony.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith, except that all papers and documents which are part of the official record of the action may be referred to in an affidavit without attaching copies, and shall be considered by the court without additional certification. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, will be entered against him.

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*If an appeal for reappraisement is involved, there shall be a statement, in lieu of the statement required in subparagraph (5), that the appeal was filed within the time provided by law.

(g) *When affidavits are unavailable.* Should it appear from the affidavit of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may deny the motion for summary judgment, or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had, or may make such other order as is just.

(h) *Affidavits or statements made in bad faith.* Should it appear to the satisfaction of the court at any time that any of the affidavits or statements presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the offending party or attorney may be adjudged guilty of contempt.

### Rule 8.3. Dismissal of Actions

(a) Voluntary Dismissal.

(1) *Before service of notice of trial.* Before service of notice of trial, an action may be voluntarily abandoned and dismissed, without order of court, by filing a notice of abandonment, as follows:

(i) An original and 4 copies of the notice of abandonment shall be filed with the clerk, together with proof of service of a copy upon the opposing party as required by Rule 4.1(d).

(ii) The notice of abandonment shall be substantially in the form set forth in Appendix D and shall include, with respect to the action noticed for abandonment: the court number, the court file (reserve file, suspension file, or suspension disposition file); the customs bureau number (customs protest number or customs appeal for reappraisement number) or the protest number, and the port of entry.

(iii) A notice of abandonment may include on a schedule attached thereto more than one action: *Provided,* That all actions listed on the schedule arise from the same port of entry and are in the same court file. Where more than one port of entry is involved in the action, an additional copy of the notice of abandonment, together with a separate schedule, shall be filed for each such different port of entry.

(iv) When an action is abandoned by notice of abandonment, the clerk, without order of the court, shall make an appropriate entry of dismissal and forward a copy of the notice of abandonment to the parties, or their attorneys, and to the appropriate customs officer at the port of entry in which the merchandise affected thereby was imported, endorsed so as to show the fact of abandonment and the date of entry of dismissal.

(v) A motion to set aside a dismissal upon an abandonment must be in writing and filed with the clerk within 30 days from the date of entry of said dismissal, and shall otherwise comply with the provisions of Rule 12.1.

(2) *After service of notice of trial.* After service of notice of trial an action will not be dismissed at plaintiff's instance except by order of the court, upon motion to dismiss, made pursuant to and in accordance with the provisions of Rule 4.12, and upon such terms and conditions as the court deems proper.

(b) *Involuntary dismissal.* (1) Actions in the reserve file or suspension disposition file are subject to dismissal at the expiration of the applicable period of time in accordance with Rule 14.6 or Rule 14.8.

(2) An action in which issue has been joined, but no further proceedings have been instituted for a period of 1 year, may be dismissed by the court on its own motion for lack of prosecution unless good cause is shown for such delay.

(3) For failure of the plaintiff to comply with these rules or with any order of the court, the defendant may move that the court dismiss the action.

(4) Whenever it shall appear that an action is not being prosecuted with due diligence, the court may, either upon its own motion or upon motion of the defendant, order the action dismissed for lack of prosecution.

(c) *Insufficiency of evidence.* After the plaintiff has completed the presentation of his evidence, the defendant may, by motion, ask for a dismissal of the action on the ground that on the facts and the law plaintiff has failed to prove a *prima facie* case. The court shall immediately thereafter rule on the motion before permitting any further proceedings. If the court renders judgment on the merits against the plaintiff, the judgment shall be supported by either a statement of findings of fact and conclusions of law or an opinion stating the reasons and facts upon which the judgment is based. The motion shall be without prejudice to the right of the defendant to present evidence if the motion is denied.

(d) *Effect of dismissal.* Unless the court otherwise specifies in its ruling, a dismissal under subparagraph (a)(2) or paragraphs (b) or (c) of this rule shall operate as an adjudication upon the merits.

## CHAPTER IX. PRETRIAL PROCEDURE

### Rule 9.1. Notice of Trial

(a) *When permitted.* At any time after issue has been joined, any party desiring to try an action shall serve upon the opposing party or parties, and file with the court, a notice of trial.

(b) *Form and content.* The notice of trial shall be substantially in the form set forth in Appendix E, and shall include:

(1) the title and court number of the action;

(2) a statement that the party has completed his discovery procedure and is ready to try the action;

(3) a request showing the party's preference for a place or places and date or dates for trial, together with a statement that all parties concur; or a statement of the reasons for requesting such place and date for trial; and

(4) an estimate of the time that will probably be required at each such place for the examination and cross-examination of the party's witnesses at that place.

(c) *Time for service.* A notice of trial shall be served at least 30 days prior to the requested date of trial.

(d) *Objection to date or place.* Any other party to the action who prefers the trial to be held at a place or date other than that requested in the notice of trial, shall, within 15 days after service of the notice of trial, file a request showing the other place where, or the other date when, he would prefer the trial to be held, together with a statement of the reasons for the request.

(e) *Designation by court.* The court shall designate the place or places and date or dates for trial. The court shall give to the parties 15 days notice of the place and date for trial or such shorter time as the court may deem reasonable.

(f) *Trial session.* Unless otherwise provided by the court, in designating the place and date for trial, the trial of the action, when commenced, shall be continued in continuous sessions, or in a series of consecutive sessions, until completed, but the court may, in its discretion, for good cause shown, adjourn the trial to take additional evidence at different places and different dates.

**Rule 9.2. Pretrial Orders**

(a) *General.* The court may, in its discretion, direct the attorneys for the parties, or any party not represented by an attorney, to take such action in preparation for a pretrial conference or for trial as may aid in the disposition of the action and all other pending actions of plaintiff involving the same article of merchandise and common issues of law or fact, including, but not limited to, any of the procedures provided for in the subsequent paragraphs of this rule.

(b) *Parties to confer.* The court may direct any party to confer with any other party at any stage of the action on any matter pertaining thereto.

(c) *Admissions.* The court may direct any party to serve on any other party a request for admissions under Rule 6.2.

(d) *Submissions.* The court may direct the parties to submit simultaneously to the court with a copy to any other party:

(1) a short narrative statement (in the nature of an opening statement at trial) of the proof to be adduced, either by oral testimony or by documentary evidence, or both;

(2) a brief statement of his contentions in terms of ultimate facts and conclusions of law, and a succinct statement of points and authorities by way of analysis of legal issues;

(3) a statement of the issues of fact in controversy;

(4) a statement of the issues of law;

(5) a list of the prospective expert witnesses, giving as to each witness the name, address, and occupation, and the issue or issues to which his testimony will be directed;

(6) a statement showing the location or locations where the party desires the witnesses be heard, and an estimate of the time that will probably be required in each location for the examination and cross-examination of the party's witnesses at that place;

(7) a statement as to when the party will be ready for trial; and

(8) a statement of such other matters as the court may direct.

Not withstanding any submission made in good faith pursuant to this paragraph (d), a party may, for good cause shown, alter positions in relation to facts or law, or call witnesses other than those listed, in order to meet the exigencies of the action as it develops.

(e) *Preliminary pretrial memorandum.* The court may direct each party to prepare and submit to any other party a memorandum containing all matters requisite to a pretrial conference at which agreement may be sought as to the authenticity and admissibility of documents, uncontraverted facts, issues of fact, issues of law, and the time and place or places and probable duration of the trial.

**Rule 9.3. Pretrial Conferences**

(a) *Scheduling of pretrial conference.* In any action, the court may, in its discretion, direct the attorneys for the parties, or any party not represented by an attorney, to appear before it prior to trial in order to consider:

(1) the simplification of the issues;

(2) the necessity or desirability of amendments to the pleadings;

(3) the possibility of avoiding unnecessary proof by the admission of facts and by the reception of documents in evidence;

(4) the disclosure of the names, addresses and occupations of all witnesses, and a brief summary of the proposed testimony of each;

(5) the limitation of the number of expert witnesses, and the exchange between the parties prior to trial of written statements by such witnesses comprising their direct testimony in the action;

(6) incorporating in the record factual data or documentary evidence pursuant to proceedings theretofore had under these rules; and

(7) the consolidation or joint trial of other pending actions involving a common question of law or fact, and such other matters as may aid in the disposition of the action.

(b) *Authority of attorneys.* An attorney appearing at a pretrial conference in behalf of a party, whether the United States or other party, should be throughly familiar with the action, be authorized to act for the party he represents at the conference, and preferably should be the attorney who will try the action for such party.

(c) *Pretrial memorandum.* The court may make a memorandum reciting the action taken at any pretrial conference. The court shall file with the clerk the original of every such memorandum and one additional copy for each party for service by the clerk. Such memorandum may be modified by the court upon timely motion by either party. Subject to such modifications, the memorandum shall become part of the record and shall govern all future proceedings in the action.

**Rule 9.4. Records Introduced in Evidence**

(a) *Records which may be incorporated.* When an action is under consideration which involves questions of law or fact substantially the same in character as were involved in another action or case which has been previously decided, partially tried, or tried and submitted to the court for decision, the record, or any part thereof, in such previous action or case may, within the discretion of the court, be admitted in evidence in the pending action upon motion of either party.

(b) *Notice to incorporate.* Notice of intention to incorporate any such record shall be served and filed with the notice of trial. A party other than the party serving the notice of trial shall serve and file notice of intention to incorporate any such record within 15 days after service of the notice of trial. Such notice to incorporate may be waived upon consent or by order of the court for good cause shown.

(c) *Objections to incorporation.* Objections to the incorporation of such record, except evidentiary objections, not involving a request to produce witnesses, shall be served and filed within 15 days after receipt of the notice of intention to incorporate. The opposing party shall have 15 days after the service of objections to respond. Objections based upon evidentiary grounds may be made at the trial.

(d) *Requests to produce witnesses; response.* If a party desires to re-examine or cross-examine one or more witnesses whose testimony is to be incorporated, a motion to the court for an order directing the production of said witnesses shall be served and filed within 30 days after receipt of the notice of intention to incorporate. The opposing party shall have 15 days after the service of said motion to respond. For good cause shown, the court may direct the production of such witnesses at the trial, and may determine which of the parties shall bear the costs of producing such witnesses.

(e) *Standing of witnesses.* Any witness whose testimony is incorporated, or who is produced for re-examination or cross-examination, shall stand in the same position with reference to both parties as he stood in the original action or case.

### Rule 9.5. Compliance and Noncompliance

(a) *Pretrial rules liberally construed.* The foregoing rules relating to pretrial procedure shall be construed liberally to expedite the trial of actions without depriving any party of any just claim, defense, or objection.

(b) *Effect of noncompliance.* Upon the failure or refusal of a party to comply with any order or direction of the court pursuant to the rules relating to pretrial procedure, the court may:

(1) order such failure or refusal to be a contempt of court;

(2) order that the facts pertaining to the matter in default shall be taken to be established for the purposes of the action in accordance with the contention of the party submitting documents or requests for admissions;

(3) declare a waiver of challenge of the accuracy of any statement of items and figures as reflecting the contents of the books and records from which taken;

(4) refuse to allow the disobedient party to support or oppose designated claims or defenses;

(5) prohibit the disobedient party from introducing in evidence designated documents or items of testimony; or

(6) order the dismissal of the action or proceeding, or any part thereof, or the rendition of judgment by default against the disobedient party.

### Rule 9.6. Documents Specially Admissible by Statute When Value Is in Issue

(*a*) *Reports; depositions; affidavits.* In addition to other admissible evidence, when the value of merchandise is in issue, reports or depositions of consuls, customs officers, and other officers of the United States and depositions and affidavits of other persons whose attendance cannot reasonably be had, may be admitted in evidence when served upon the opposing party in accordance with paragraph (b) of this rule.

(*b*) *Service.* A copy of any report, deposition or affidavit described in paragraph (a) of this rule which is intended to be offered in evidence shall be served on the opposing party with the notice of trial. A party other than the party serving the notice of trial shall serve a copy of any such report, deposition or affidavit which he intends to offer in evidence upon the opposing party within 15 days after service of the notice of trial. Timely service of copies of such documents may be waived or the time extended upon consent, or by order of the court for good cause shown.

(*c*) *Objections.* Objections to the admission of such documents in evidence may be made at the trial.

(*d*) *Price lists; catalogs.* When the value of merchandise is in issue, price lists and catalogs may be admitted into evidence when duly authenticated, relevant, and material.

## CHAPTER X. TRIALS

### Rule 10.1. Subpoena

(a) *For attendance of witnesses; form; issuance.* Every subpoena shall be issued by the clerk under the seal of the court, shall state the name of the court and the title of the action, and shall command each person to whom it is directed to attend and give testimony at a time and place therein specified. The clerk shall issue a subpoena, or a subpoena for the production of documentary evidence, signed and sealed but otherwise in blank, to a party requesting it, who shall fill it in before service.

(b) *For production of documentary evidence.* A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein.

(c) *Motion to quash.* The court, upon motion made promptly and, in any event, at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify any subpoena if it is unreasonable or oppressive, or (2) condition denial of the motion upon the advancement, by the person in whose behalf the subpoena is issued, of the reasonable cost of complying with the subpoena.

(d) *Service.* (1) A subpoena may be served by the marshal of this court or his deputy, by a United States marshal or his deputy, or by any other person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and by tendering to him the fees for one day's attendance and the mileage allowed by 28 U.S.C. § 1821. When the subpoena is issued in behalf of the United States or an officer or agency thereof, fees and mileage need not be tendered. The party at whose instance a subpoena is issued shall be responsible for the payment of witness fees and mileage, as well as fees and mileage of the officer who serves the subpoena.

(2) A subpoena requiring the attendance of the witness at a hearing or trial may be served at any place within 100 miles of the place of the hearing or trial specified in the subpoena; but the court, upon proper application and for good cause shown, may authorize the service of a subpoena at any other place.

(3) A subpoena directed to a witness in a foreign country shall issue under the circumstances and in the manner and be served as provided in 28 U.S.C. § 1783.

(e) *Contempt.* Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court.

### Rule 10.2. Proof of Official Record

(a) *Authentication of copy.* (1) *Domestic.* An official record or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof, or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied with a certificate that said officer has the custody. If the office in which the record is kept is within the United States or within a territory or insular possession subject to the dominion of the United States, the certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or it may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office.

(2) *Foreign.* If the office in which the record is kept is in a foreign state or country, the certificate may be made by a secretary of embassy or legation, consul general, consul, vice-consul, or consular agent or by any officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept, and authenticated by the seal of his office.

(b) *Proof of lack of record.* A written statement signed by an officer having the custody of an official record or by his deputy that after diligent search no record or entry of a specified tenor is found to exist in the records of his office, accompanied by a certificate as above provided, is admissible as evidence that the records of his office contain no such record or entry.

(c) *Other proof.* This rule does not prevent the proof of official records or of entry or lack of entry therein by any method authorized by any applicable statute or by the rules of evidence at common law.

### Rule 10.3. Consolidation; Joint Trials; Severance

The court may, upon the motion of a party or on its own motion, make such orders concerning proceedings in any action as may tend to avoid unnecessary expense or delay, including, but not limited to;

(a) *Consolidation.* When actions involving a common question of law or fact are pending before the court, and the parties are the same, the court may order consolidation of the actions or any claims therein.

(b) *Joint trials.* When actions involving a common question of law or fact are pending before the court, and the parties are not the same, the court may order a joint trial of the actions or any claims therein.

(c) *Severance.* The court may order a severance and separate proceeding or trial of any claim or issue.

### Rule 10.4. Reception of Evidence

(a) *Form and admissibility.* In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by statute or by these rules. All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States in non-jury trials. In any trial, the statute or rule which favors the reception of the evidence governs, and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner.

(b) *Scope of examination and cross-examination.* A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party, or an official, officer, director, or managing agent thereof, and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party, and the witness thus called may be contradicted and impeached by or in behalf of the adverse party also, and may be cross-examined by the adverse party only upon the subject matter of his examination in chief.

(c) *Record of excluded evidence.* (1) If an objection to a question propounded to a witness is sustained by the court, the examining attorney may make a specific offer of what he expects to prove by the answer of the witness. The court may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon.

(2) When an objection to the introduction of documentary or physical evidence is sustained, the document or object shall be marked for identification; and, upon the request of the party who offered the same, it shall be filed by the reporter with the transcript of the evidence, unless the court rules that such evidence is not admissible on any ground.

(d) *Exclusion of proposed witnesses.* The court, on its own motion or on motion of a party, may exclude from the courtroom any or all persons, other than parties, whom the parties expect or intend to call as witnesses at the trial: *Provided, however,* That each party may designate one person as advisor to his counsel, who may not be excluded from the courtroom, and who may testify at the appropriate time despite his attendance in the courtroom.

(e) *Affirmation in lieu of oath.* Whenever, under these rules, an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.

### Rule 10.5. Exceptions Unnecessary

Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

### Rule 10.6. Contempt

(a) *Summary disposition.* Any person who shall, during the trial or hearing of any issue pending before any judge or judges of this court, or upon the argument of any motion, misbehave in the presence of any such judge or judges or so near thereto as to obstruct the administration of justice, may, in the discretion of such judge or judges, be declared and held to be guilty of contempt and may be summarily punished therefor by such judge or judges by being subjected to a fine not to exceed $1,000 or by imprisonment not to exceed 6 months, or both.

(b) *Disposition upon notice and hearing.* Any person who shall willfully disobey any lawful process, order, rule, or command of any judge or judges of this court, may be adjudged guilty of contempt. Any person so adjudged may be cited to appear before a judge or judges of the court, as the case may be, to show cause upon a day certain named in the order why he should not be punished therefor. The order and accompanying papers, if there be any, shall be served with sufficient promptness upon the person charged, to enable him to prepare for and make return to the order at the time and place fixed therein. If upon such return in the judgment of the judge or judges, as the case may be, the alleged contempt is not satisfactorily purged the procedure to be followed shall, as near as may be possible, be that provided in 18 U.S.C. §§ 401, 402, 3285 and 3691 and in Rule 42 of the Federal Rules of Criminal Procedure.

## CHAPTER XI. ORAL ARGUMENT; AMICUS CURIAE; POST TRIAL PROCEEDINGS

### Rule 11.1. Oral Argument

In any action, the court may, upon the motion of a party or on its own motion: (1) direct oral argument on a pending motion; and (2) direct oral argument in lieu of or in addition to brief after trial. The court shall fix the place and date of such oral argument.

### Rule 11.2. Amicus Curiae

(a) *Appearance.* The court may in any action invite any member or members of the bar of the court to serve the court as *amicus curiae.* Any application to appear as *amicus curiae* shall be made by motion under Rule 4.12 unless such application is made in open court.

(b) *Brief.* On the trial of an issue involving the construction of any paragraph, item, or provision of tariff or customs law, the court may permit counsel other than those engaged in the trial of any such issue to appear as *amicus curiae* and file a brief on the legal questions involved. Such *amicus curiae,* so permitted by leave of court to file a brief, may not participate in the trial of the issues involved. Copies of every such brief filed by *amicus curiae* shall be served upon the parties engaged in the trial of the action within the time prescribed by the court, and the respective parties shall serve a copy of their briefs upon the *amicus curiae* at the time they file their briefs with the court.

A brief filed by *amicus curiae* shall conform to Rule 17.1 as to form, size, and number of copies and to paragraph (d) or (e) of Rule 11.3 as to content.

### Rule 11.3. Briefs

(a) *Briefs in contested actions.* In every contested action a brief shall be filed by each of the parties, within the time respectively allowed therefor by the court, unless excused by the court.

(b) *Time.* (1) Plaintiff's brief shall be served upon the defendant and filed with the clerk of the court in accordance with Rule 4.1, within the time period fixed by the court.

(2) Defendant's brief shall be served upon the plaintiff and filed with the clerk of the court in accordance with Rule 4.1, within the time period fixed by the court.

(3) A reply brief may be served and filed no later than 15 days after service of defendant's brief.

(4) Extensions of time may be allowed by the court upon stipulation of the parties, or upon motion for good cause shown.

(c) *Form; size; copies.* Briefs shall be in the form, size, and number of copies as prescribed by Rule 17.1.

(d) *Content: Plaintiff's Brief.* Plaintiff's brief shall contain, under proper headings and arranged in the following order:

(1) A table of contents.

(2) A table of the statutes, regulations, and cases cited, giving the volume and page in the official editions where they may be found, and arranging the cases in alphabetical order.

(3) A brief description of the merchandise; country of origin and of exportation; date of exportation; date of entry; and port of entry.

(4)(i) In actions involving classification, the verbatim paragraph or item of the tariff statute under which the merchandise was assessed, and the verbatim paragraph or paragraphs or item or items under which it is claimed that the merchandise is properly dutiable, together with any other verbatim pertinent statutory provisions or regulations.

(ii) In actions involving valuation, the statutory basis of appraisement and the unit of value at which the merchandise was appraised, and the claimed statutory basis of value and unit value, together with the verbatim pertinent statutory provisions.

(5) The questions presented for decision, including all subsidiary questions involved.

(6) A concise statement of facts relevant to the issues with a specific citation to the page or pages in the record or exhibits supporting each such material fact.

(7) A summary of argument, which shall be a succinct, but accurate and clear, condensation of the contentions made in the body of the brief.

(8) An argument, exhibiting clearly the contentions of the party with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes, exhibits, and pages of the record relied upon.

(9) A short conclusion stating the relief sought.

(e) *Content: Defendant's brief.* The brief of the defendant shall conform to the foregoing requirements except that no statement of the facts need be made beyond what may be deemed necessary to correct any inaccuracies or omissions in plaintiff's brief, and except that items (3), (4), and (5) need not be included unless the defendant is dissatisfied with their presentation by the other side.

(f) *Content: Reply brief.* A reply brief shall be confined to rebutting matters contained in the brief of the defendant.

(g) *General.* Briefs must be compact, concise, logically arranged, and free from burdensome, irrelevant, immaterial, and scandalous matter. Briefs not complying with this rule may be disregarded by the court.

(h) *Failure to file.* Where a brief is not filed within the time allowed by the court, the court may take such action as it may deem appropriate, including, but not limited to the following:

(1) the court may, upon its own motion, or a motion of a party, render judgment on the record without further briefs or hearing; or

(2) the court may direct the filing of a brief by the party not in default within a time to be fixed by the court, after which judgment may be rendered upon the record and brief so filed; or

(3) where plaintiff fails to file a brief within the time allowed by the court, the court may, upon 10 days' notice or upon motion of defendant, dismiss the action.

### Rule 11.4. Proposed Findings of Fact and Conclusions of Law

(a) *By direction of court.* In lieu of or in addition to a brief, the court may direct any party to file with the clerk of the court proposed findings of fact and conclusions of law consecutively or concurrently either prior to or following its final determination in any action.

(b) *Time for filing.* Unless otherwise directed:

(1) *When filing is consecutive.* (i) Plaintiff shall have 30 days after the transcript of the record has been filed within which to serve and file his proposed findings of fact and conclusions of law.

(ii) Defendant shall have 30 days after service of plaintiff's finding and conclusions within which to serve and file its proposed findings of fact and conclusions of law and objections, if any, to plaintiff's findings and conclusions.

(iii) Plaintiff shall have 15 days after service of defendant's proposed findings and conclusions within which he may serve and file objections thereto.

(2) *When filing is concurrent.* (i) The parties shall have 30 days after filing of the transcript of the record within which to serve and file their proposed findings of fact and conclusions of law.

(ii) If the proposed findings and conclusions are served and filed in conformity with subdivision (b)(2)(i), either party may serve and file objections to the proposed findings and conclusions of the opposing party within 15 days after service thereof.

(c) *Form and content of proposed findings and objections.* Unless otherwise directed:

(1) The proposed findings of fact shall consist of concise numbered statements of fact. Each such finding shall be presented in logical, sequential order, supported by references to the record or other sources, where appropriate.

(2) The proposed findings shall be followed by short numbered statements of the ultimate facts established therefrom.

(3) The proposed conclusions of law shall be concise and numbered.

(4) The proposed ultimate findings of fact and conclusions of law may include citations, where appropriate.

(5) The objections to any proposed findings of fact and conclusions of law shall set out, in numbered statements, specifically and with particularity, the reasons therefor.

(d) *Official record.* Only the findings of fact and conclusions of law made and entered by the court shall constitute part of the record in the action.

### Rule 11.5. Decisions; Judgments

(a) *Decisions.* In all contested actions, the decision of the court may be either in writing or orally entered on the record. The decision shall be supported by either (1) a statement of findings of fact and conclusions of law, or (2) an opinion stating the reasons and facts upon which the decision is based.

(b) *Judgments.* (1) An appropriate judgment shall be entered: on all decisions in contested actions; in actions where a motion for summary judgment or a motion for judgment on the pleadings has been granted; in actions submitted on agreed statements of fact pursuant to Rule 8.1; and in all other actions where there is a dispositive order.

(2) Except as to a party against whom a judgment is entered by default, every final judgment may grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

## CHAPTER XII. REHEARINGS; RETRIALS; AMENDMENT OF JUDGMENTS

### Rule 12.1. Rehearing; Retrials

(a) *Form and filing of motions.* All motions for rehearings or retrials must be in writing and filed with the clerk of the court at New York within 30 days from the entry of the judgment or order in the action in which rehearing or retrial is requested.

(b) *Grounds.* Such motion must clearly state the grounds upon which the moving party relies for the granting of such rehearing or retrial. If the grounds do not appear of record, the motion must be supported by an affidavit or affidavits setting forth in detail the facts upon which such motion is predicated.

(c) *Service; response.* A copy of such motion for rehearing or retrial shall be served by the moving party upon the opposite party or his attorney; and the opposite party or his attorney shall be allowed 15 days after such service in which to serve and file objections thereto.

(d) *Oral argument.* Oral argument shall not be heard upon such motion except by leave of the court. Any such motion or opposition thereto may be accompanied by memoranda setting forth the facts and law upon which the parties rely. All such motions for and all papers filed in opposition thereto shall be accompanied by a proposed order.

(e) *Time for appeal.* The denial of a timely motion for rehearing or retrial shall reinstate the statutory period within which appeal may be taken.

(f) *Upon motion of court.* The court may, upon its own motion and not later than 30 days after the entry of the judgment or order it has rendered in an action, order a rehearing or retrial therein.

### Rule 12.2. Amendment of Judgments

(a) *Clerical mistakes.* Clerical mistakes in judgments, orders, or other parts of the record, and errors therein arising from oversight or omission, may be corrected by the court at any time on its own initiative or on the motion of any party.

(b) *Mistakes; inadvertence; excusable neglect.* On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for mistake, inadvertence, surprise, or excusable neglect.

(c) *Harmless error.* No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. At every stage of the proceeding, the court shall disregard any error or defect which does not affect the substantial rights of the parties.

## CHAPTER XIII. APPEALS

### Rule 13.1. Appeals—Procedures

(a) *Record.* (1) Upon receipt of an order from the United States Court of Customs and Patent Appeals, directing the return of a record on appeal, the clerk shall prepare the full record of said action in accordance with the rules of the United States Court of Customs and Patent Appeals.

(2) Thereafter, the clerk shall notify counsel for the parties that the record is available for inspection.

(b) *Objections.* Objections to the form or substance of the record as prepared by the clerk may be raised by motion to settle the record made in accordance with the general provisions for motions as specified in Rule 4.12.

(c) *Transmission.* Upon approval of counsel for the parties or pursuant to direction by the court, the clerk shall certify as to the correctness of the record and transmit it, under seal of the court, to the Clerk of the Court of Customs and Patent Appeals.

### Rule 13.2. Interlocutory Appeals—Procedures

(a) *Application.* When an interlocutory order issued by a judge or judges of the court includes therein a statement that a controlling question of law is involved as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate determination of the litigation, or when an order is issued by the chief judge pursuant to the provisions of Rule 2.2(b) and 28 U.S.C. § 256(a), an application may be made to the Court of Customs and Patent Appeals for an appeal within 10 days after the entry of the order.

(b) *Stay.* (1) Neither the application for an interlocutory appeal nor the granting of such an appeal will stay proceedings in this court unless a stay is ordered by a judge of this court or by the Court of Customs and Patent Appeals or a judge of that court.

(2) A stay may be granted upon motion of either party to the proceeding. Notwithstanding other provisions in these rules, a response to a motion to stay shall be filed within 7 days of the service of said motion.

(c) *Record.* The provisions of Rule 13.1 shall be applicable where an interlocutory appeal is granted by the Court of Customs and Patent Appeals.

## CHAPTER XIV. THE CLERK'S OFFICE

### Rule 14.1. Judgments and Orders

(a) *Entry of judgment or order.* When a judgment or order is rendered, the clerk shall enter the judgment or order in an appropriate book or books kept for that purpose and shall show the date the entry is made. The date of such entry shall be deemed to be the date of entry of such judgment or order.

(b) *Notice of entry of judgment or order.* (1) Upon the entry of a judgment, the clerk shall, by delivery or by mailing, serve upon each party, the Secretary of the Treasury, and the district director of the district from which the action arose, a notice of entry of the judgment, together with a copy of the judgment, opinion, decision, or findings of fact and conclusions of law upon which it is based.

(2) Upon the entry of an order, the clerk shall serve upon each party, by delivery or by mailing, a notice of entry of the order, together

with a copy of the order and any accompanying memorandum.

### Rule 14.2. Books and Records Kept by the Clerk

(a) *Civil docket.* The clerk shall maintain as an original and permanent record a book to be known as the Civil Docket, to be kept on one or more loose-leaf sheets for each action, and shall enter therein each action filed with the court. Actions shall be assigned consecutive file numbers. The file number of each action shall be noted on the page of the Civil Docket whereon the first entry of the action is made. All papers filed with the clerk and all judgments and orders shall be entered chronologically in the Civil Docket on the sheet assigned to the action and shall be marked with its file number. These entries shall be brief, but shall show the nature of each paper filed and the substance of each judgment or order. The docket sheet shall show the date a paper is filed and the date the entry of a judgment or order is made.

(b) *Judgments and orders.* The clerk shall maintain as a permanent record a Judgment and Order Book in which there shall be filed, in serially numbered chronological sequence in loose-leaf binders, a correct copy of every final judgment or appealable order, together with all opinions, decisions, or findings of fact and conclusions of law upon which it is based, and any other order which the court may direct to be kept. Every such final judgment or appealable order shall, from time to time but no less frequently than semiannually, be permanently bound. None of the foregoing papers shall be accessible to any unauthorized person, whether a party to the proceeding or not, until the judgment or order has been entered.

### Rule 14.3. Access to and Withdrawal of Papers

(a) *Custody and control.* All papers filed with or transmitted to the court shall be retained in the office of the clerk of the court, under his custody and control, except:

(1) when such papers are required by the court; or

(2) when requested by the Chief, Customs Section, Department of Justice, relevant papers may be transmitted by the clerk to an appropriate customs officer for the purpose of considering a submission upon an agreed statement of facts pursuant to Rule 8.1, or for the purpose of answering an inquiry by an appropriate customs officer; or

(3) when the chief judge so directs, the clerk shall transmit relevant papers in any action defined in Rule 3.1, to an appropriate customs officer on request of the attorney of record for a party, or an individual not represented by an attorney, for good cause shown in such request. Notice of such request shall be given to all other parties.

(b) *Temporary withdrawal.* (1) Except where restricted by law (28 U.S.C. § 2637(b)), any person may have access to the relevant papers in an action other than entries, invoices and laboratory reports, which shall be available only to the attorney of record or a party to the action.

The clerk may provide copies of accessible papers to any person upon payment of the prescribed fees as set forth in Rule 14.5.

(2) The Chief, Customs Section, Department of Justice, may withdraw the relevant papers in an action to a designated place in his offices for a period not to exceed 30 days: *Provided,* That upon notice from the clerk, such papers shall immediately be returned to the office of the clerk.

(3) Any person, qualified in accordance with paragraph (b)(1) of this rule, may withdraw the relevant papers in an action to a designated place in the offices of the Customs Court or the Customs Section, Department of Justice: *Provided,* That such papers are returned to the office of the clerk no later than the close of business on the same day as they are withdrawn.

(4) Whenever any person withdraws relevant papers in accordance with paragraph (b)(1) of this rule, he shall sign and leave with the clerk a receipt describing the papers so withdrawn and the designated place to which the papers are to be taken.

(c) *Relevant papers.* For purposes of this rule, the relevant papers include all papers transmitted to or filed with the court as required by law or the rules of the court, including the transcript of all proceedings and exhibits in the action.

(d) *Return of papers.* When a judgment or order of the court has become final, papers transmitted to the court by the appropriate customs officer pursuant to 28 U.S.C. § 2632(f), shall be returned by the clerk, together with a copy of the judgment or order, to the appropriate customs officer.

### Rule 14.4. Exhibits—Disposition

(a) *Custody and control generally; exception upon motion.* Exhibits introduced in evidence in an action or case heard by the court shall remain in the custody and control of the clerk for such time as they may be required, and shall not be surrendered by the clerk until final judgment is entered in the action or case in which they were introduced, except by order of the court upon motion of a party.

(b) *Exhibits of more than ordinary value.* When such exhibits are of more than ordinary value, they may be withdrawn from the custody and control of the clerk by order of the court upon motion of a party.

(c) *Procedure after final judgment.* (1) *Notice; time for response.* When a final judgment is entered in an action or case in which exhibits were introduced in evidence, the clerk may notify the parties of record to remove the exhibits and post a copy of the notice in a conspicuous place. If the exhibits are not removed within 30 days after such notice, the exhibits may be disposed of by the clerk.

(2) *Responsibility for costs.* Any expense incident to the removal of exhibits shall be borne by the party making such request.

(3) *Motion to enlarge custody and control time of clerk.* Upon motion of a party, and for good cause shown, the court may order an extension of the time within which exhibits shall remain in the custody and control of the clerk.

(d) *Decomposed or offensive exhibits.* If an exhibit becomes decomposed or offensive, the clerk shall notify the court and such exhibit may be disposed of by order of the court, and a proper record of its disposition shall be made by the clerk.

### Rule 14.5. Photostatic Copying of Documents

*Fee.* The clerk shall receive, from the party at whose request photostatic copying of documents is performed, a fee of 25 cents, payable in advance, for each side of the page so photostated.

### Rule 14.6. Reserve File

(a) *Placement in reserve file.* All actions commenced in the court after the effective date of these rules (including all appeals for reappraisement and all protests received by the court after the effective date of these rules), and all actions described in Rule 14.9(c)(1) shall be placed in the reserve file for the month and year in which the action is commenced.

(b) *Removal from reserve file.* An action may be removed from the reserve file: (1) upon the filing of a complaint pursuant to Rule 4.4; or (2) upon the granting of a motion for consolidation pursuant to Rule 10.3 or for suspension pursuant to Rule 14.7(b); or (3) upon submission of the action to the court for decision upon an agreed statement of facts pursuant to Rule 8.1.

(c) *Dismissal for lack of prosecution.* An action which is not removed from the reserve file within a period of 2 years shall be dismissed for lack of prosecution, and unless the plaintiff has pending a motion for extension of time, the clerk shall enter an order of dismissal without further direction of the court. The applicable 2-year period shall begin to run from the last day of the month in which the action is commenced, and shall end on the last day of the 24th month thereafter.

(d) *Notice to remove.* At least 6 months before the expiration of the applicable 2-year period, the clerk shall send notice to the parties, in an action not previously removed from the reserve file, informing them that the action will be dismissed in accordance with paragraph (c) of this rule unless removed from the reserve file within the applicable period of time.

(e) *Motion for extension of time.* For good cause shown, the court may, upon motion, order an extension of the time, beyond the applicable 2-year period, within which an action may remain in the reserve file. Any motion for extension of time shall be filed with the clerk prior to the expiration of the period of time. An objection or response thereto shall be filed within 5 days after service of such motion. No order of dismissal shall be entered under Rule 14.6(c) until the court has acted on the motion. If the motion for extension of time is denied and less than 10 days remain, or the time has expired, for removing such actions from the reserve file pursuant to paragraph (b) of this rule, then the action shall continue to remain in the reserve file for 10 days after the court enters the order denying the extension of time.

### Rule 14.7. Suspension Procedure

(a) *Suspension of actions.* An action may be suspended pending the final determination of another action (hereinafter referred to as a test case) if it involves an issue of fact or a question of law which is the same as the issue of fact or question of law involved in such test case. A party to any action who desires to have any action considered as a test case may, after issue has been joined in the test case, serve and file a motion stating the reasons therefor. At the time that a plaintiff serves and files a complaint in an action pursuant to Rule 4.4 it may serve and file a single motion (1) to have said action designated a test case and (2) to suspend actions thereunder, stating the reasons therefor: *Provided,* That the defendant shall file its objection or response to such a motion within 15 days after it has filed its answer to the complaint pursuant to Rule 4.7. For purposes of this rule, an action may be considered as a test case when an order to that effect is issued by the court after a motion has been served and filed pursuant to this rule or after trial has been commenced or the action submitted to the court for decision. The trial of an action commences when, in open court, the first witness is sworn or evidence is admitted.

(b) *Motion for suspension.* An application for suspension shall be made upon a motion which shall include: the title and court number of the action for which suspension is requested; the title and court number of the action under which suspension is requested; and a concise statement of the issue of fact or question of law alleged to be the same in both actions.

(c) *Response to motion.* The response to a motion for suspension shall include: a statement consenting to the motion; or a statement of the reason for opposing the motion; or a statement of the reason for neither consenting to nor opposing the motion.

(d) *Denial of motion.* When a motion for suspension is denied, the action for which suspension has been denied:

(1) shall remain in the reserve file or suspension disposition file, provided the period of time within which the action may remain in such file has not expired; or

(2) shall be dismissed for lack of prosecution if the period of time within which the action may remain in the reserve file or suspension disposition file has expired, unless within 60 days from the date of notice of denial of the motion for suspension: a complaint is filed; or a motion for reconsideration, or for suspension under another action, or for an extension of time is granted.

(e) *Effect of suspension.* An order suspending an action shall stay all further proceedings and filing of papers therein, unless the court directs otherwise.

(f) *Removal from suspension.* A suspended action may be removed from suspension by filing (1) a complaint, (2) notice of trial after issue is joined, or (3) submission of the action to the court for decision upon an agreed statement of facts. Upon motion of a party for removal from suspension for the purpose of moving the action toward a final disposition by trial or otherwise, the court may order the removal upon such terms and within such time as it may direct.

### Rule 14.8. Suspension Disposition File

(a) *Transfer to suspension disposition file.* When an action is finally determined, dismissed or discontinued, any actions suspended thereunder, including actions in which complaints or complaints and answers were filed prior to suspension, shall be transferred to a suspension disposition file.

(b) *Removal from suspension disposition file.* An action may be removed from a suspension disposition file upon: (1) the filing of a motion for removal; or (2) the filing of a complaint or answer subsequent to suspension pursuant to Rule 4.4; or (3) the granting of a motion for consolidation pursuant to Rule 10.3 or for suspension under another action pursuant to Rule 14.7(b); or (4) submission of the action to the court for decision upon an agreed statement of facts pursuant to Rule 8.1 or upon the filing of a dispositive motion; or (5) the filing of a notice of trial pursuant to Rule 9.1. Such motion for removal shall be made solely for the purpose of moving the action toward a final disposition by trial or otherwise, upon such terms and within such time as the court may direct. The motion shall specify the further proceedings desired to be taken and shall be submitted together with a proposed order specifying such further proceedings. A motion for removal or any other motion made pursuant to this paragraph shall be filed no later than 15 days prior to the expiration of the time within which the action may remain in the suspension disposition file. An objection or response to a motion for removal shall be filed within 10 days after service of the motion. An objection or response to a dispositive motion shall be filed within 30 days. No order of dismissal shall be entered under Rule 14.8(c) until the court has acted upon the motion made pursuant to this paragraph. If the motion is denied and less than 10 days remain, or the time has expired, for removing the action from the suspension disposition file, then the action shall continue to remain in the suspension disposition file for 10 days after the court enters the order denying the motion.

(c) *Dismissal for lack of prosecution.* An action which is not removed from the suspension disposition file within a fixed period of time shall be dismissed for lack of prosecution, and unless the plaintiff has pending a motion for extension of time, the clerk shall enter an order of dismissal without further direction of the court. The period of time, not to exceed 18 months, within which an action may remain in the suspension disposition file shall be fixed by the judge to whom the action has been assigned, or by the judge who decided the action under which the actions transferred to the suspension disposition file were suspended.

(d) *Notice to remove.* The applicable fixed period of time within which an action may remain in the suspension disposition file shall begin to run from the day the clerk sends notice to the parties informing them of the date when the action will be dismissed in accordance with paragraph (c) of this rule unless removed from the suspension disposition file before such date.

(e) *Motion for extension of time.* For good cause shown, the court may, upon motion, order an extension of time beyond the applicable fixed period of time within which an action may remain in the suspension disposition file. A motion for extension of time shall be filed with the clerk prior to the expiration of the period of time. An objection or response thereto shall be filed within 5 days after service of such motion. No order of dismissal shall be entered under Rule 14.8(c) until the court has acted on the motion. If the motion for extension of time is denied and less than 10 days remain, or the time has expired, for removing said actions from the suspension disposition file pursuant to paragraph (b) of this rule, then the action shall continue to remain in the suspension disposition file for 10 days after the court enters the order denying the extension of time.

### Rule 14.9. Disposition of Pending Actions

(a) *Actions affected.* All actions received by the court prior to October 1, 1970, shall, as of that date and for purposes of this rule, be deemed to be in one of the following two categories:

(1) actions in which trials have commenced prior to October 1, 1970; or

(2) actions in which trials have not commenced prior to October 1, 1970.

(b) *Trials commenced.* (1) All actions in which trials have commenced prior to October 1, 1970 shall be further processed and governed in accordance with the law and with the rules of the court in effect prior to October 1, 1970.

(2) Actions in which, in open court, a witness was sworn or evidence was admitted prior to October 1, 1970, and actions which have been remanded to a single judge to find value under 28 U.S.C. § 2632(d), as amended by 62 Stat. 981 (1948), shall be deemed to be actions in which trials have commenced prior to October 1, 1970.

(c) *Trials not commenced.* All actions in which trials have not commenced prior to October 1, 1970 shall, as of that date and for purposes of this rule, be deemed to be in one of the following two sub-categories:

(1) Actions listed or scheduled to be listed on court calendars. Such actions shall be removed from the calendars on which they are listed or scheduled to be listed, placed in a reserve file in accordance with Rule 14.6, and be deemed to have commenced on October 1, 1970; or

(2) Actions suspended pending the final determination of another action. Such actions shall remain suspended until the final determination of the action under which they were suspended, at which time they shall be transferred to the suspension disposition file in accordance with Rule 14.8.

(d) *Processing of untried actions.* Except as otherwise provided in this rule, all actions in which trials have not commenced prior to October 1, 1970, shall be further processed and governed in accordance with the law and with the rules of the court in effect on and after October 1, 1970, except that such actions shall be deemed to have had summonses timely and properly filed.

## CHAPTER XV. THE MARSHAL

### Rule 15.1. Duties; Fees

(a) *Duties at New York.* The marshal shall attend court at all its sessions in New York City and shall serve and execute such process and orders as directed by the court.

(b) *At places other than New York.* At all sessions of the court at places other than New York City, the United States marshal for the district in which a session of the court is being held shall act as the marshal for the court and shall be present at all sessions of the court in his district, and when serving as such shall execute such process and orders as directed by the court.

(c) *Fees.* The fees of the marshal for service of any subpoena, writ, process, or other court paper or document, or for the doing of any act specified in 28 U.S.C. § 1921 shall be the same as those provided in that statute for similar services or acts by a United States marshal, together with the same mileage, expense, and costs provided in that statute.

## CHAPTER XVI. ATTORNEYS

### Rule 16.1. Attorneys—Admission to Practice

(a) *On motion or by application.* Any person of good moral character who is a citizen of the United States or of any territory or possession thereof and who has been admitted to practice in the Supreme Court of the United States or the highest court of any state, territory, possession, or the District of Columbia, or the United States Court of Customs and Patent Appeals, and is in good standing therein, may be admitted to practice as an attorney in this court by either of the following methods:

(1) *Oral motion.* Upon oral motion made in open court by a member of the bar of this court or, if the court is not in session, before the chief judge or any judge present, following the filing of an application form provided by the court, and upon taking the following oath:

*I, ________, do solemnly swear (or affirm) that I will faithfully conduct myself as an attorney and counselor at law of this court uprightly and according to law, and that I will support the Constitution of the United States, so help me God.*

(2) *Verified application.* Upon verified application in writing, in the form provided by the court, showing that the applicant is possessed of the qualifications described above, accompanied by:

(i) a certificate of a judge or of the clerk of any of the courts specified above that the applicant is a member of the bar of such court and is in good standing therein;

(ii) a letter or signed statement of a member of the bar of this court or of the Supreme Court of the United States, not related to the applicant, stating that the applicant is personally known to him, that the applicant possesses all the qualifications required for admission to the bar of this court, that he has examined the applicant's application, and that he affirms that the applicant's personal and professional character and standing are good; and

(iii) an oath in the form prescribed in subparagraph (1) of this paragraph (a), signed by the applicant and administered by an officer authorized to administer oaths in the state, territory, possession, or the District of Columbia, where the oath is administered.

(b) *Fee for admission.* The applicant for admission shall pay to the clerk a fee of $10, and shall be entitled to a certificate of admission. The clerk, as trustee, shall deposit such sum in a bank designated by the court and shall expend such moneys as directed by the court. Where the applicant is an attorney representing the United States before this court, payment of such fee is not required.

(c) *Admission of foreign attorneys.* An attorney, barrister, or advocate who is qualified to practice at the bar of the court of any foreign state which extends a like privilege to members of the bar of this court may be specially admitted for purposes limited to a particular action. He shall not, however, be authorized to act as attorney of record. In the case of such an applicant, the oath shall not be required and there shall be no fee. Such admission shall be granted only on written motion of a member of the bar of this court, filed with the clerk at least 3 days prior to the consideration of the motion by the court.

### Rule 16.2. Disbarment or Other Disciplinary Action

(a) *Invitation of proceedings.* When a certificate shall be received from the clerk of any court, or a complaint supported by an affidavit filed with the clerk of this court, setting forth any of the following facts concerning a member of the bar of this court:

(1) that he has resigned from the bar of the Supreme Court of the United States or any other federal court, or from any court of record of any state, territory, or possession;

(2) that he has been disbarred, suspended from practice or censured in the Supreme Court of the United States or any other federal court, or in any court of record of any state, territory, or possession;

(3) that he has been convicted of a crime involving moral turpitude; or

(4) that he has been guilty of dishonest or unethical conduct; the clerk of this court shall forthwith deliver such certificate or complaint to the chief judge of this court.

(b) *Sufficiency.* The chief judge shall preliminarily examine such certificate or complaint and rule upon its sufficiency *prima facie.* If he deems the facts insufficient on their face to warrant disciplinary action, he shall so advise the complainant and the attorney named.

(c) *Investigation and prosecution.* Where the certificate or complaint is deemed sufficient *prima facie,* the chief judge shall appoint a committee, consisting of three members of the bar of this court, to which the certificate or complaint shall be referred. It shall then be the duty of the committee to investigate the facts involved in such resignation, disbarment or suspension from practice or other facts alleged in the certificate or complaint. If, in the committee's judgment, probable cause for disbarment, suspension, or disciplinary action exists, it shall then be the duty of the committee to proceed against the attorney by an order signed by the chief judge setting forth the charges against him and requiring him, within 30 days after service of the order upon him by delivery or by mailing, to show cause as to why disciplinary action should not be taken.

(d) *Appearance.* The attorney named in the order to show cause may appear in person and may be represented by an attorney and shall have the right to file any answer which, in his opinion, the proceedings may warrant.

(e) *Hearing and report.* Upon answer by the attorney to the order to show cause, the chief judge shall designate three judges of the court who shall hear the matter, after due notice to the attorney named in the order, and report their findings of fact and conclusions of law to the full court.

(f) *Action by the Court.* The full court, after consideration of the record, may enter an order disbarring, suspending, or otherwise disciplining such member of the bar, or dismissing the proceedings, or making such other disposition of the case as may be warranted by the record.

### Rule 16.3. Notice of Appearance; Attorney of Record; Substitution of Attorneys

(a) *Notice of appearance.* Attorneys authorized to appear in actions pending before the court shall file notice thereof in writing with the clerk. Such notice shall state the title and court number of the action, and the name, address and telephone number of the attorney or attorneys so appearing. The notice shall be substantially in the form as set forth in Appendix F.

(b) *Initial document.* If the summons or other paper commencing an action bears the name and address of any member or members of the bar of this court, he or they shall be recognized as the attorney or attorneys of record and no separate notice of appearance shall be required in such action.

(c) *The United States.* The Assistant Attorney General, Civil Division, Department of Justice, shall be considered as having entered an appearance in all actions in which the United States is a party.

(d) *Attorney of record.* An appearance may be made in the name of an individual attorney or in a firm name. If an appearance is made in a firm name, the name of the individual attorney responsible for the litigation shall also be stated.

(e) *Appearance—Admission to practice.* Except in an action commenced by an individual in his own behalf, only an attorney admitted to the bar of this court may enter an appearance or practice before this court.

(f) *Substitution of attorneys.* A party to any action who may desire to substitute an attorney in place of the one of record may do so by filing a notice therefor expressing his consent, signed by himself and the attorney of record. The notice shall be substantially in the form as set forth in Appendix G. If the consent of the previous attorney of record is annexed or endorsed on the notice, substitution shall be accomplished by an appropriate entry on the docket of the court. A notice of appearance shall be filed by the substituted attorney. If an attorney of record refuses to consent to a substitution, the court, on motion, may order that such substitution be made on such terms as the court deems appropriate.

(g) *Withdrawal of attorney.* No attorney of record may withdraw his appearance except by order of the court on motion and after notice is served on his client.

## CHAPTER XVII. DUPLICATION; COPIES

### Rule 17.1. Form; Size; Copies; Conformity

(a) *Conformity required.* All papers to be filed with the clerk shall be produced, duplicated, and filed in conformity with these rules as to means of production, methods of duplication, form and size, and number of copies. The clerk shall refuse to file any paper which is not in substantial conformity with the rules of this court. A party aggrieved by such action may move to compel the clerk to accept the paper for filing.

(b) *Means of production.* All papers shall be plainly and legibly typewritten or otherwise produced by any duplicating or copying process which produces a clear black image on white paper. All but printed matter shall cover one side of the sheet only.

(c) *Caption and signing.* All papers shall bear a caption in conformity with paragraph (a) of Rule 4.3 and shall be signed in conformity with paragraphs (a) and (b) of Rule 4.11.

(d) *Numbering of pages.* The pages of each paper shall be numbered consecutively, commencing with number 1.

(e) *Designation of originals.* When multiple copies of a paper are filed, one shall be designated as the original by the party.

(f) *Briefs; trial and pretrial memoranda.* Briefs, trial and pretrial memoranda shall be filed in 2 copies and shall be 8½ by 11 inches in size. Pages shall be numbered on the bottom portion thereof, and bound or attached on the left margin. Typed matter shall be double spaced, except quoted material which may be indented and single spaced, and except titles, schedules, tables, graphs, columns of figures, or other interspersed material which is more readable in a form other than double spaced.

(g) *Pleadings and other papers.* Unless otherwise provided by these rules, all papers shall be filed in duplicate, only the original of which need be executed. Pleadings and other papers shall be 8½ by 11 inches in size. Pages shall be numbered on the bottom portion thereof and bound or attached on the top margin. Typed matter shall be double spaced except quoted material which may be indented and single spaced and except titles, schedules, tables, graphs, columns of figures, or other interspersed material, which is more readable in a form other than double spaced.

## APPENDIX A

### FORM OF SUMMONS IN AN ACTION TO CONTEST DENIAL OF PROTEST

### Instructions for Use

**The summons consists of: a first page (CC-S1), setting forth identifying information concerning the denied protest; a second page (CC-S2), setting forth relevant information concerning the administrative decision contested in the action; and a third page (CC-S3), Schedule of Protests, when more than one denied protest is included in the action.**

**An original and 4 copies of the summons shall be filed when the action includes protests denied at one port of entry.**

**When, under the circumstances permitted by these rules, the action includes protests denied at more than one port of entry, there shall be filed for each such port an additional copy of the summons (CC-S1 and CC-S2), to which there shall be attached an additional copy of the Schedule of Protests (CC-S3), pertaining to the protests included in the action which were denied at that port of entry.**

**UNITED STATES CUSTOMS COURT**

| | | |
|---|---|---|
| | *Plaintiff,* | |
| v. | | *Summons* |
| UNITED STATES, | *Defendant.* | |

**TO: The Attorney General and the Secretary of the Treasury:**

**PLEASE TAKE NOTICE that a civil action has been commenced to contest denial of the protest specified below (and the protests listed in the attached schedule).**

CLERK OF THE COURT

**PROTEST**

| | |
|---|---|
| PORT OF ENTRY: | DATE PROTEST FILED: |
| PROTEST NUMBER: | DATE PROTEST DENIED: |
| IMPORTER: | |
| CATEGORY OF MERCHANDISE: | |

**ENTRIES INVOLVED IN ABOVE PROTEST**

| ENTRY NUMBER | DATE OF ENTRY | DATE OF LIQUIDATION | ENTRY NUMBER | DATE OF ENTRY | DATE OF LIQUIDATION |
|---|---|---|---|---|---|
| | | | | | |
| | | | | | |

DISTRICT DIRECTOR.

| | |
|---|---|
| Address of Customs District in Which Protest Was Denied | Name and Address of Person Filing Summons, Telephone Number:——— |

(CC-S1)

**CONTESTED ADMINISTRATIVE DECISION**

APPRAISED VALUE OF MERCHANDISE

| STATUTORY BASIS | STATEMENT OF VALUE |
|---|---|
| APPRAISED: | |
| PROTEST CLAIM: | |

CLASSIFICATION, RATE OR AMOUNT

| | ASSESSED | | PROTEST CLAIM | |
|---|---|---|---|---|
| MERCHANDISE | PARAGRAPH OR ITEM No. | RATE | PARAGRAPH OR ITEM No. | RATE |
| | | | | |
| | | | | |

*Other*

State Specifically the Decision (as Described in 28 U.S.C. § 1582(a)) and the Protest Claim:

The issue which was common to all such denied protests:

Every denied protest included in this civil action was filed by the same above-named importer, or by an authorized person in his behalf. The category of merchandise specified above was involved in each entry of merchandise included in every such denied protest. The issue or issues stated above were common to all such denied protests. All such protests were filed and denied as prescribed by law. All liquidated duties, charges or exactions have been paid, and were paid at the port of entry unless otherwise shown.

| | |
|---|---|
| Date | Signature of attorney or individual filing in his own behalf. |

(CC-S2)

**SCHEDULE OF PROTESTS**

Port of Entry

| PROTEST NUMBER | DATE PROTEST FILED | DATE PROTEST DENIED | ENTRY NUMBER | DATE OF ENTRY | DATE OF LIQUIDATION |
|---|---|---|---|---|---|
| | | | | | |
| | | | | | |

| | |
|---|---|
| DISTRICT DIRECTOR OF CUSTOMS. | If the port of entry shown above is different from the port of entry shown on the first page (CC-S1) of the summons, the address of the District Director for such different port of entry must be given in the space provided. |

(CC-S3)

## APPENDIX B-1

### FORM OF SUMMONS IN ACTIONS, UNDER 19 U.S.C. § 1516(c), BY AMERICAN MANUFACTURERS, PRODUCERS, OR WHOLESALERS

### Instructions for Use

**The summons consists of a first page (CC-SA1), setting forth identifying information concerning the entry involved in the action, and a second page (CC-SA2), setting forth relevant information concerning the decision contested in the action.**

**An original and 5 copies of the summons shall be filed when the action includes entries involving only one consignee and only one port of entry.**

**When, under the circumstances permitted by these rules, the action includes entries involving more than one consignee or more than one port of entry, an additional copy of the summons shall be filed at the same time for each such different consignee and for each such different port of entry.**

**UNITED STATES CUSTOMS COURT**

________ *Plaintiff,*
v.
UNITED STATES, *Defendant.*
} *Summons*

**TO: The Attorney General and the Secretary of the Treasury, and ________, Party in Interest:**

**PLEASE TAKE NOTICE that a civil action has been commenced to contest a decision of the Secretary of the Treasury made pursuant to section 516(c) of the Tariff Act of 1930, as amended (19 U.S.C. § 1516(c), as amended).**

________
**Clerk of the Court**

**ENTRY**

| PORT OF ENTRY | ENTRY NUMBER | DATE OF ENTRY | DATE OF LIQUIDATION | DATE OF MAILING OF NOTICE OF LIQUIDATION |
|---|---|---|---|---|
| | | | | |

| DESCRIPTION OF MERCHANDISE | NAME AND ADDRESS OF CONSIGNEE OR AGENT |
|---|---|
| | |

DISTRICT DIRECTOR.

| Address of Customs District From Which Notice Was Given | Name and Address of Person Filing Summons Telephone Number:________ |
|---|---|

(CC-SA1)

**CONTESTED DECISION**

APPRAISED VALUE OF MERCHANDISE

| STATUTORY BASIS | STATEMENT OF VALUE |
|---|---|
| | |

APPRAISED:

PROTEST CLAIM:

CLASSIFICATION AND RATE

| ASSESSED | | CLAIM | |
|---|---|---|---|
| ITEM NUMBER | RATE | ITEM NUMBER | RATE |
| | | | |

| Date | Signature of attorney or individual filing in his own behalf. |
|---|---|

(CC-SA2)

## APPENDIX B-2

### FORM OF SUMMONS IN ACTIONS, UNDER 19 U.S.C. § 1516(d), BY AMERICAN MANUFACTURERS, PRODUCERS, OR WHOLESALERS

### Instructions for Use

**The summons consists of a single page (CC-SA3), setting forth identifying information concerning the determination by the Secretary of the Treasury contested in the action.**

**An original and 3 copies of the summons shall be filed.**

**UNITED STATES CUSTOMS COURT**

________ *Plaintiff,*
v.
UNITED STATES, *Defendant.*
} *Summons*

**TO: The Attorney General and the Secretary of the Treasury:**

**PLEASE TAKE NOTICE that a civil action has been commenced to contest a determination by the Secretary of the Treasury made pursuant to section 516(d) of the Tariff Act of 1930, as amended (19 U.S.C. § 1516(d), as amended).**

________
**Clerk of the Court**

**1. ________**
**(Status of plaintiff)**

**2. ________**
**(Brief description of contested determination by the Secretary of the Treasury)**

**3. ________**
**(Date of the determination by the Secretary)**

**4. ________**
**(Date of filing with the Secretary of plaintiff's written notice of desire to contest such determination)**

5. ————————————————

(Date of publication by Secretary of notice of desire to contest such determination)

6. ————————————————

(Name, signature, post office address, and telephone number of attorney filing summons or the individual filing summons in his own behalf)

(CC-SA3)

## APPENDIX C

UNITED STATES CUSTOMS COURT

————————————— *Plaintiff,*  
*v.*  
UNITED STATES, *Defendant.* } *Court No.*  
—————————————

DECISION AND JUDGMENT UPON AGREED STATEMENT OF FACTS

—————————————— attorney for plaintiff.

—————————————— Assistant Attorney General, for defendant.

—————————— Judge: This action having been submitted on an agreed statement of facts, it is DECIDED and ADJUDGED that the merchandise marked "A" and initialed ———— by Import Specialist ———— is properly dutiable upon the basis of ———— value as defined in section 402 ———— of the Tariff Act of 1930, as amended by the Customs Simplification Act of 1956 ———, and that said value is ————.

It is further DECIDED and ADJUDGED that the merchandise marked "B" and initialed —————————— by Import Specialist ———————— which is [the same] [similar] in all material respects as the merchandise in —————————————— v. ———————————— [give complete case citation] which record has been incorporated herein, is properly dutiable as ————, under ————, as modified by ————, at the rate of ————.

All other claims are overruled.

It is HEREBY ORDERED that the [district director of customs] [regional commissioner] at the port of ———— shall reliquidate the entry accordingly.

————————  
Judge

Dated: New York, N.Y.  
————, 19——.

## APPENDIX D

NOTICE OF ABANDONMENT

UNITED STATES CUSTOMS COURT

————————————— *Plaintiff,*  
*v.*  
UNITED STATES, *Defendant,* } *Court No.*  
—————————————

PLEASE TAKE NOTICE that plaintiff, pursuant to Rule 8.3 of the Rules of the United States Customs Court, abandons the actions listed on the schedule attached hereto, which are presently in the ———— File of the Court. Unless otherwise noted, each action covers only one entry.

Dated: ————

————————————  
Attorney for Plaintiff  
[Address]

Schedule to Notice of Abandonment

| Court File | Court Number | Customs Number |
|---|---|---|

Order of Dismissal

The cases listed on the schedule set forth above, having been voluntarily abandoned by plaintiff, are dismissed.

Dated: ————

CLERK, UNITED STATES CUSTOMS COURT  
BY: ————————  
DEPUTY CLERK

## APPENDIX E

NOTICE OF TRIAL

UNITED STATES CUSTOMS COURT

————————————— *Plaintiff,*  
*v.*  
UNITED STATES, *Defendant,* } *Court No.*  
—————————————

PLEASE TAKE NOTICE that plaintiff [defendant] has completed his discovery procedure and is ready to try the above-entitled action.

It is requested that trial be held on or about

————————————————————  
[date or dates]

at ————————————————————  
[place or places]

[All parties concur in the request for trial at the above-stated date or dates and place or places.]

OR

[Statement of the reasons for requesting trial at the above-stated date or dates and place or places.]

It is estimated that the time required by the party filing the notice of trial for the examination and cross-examination of his witnesses will be as follows:

—————————— ——————————  
[place] [time]  
—————————— ——————————  
[place] [time]

[List all places where trial is requested and the time estimated for trial at each.]

Dated: ————————

————————  
Attorney for  
[Address]

## APPENDIX F

### NOTICE OF APPEARANCE

UNITED STATES CUSTOMS COURT

____________________, *Plaintiff,*
v.
UNITED STATES, *Defendant.*
} *Court No.*

PLEASE TAKE NOTICE that the undersigned, hereby appears in the above-entitled action as attorney for ____________, the plaintiff herein, and requests that all papers in connection therewith be served upon him.

Dated: ________

____________________, Attorney
____________________
[Street Address]
____________________
[City] [State] [Zip Code]
Telephone No.
By: ________________
[Signature]

---

## APPENDIX G

### NOTICE OF CONSENT TO SUBSTITUTION OF ATTORNEY

UNITED STATES CUSTOMS COURT

____________________, *Plaintiff,*
v.
UNITED STATES, *Defendant.*
} *Court No.*

PLEASE TAKE NOTICE that on consent of ____________, plaintiff in the above-entitled action, and ____________, previous attorney of record for plaintiff, ____________ has been substituted as attorney of record for plaintiff in this action.

Dated: ________

________________
Plaintiff
By: ____________

____________________
Previous attorney of record

PLEASE TAKE FURTHER NOTICE that the undersigned hereby appears in the above-entitled action as attorney for ____________, the plaintiff herein, and requests that all papers in connection therewith be served upon him.

Dated: ________

____________________, Attorney
____________________
[Address and Telephone No.]
By: ________________
New attorney of record

---

## APPENDIX H

### TABLE OF TIME LIMITS

The following table is for convenience of reference by parties and counsel. It is not a rule. Rules cited should be carefully examined for the full import of their reference to time.

| | Time | Rule |
|---|---|---|
| ABANDONMENT: | | |
| Involuntary dismissal of action for lack of prosecution, after joinder of issue | 1 year | 8.3(b)(2) |
| Motion to set aside dismissal after notice of, filed within | 30 days | 8.3(a)(1) |
| APPEALS: | | |
| (*See* INTERLOCUTORY APPEAL, below.) | | |
| APPLICATION FOR THREE-JUDGE PANEL: | | |
| Motion for, filed after notice of trial | 10 days | 4.13 |
| ATTORNEY: | | |
| Foreign, motion for admission of | 3 days | 16.1(c) |
| Response to disbarment notice | 30 days | 16.2(c) |
| BRIEFS: | | |
| Plaintiff's reply brief | 15 days | 11.3(b)(3) |
| COMPLAINT: | | |
| Filed by plaintiff after service of defendant's demand for | 60 days | 4.4(b) |
| COURT: | | |
| Disbarment proceedings to commence after service of order of | 30 days | 16.2(c) |
| Dismissal of action by, after notice, for failure to file brief | 10 days | 11.3(h)(3) |
| Order of, interlocutory appeal from, in relation to foreign session | 10 days | 2.2(b)(4) |
| DEPOSITIONS: | | |
| Litigants noticed before trial of proponent's re-use of previous | 30 days | 7.5(a)(6) |
| Signing of, by witness after examination of transcribed testimony | 30 days | 7.3(e) |
| Suppress, motion to, after notice of filing by clerk | 30 days | 7.7(f) |
| Written interrogatories, upon: | | |
| Cross-interrogatories after notice of leave for | 15 days | 7.4(a) |
| Redirect interrogatories | 10 days | 7.4(a) |
| Recross-interrogatories. | 10 days | 7.4(a)<br>7.7(d) |
| Objections to form of, after service | 10 days | 7.5(d)(2) |
| DISCOVERY: | | |
| Initiated after answer | | 6.1(d) |
| Response to request: | | |
| Admissions, for | 60 days | 6.2(b)(1) |
| Interrogatories, for | 60 days | 6.3(a) |
| Production of documents or things, for | 30 days | 6.4(b) |
| DOCUMENTS SPECIALLY ADMISSIBLE BY STATUTE: | | |
| Party served notice of trial may serve on opposing party copies of, within | 15 days | 9.6(b) |
| EXHIBITS: | | |
| Disposal of, after notice | 30 days | 14.4(c)(1) |
| FINDINGS OF FACT: | | |
| Concurrent filings of requested findings | 30 days | 11.4(b)(2) |
| Concurrent objections | 15 days | 11.4(b)(2) |
| Plaintiff's requested findings | 30 days | 11.4(b)(1) |
| Defendant's requested findings and objections | 30 days | 11.4(b)(1) |

| | Time | Rule |
|---|---|---|
| **IMPROPERLY INCLUDED PROTEST:** | | |
| Severed and dismissed after order | 30 days | 3.3(c) |
| **INTERLOCUTORY APPEAL:** | | |
| Application for, filed after order | 10 days | 13.2(a) |
| Response to motion to stay | 7 days | 13.2(b)(2) |
| **MOTIONS:** | | |
| Dispositive: | | |
| Objections or response to | 30 days | 4.12(c) |
| Reply to | 15 days | 4.12(c) |
| Extension of time, for (*see also* RESERVE FILE and SUSPENSION DISPOSITION FILE, below): | | |
| Generally: | | |
| Filed prior to expiration of period to act | 5 days | 3.6(b)(2) |
| Objection or response to | 5 days | 3.6(b)(2) |
| Foreign attorneys, for admission of | 3 days | 16.1(c) |
| New trial or rehearing after judgment, for: | | |
| Court's initiative, on | 30 days | 12.1(f) |
| Parties, by | 30 days | 12.1(a) |
| Response to | 15 days | 12.1(c) |
| Procedural: | | |
| Definite statement, for more | 30 days | 4.7(d) |
| Objections or response to | 10 days | 4.12(c) |
| Strike, to, after service | 30 days | 4.7(e) |
| **PAPERS:** | | |
| Temporary custody of, no longer than | 30 days | 14.3(b)(2) |
| **PLEADINGS:** | | |
| Amendment when no responsive pleading is permitted | 30 days | 4.8(a) |
| Answer: | | |
| Amended pleadings, to | 30 days | 4.8(a) |
| Motion, after denial or postponement of | 30 days | 4.7(a)(2) |
| Petition, to | 60 days | 4.7(a)(1) |
| Reply to | 30 days | 4.7(a)(4) |
| **RECORD:** | | |
| Incorporate, notice of intention to, served and filed after notice of trial | 15 days | 9.4(b) |
| Objections to incorporation of: | | |
| Not involving request to produce witnesses | 15 days | 9.4(c) |
| Reply to | 15 days | 9.4(c) |
| Order for production of witnesses to incorporate their testimony in, motion for: | | |
| Served after notice of intention to incorporate | 30 days | 9.4(d) |
| Response to | 15 days | 9.4(d) |
| **RESERVE FILE:** | | |
| Action may remain in | 2 years | 14.6(c) |
| Dismissal upon expiration of time, after denial of motion for suspension | 60 days | 14.7(d)(2) |
| Notice of dismissal served prior to expiration of time | 6 mos. | 14.6(d) |
| Extension of time in: | | |
| Motion for, filed prior to expiration of time | | 14.6(e) |
| Objection or response to | 5 days | 14.6(e) |
| **SERVICE BY MAIL:** | | |
| Additional time after prescribed period | 5 days | 3.6(c) |
| **SUBMISSION ON AGREED STATEMENT OF FACTS, PROPOSED:** | | |
| Notice to court by plaintiff of date of filing | 5 days | 8.1(a) |
| **SUSPENSION DISPOSITION FILE:** | | |
| Action may remain in | 18 mos. | 14.8(c) |
| Dismissal upon expiration of time, after denial of motion for suspension | 60 days | 14.7(d)(2) |
| Extension of time in: | | |
| Motion for, filed prior to expiration of time | ................ | 14.8(e) |
| Objection or response to | 5 days | 14.8(e) |
| Removal from: | | |
| Motion for, or other motion, filed prior to expiration of time | 15 days | 14.8(b) |
| Objection or response to: | | |
| Dispositive motion | 30 days | 14.8(b) |
| Motion for removal | 10 days | 14.8(b) |
| **TRIAL:** | | |
| Notice to parties by court prior to court-designated trial date | 15 days or less | 9.1(e) |
| Service of notice by party prior to proposed trial date | 30 days | 9.1(c) |

## APPENDIX I

### INFORMATION SHEET OF THE UNITED STATES CUSTOMS COURT

### I. GENERAL INFORMATION

**Court Business Hours**—9:00 a.m. to 4:30 p.m. daily, except Saturdays, Sundays, and legal holidays. (*See* Rule 3.6 for legal holidays.)

**Court Mailing Address**—Office of the Clerk of the Court, United States Customs Court, One Federal Plaza, New York, N.Y. 10007.

**Court Telephone Number**—At New York: (212) 264-2800.

**Courthouse Location**—United States Customs Court, One Federal Plaza, New York, N.Y. 10007.

**Courtroom Facilities**—The court maintains courtrooms in the cities listed in section II. below, and arranges for the use of courtrooms in other cities when it is necessary to conduct trials at such other cities.

**Receipt of Papers**—Facilities for the receipt of papers exist *only* at the Office of the Clerk of the Court, United States Customs Court, One Federal Plaza, New York, N.Y. 10007. (*See* Rule 4.1 for the service and filing of papers.)

**Table of Time Limits**—For time limits imposed by the rules, *see* APPENDIX H. (For general rules relating to time, *see* TIME in the Index.)

### II. COURTROOM FACILITIES OF THE UNITED STATES CUSTOMS COURT IN ADDITION TO THE COURTROOMS LOCATED AT ONE FEDERAL PLAZA, NEW YORK, N.Y.

Baltimore:
Appraisers Stores Building
Courtroom No. 707-709
Gay, Lombard and Water Sts.
Baltimore, Md. 21202

Chicago:
United States Custom House
610 South Canal St. Chicago, Ill. 60607

Los Angeles:
Federal Building
Courtroom No. 8529
300 North Los Angeles St.
Los Angeles, Calif. 90012

Philadelphia:
Custom House
Courtroom No. 300
Second and Chestnut Sts.
Philadelphia, Pa. 19106

San Francisco:
Appraisers Building
Courtroom No. 421
630 Sansome St.
San Francisco, Calif. 94111

San Juan:
Custom House
La Puntilla Marina Section
Courtroom No. 707
Old San Juan, P.R. 00904

Seattle:
Federal Office Building
Courtroom No. 1057
First Ave. and Madison St.
Seattle, Wash. 98174